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THE
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ANNOTATED

BOOK XXXIV.

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BURDETT A. RICH, EDITOR, HENRY
P. FARNHAM, ASSISTANT

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LAWYERS' REPORTS

ANNOTATED.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Lewis F. F. ABBOTT

2.

Valentine DOANE, Jr.

(168 Mass. 483.)

1. A note by a stockholder, director, and creditor of a corporation, given to

the maker of an accommodation note which the corporation had received the benefit of, in consideration of money furnished by the maker of the accommodation note to pay it, is not without consideration although the payee was bound to take up the other note.

2. The performance of a contract by a party who has hesitated or refused to

NOTE.—Performance of existing contract obligation as consideration for new promise.

In its simplest form this question is free from difficulty, and the decisions upon it are harmonious. But when the further question is involved, as to how far a person may free himself from his contract obligation and make his old promise form the consideration for a new promise by his adversary, the subject becomes technical, and is attended with much difficulty; and the decisions dealing with it have not always dealt with the facts as they appeared in the case in reaching conclusions, so that conflict and uncertainty appear. A strict application of fundamental principles to the actual facts would remove much of this difficulty, and extend the rule governing the simpler forms of the subject into its more complex forms.

The general rule is that a promise cannot be conditioned on a promise to do a thing to which the party is already legally bound. *Wimer v. Overseers of Poor*, 104 Pa. 817.

And this rule extends universally through all the cases in which the simple question has arisen as to whether or not performance of an existing obligation is a consideration for a new promise by the other party.

So, performing the obligation of a mortgage contract is not a sufficient consideration for a new promise by one of the parties. *Lukens's Appeal*, 142 Pa. 396, 18 L. R. A. 581.

Payment of existing debt as consideration.

A large number of cases hold that payment of part of a debt already due is no consideration for a promise to release the remainder of the debt. *Note to Fuller v. Kemp* (N. Y.) 20 L. R. A. 785.

In *Anonymous*, 1 Vent. 258, it is said that a promise by a person to pay a sum of money which he owes is not a good consideration; but payment of a debt without suit is a good consideration.

No man can make his own wrong in withholding what he justly owes the foundation of a demand against his creditor. *Keffer v. Grayson*, 76 Va. 517.

An engagement by a man to pay his own debts is no consideration for a promise to him by a third person. *Jones v. Waite*, 5 Bing. N. C. 341.

The payment by one of a debt clearly due does not constitute sufficient consideration for any kind of contract or agreement. No one can claim compensation for doing that which he is plainly and clearly bound by law to do. *Swaggard v. Hancock*, 25 Mo. App. 586.

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Payment of money presently due is not a consideration for a promise to give the debtor a quitclaim deed to land standing in the name of the creditor. *Tucker v. Bartle*, 35 Mo. 114.

A payment of an existing debt is not a consideration upon which a court of equity will enforce a promise to convey real estate. *Smith v. Phillips*, 77 Va. 548.

A promise to surrender a premium note which has been given to an insurance company upon payment of an assessment then due is without consideration. *Sands v. Hill*, 42 Barb. 651.

Payment of money already due is not a consideration for an agreement to attempt to collect the balance of the debt from other persons. *Pemberton v. Hoosier*, 1 Kan. 108.

In case of a claim of a balance due under a contract and for an additional amount for extras, an agreement to pay the balance due on the contract in case of the abandonment of the claim for extras is not founded on any consideration, since an agreement to pay that which a party has contracted to pay does not constitute a consideration for a new promise to perform the same contract. *Widman v. Brown*, 88 Mich. 241.

Payment of part of what is due on a judgment is not a consideration for a promise by the creditor to convey to the debtor land which he had received in part satisfaction of the original debt in addition to the satisfaction of the entire judgment. *Phoenix Ins. Co. v. Rink*, 110 Ill. 538.

A promise by a creditor in consideration of the execution of a note by his debtor for a debt already due to supply him with goods in the future is without consideration. *Overdeer v. Wiley*, 30 Ala. 708.

If interest is already payable on an overdue account, a positive agreement by the debtor to pay interest is not a sufficient consideration for an agreement by the creditor to give six months' notice of withdrawal before proceeding to collect the money. *Orme v. Galloway*, 9 Exch. 544, 2 C. L. Rep. 480, 23 L. J. Exch. N. S. 113 (1884).

A promise to take up notes on which the promisor is liable as indorser is not a valid consideration. *Sherwin v. Brigham*, 30 Ohio St. 137.

So, payment of a part of the amount due is no consideration for a promise to extend the time for payment of the residue. *King v. State Bank*, 9 Ark. 185, 47 Am. Dec. 739; *Stone v. State Bank*, 8 Ark. 145; *Thompson v. Robinson*, 34 Ark. 44; *Liening v. Gould*, 13 Cal. 598; *State, Clark, D. & Co., v. Dav-enport*, 12 Iowa, 335; *Price v. Cannon*, 3 Mo. 483;

complete it may constitute a good consideration for a promise by a third person who will be benefited by such performance.

(April 6, 1895.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County, made during the trial of an action on a promissory note, which resulted in a verdict in plaintiff's favor. *OVERRULED.*

The facts are stated in the opinion.

Miller v. Holbrook, 1 Wend. 317; Kellogg v. Olmsted, 23 Barb. 96; Hall v. Constant, 2 Hall, 185; Halliday v. Hart, 30 N. Y. 474; Turnbull v. Brock, 31 Ohio St. 649; Jenkins v. Clarkson, 7 Ohio, pt. 1, p. 72; Pomeroy v. Blade, 16 Vt. 230; Wheeler v. Washburn, 24 Vt. 293.

In Kellogg v. Olmsted, 25 N. Y. 189, the court, in deciding that a promise to pay an overdue debt at a certain time in the future with interest is not a consideration for a promise to extend the time of payment, states that it has been decided over and over again that if the creditor whose debt is due receives part payment of it, and in consideration of such payment promises to postpone or extend the time for payment of the balance, the promise is void for want of consideration.

So, a promise to pay an existing obligation will not support a promise to extend the time of payment. Hopkins v. Logan, 5 Mees. & W. 241, 7 Dowl. P. C. 360.

An agreement to pay in the future is not a consideration for the extension of the time of payment of a debt already due. Stickler v. Giles, 9 Wash. 147.

A promise before the maturity of a promissory note to extend the time of payment to a fixed date, if at that time it will be promptly paid, is without consideration. Gibson v. Irby, 17 Tex. 173.

A note given in part payment of an existing liability is not a sufficient consideration to support an agreement to give time for payment of the residue. Gison v. Renne, 19 Wend. 399.

An agreement to pay money which is due in a way which could be insisted upon by the creditor without the agreement is no consideration for the extension of time for the payment. McManus v. Bark, L. R. 5 Exch. 65, 39 L. J. Exch. N. S. 65, 21 L. T. N. S. 676.

The agreement to pay a debt which is due by regular instalments with interest is not a consideration for an agreement to postpone the time of payment. Reer v. Foakes, L. R. 11 Q. B. Div. 221, 52 L. J. Q. B. N. S. 712.

So, payment of accrued interest on a note is not a consideration for a promise to extend the time of payment. Helms v. Crane, 4 Tex. Civ. App. 89; Hale v. Forbis, 3 Mont. 395; Hunt v. Postlewait, 23 Iowa. 427; Dennis v. Piper, 21 Ill. App. 169; Waters v. Simpson, 7 Ill. 570.

So, accepting a non-negotiable note for the interest due on a bond is without consideration so as to constitute a valid contract to extend the time of payment of the bond. Gahn v. Niemcewicz, 11 Wend. 312.

So, a promise to pay interest during the time of forbearance is no consideration for the agreement to forbear, when the debtor is already bound to pay interest. Reynolds v. Ward, 5 Wend. 501; Parmelee v. Thompson, 45 N. Y. 53, 6 Am. Rep. 33; Abel v. Alexander, 45 Ind. 523, 15 Am. Rep. 270; Holmes v. Boyd, 30 Ind. 382; Dow v. Chambers, 14 Phila. 647; Moore v. Macon Sav. Bank, 22 Mo. App. 692.

An agreement to pay interest on a note in the same way which the law would imply from the contract will not be a consideration for the extension of the time of payment. McCann v. Lewis, 9 Cal. 246.

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Mr. W. B. French, for defendant:

In order to constitute a valid consideration to support a promise, the promisee must do something which he was not bound to do.

Jennings v. Chase, 10 Allen, 526; *Smith v. Bartholomew*, 1 Met. 276, 2 J. Am. Dec. 365; *Pool v. Boston*, 5 Cush. 219; *Bartlett v. Wyman*, 14 Johns. 260; *Dodge v. Stiles*, 26 Conn. 463.

When one party to a contract makes a promise to the other party to the contract as an in-

A mere agreement to pay interest as called for on the contract is not sufficient to uphold an agreement to extend the time for payment of the debt. *Wilson v. Powers*, 130 Mass. 127.

The agreement to pay interest in a certain manner or to pay the principal in certain instalments is not a consideration for an agreement to extend the time of payment. *Van Allen v. Jones*, 10 Bosw. 369; *Hume v. Mazelin*, 84 Ind. 574.

Payment of part of a note when it is due, and an agreement to pay interest on the residue, is not a consideration for an agreement to extend time of payment of the note. *Fairchild v. Warren*, 21 How. Pr. 187.

But the time for the performance of a contract may be enlarged if the agreement for enlargement is made at a time when each party will receive some consideration for his promise to extend the time.

At any time before breach the parties may by mutual promises extend the time for performance. *McNish v. Reynolds*, 96 Pa. 493.

In case of an agreement executory on both sides the time for performance may be extended by mutual agreement without any other or further consideration. *Clark v. Dale*, 20 Barb. 42.

But after the time for performance of a contract has expired, so that there is a breach by one of the parties, there can be no valid extension of time of performance without a new consideration. *Hill v. Blake*, 16 Jones & S. 253.

In *Cox v. Bennet*, 13 N. J. L. 165, a condition in a bond for the payment of money within a year was held capable of enlargement by an agreement without consideration so as to make a certain portion payable each year until the entire amount was paid.

But in *Stryker v. Vanderbilt*, 27 N. J. L. 63, it was held that an agreement, after the breach of the original contract, to extend the time of the performance, must be on a new consideration.

In *Miller v. Holbrook*, 1 Wend. 317, the court says of *Keating v. Price*, 1 Johns. Cas. 23, 1 Am. Dec. 92, in which the time of performance of a contract was enlarged, that it is to be presumed that in that case it appeared that the promise to enlarge the time of performance was founded on a good and sufficient consideration.

In *Flanders v. Fay*, 40 Vt. 316, it seems to be assumed that to enlarge the time of performance of a contract requires a new agreement upon a new consideration.

Where a debt is payable in specific property a new contract made before the debt has become payable, changing the mode of payment and extending the time, needs no new consideration for its support. *Thrall v. Mead's Estate*, 40 Vt. 540. The court says there is a manifest distinction between cases where the debt is already due when the agreement is made and one where it is not due and is payable in specific articles, and the debtor relying on the new agreement suffers the time specified in the original contract for payment to expire. In such case it would be a fraud to allow the creditor to collect the debt in money when the original contract expires, and repudiate the new agreement, and thus convert the debt into money contrary to

document to secure its performance, the promise is without consideration, although the promisor receives some benefit from the performance. There seems to be no reason on principle why the same rule should not hold where a third person, a stranger to the contract, makes a like promise.

Putnam v. Woodbury, 68 Me. 58; *Brownlee v. Lowe*, 117 Ind. 420; *Gordon v. Gordon*, 56 N. H. 170; *Johnson v. Sellers*, 33 Ala. 265; *Schuler v. Mylon*, 48 Kan. 282; *L'Amoreux v.*

Gould, 7 N. Y. 849, 57 Am. Dec. 524; *Peelman v. Peelman*, 4 Ind. 612; *Merrick v. Giddings*, 1 Mackey, 394; *Davenport v. First Cong. Soc.* 33 Wis. 390.

A promise based on the consideration of doing that which one is already bound to do is invalid, whether the plaintiff's prior obligation were an obligation to the defendant or to a third person.

Hilliard, Cont. p. 251; *Richardson v. Williams*, 49 Me. 558; *Edison v. Jackson Water*

the agreement and to the prejudice of the debtor.

If one who has contracted to deliver coal at a certain time is not able to comply with his contract, and so notifies the other party, and requests him, if he is going to take advantage of the breach, to say so, saying under such circumstances the coal will not be delivered at all, whereupon the other party states that he will waive the breach and accept and pay for the coal when delivered, the latter cannot, after receiving the coal, refuse to pay for it because it was not delivered within the terms of the contract. *Lawrence v. Davey*, 28 Vt. 284.

In *Connelly v. Devoe*, 37 Conn. 570, where there was a contract to dig a well within a given time, which could not be done because of the caving in of the well after it was partly constructed, whereupon the parties made a new agreement for extending time of performance, it was contended that there was no consideration for the extended time, but the court said that the abandonment of the original contract when in force, to substitute a new agreement for it, was a sufficient consideration. And the court then says that, further, it was for the interest of the owner to have the work completed, and adds: "And besides, defendant suffered the plaintiff to go on with the work after the agreement was made."

It appears in the case that after the new agreement the builder on the faith of the contract to extend the time for performance purchased additional materials and performed additional work, so that a refusal to extend the time would result in appropriating his added labor and money for which he would receive no compensation, and which he would not have furnished had the refusal to continue been made when the accident occurred. Of course such conduct worked an estoppel against afterwards refusing to permit him to finish the work, and is of itself sufficient ground to uphold the recovery in favor of plaintiff, so that what is said about consideration is not really necessary to the decision of the case.

Where an action for breach of the covenant to repair was defended upon the ground that after the breach the landlord agreed, in consideration that the tenant would repair before a certain date, to refrain from suit before that time, the court said there is no good consideration laid for the plaintiff's promise to forbear to sue. The defendant was liable to damages upon the covenant immediately for not repairing, and therefore the promise by him to repair before the designated date would be no consideration for the plaintiff's promise to forbear. *Bayley v. Homan*, 8 Bing. N. C. 915.

Promise to release joint debtor.

The payment of a debt by a debtor, which is due and payable, is not a sufficient consideration to support a promise. So, an agreement by the holder of a joint and several debt to one of the debtors upon his payment of part of the amount to look to the other debtor for the balance is without consideration and is not binding. *Smith v. Bartholomew*, 1 Met. 276, 25 Am. Dec. 365.

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An agreement by one of the makers of a note to pay the whole amount is no consideration for the promise of the surety to release the other maker from liability. *Cameron v. Warbritton*, 9 Ind. 351.

The promise of one partner to pay the debts of the firm is no consideration for the promise of a creditor to release the other partner. *Wadhams v. Page*, 1 Wash. 420; *Barly v. Burt*, 68 Iowa, 716; *Wildes v. Fessenden*, 4 Met. 12; *Lodge v. Dicus*, 3 Barn. & Ald. 611; *David v. Ellice*, 5 Barn. & C. 196, 1 Car. & P. 368, 7 Dowl. & R. 600; *Smith v. Rogers*, 17 Johns. 340.

Some of the cases involving the question of release of partner involve other matters than the mere question of consideration, so that the subject is not fully treated here.

Payment by surety.

Payment by a surety whose obligation has become fixed is no consideration for the promise of the other party to deliver up to him the obligation of the principal. *Dixon v. Adams*, Cro. Eliz. pt. 2, p. 538.

Promise not to sue.

Payment of part of a debt already due and payable is no consideration for the agreement to forbear to sue for the residue. *Warren v. Dodge*, 121 Mass. 106; *Reynolds v. Lofland*, 3 Harr. (Del.) 366; *Pabodie v. King*, 12 Johns. 428.

A promise by a debtor to make monthly payments upon certain of his overdue notes upon which the holder has no security is not a good consideration for the promise of the creditor to forbear for a time to press for payment of another overdue note against the same debtor upon which there are indorsers. *Jennings v. Chase*, 10 Allen. 523.

An agreement not to sue in case of the making of definite payments of a sum already due is without consideration. *Keirn v. Andrews*, 50 Miss. 30.

A payment of part of the sum due on a note is not a sufficient consideration for a promise to remit interest due upon the note or to delay suit. *Barron v. Vandvert*, 13 Ala. 232.

Payment of interest due is not a consideration for an agreement to forbear. *Crossman v. Wohlleben*, 90 Ill. 537; *Woolford v. Dow*, 24 Ill. 423.

A promise to forbear in collection of a debt upon the promise of the debtor to pay interest which was already due is without consideration. *Stuber v. Schwick*, 33 Ill. 191.

A promise to pay in the future rent now due and for which a suit has been brought is no consideration for an agreement to discontinue the suit. *Farrington v. Bullard*, 40 Barb. 512.

So, a payment of part of a judgment is not a consideration for holding up the execution as to the remainder. *Yeary v. Smith*, 45 Tex. 72.

Compliance with obligation to deliver papers or property.

A promise to pay for the delivery of a paper which the holder is already in duty bound to deliver is without consideration. *McCaleb v. Price*, 12 Ala. 753.

Where a person has agreed to surrender a cou-

Co. 12 Cal. 542; Ritenour v. Mathews, 42 Ind. 7; 3 Am. & Eng. Enc. Law, p. 886, note; Havana Press Drill Co. v. Ashurst, 148 Ill. 115; Re Goddard's Estate, 86 Vt. 415; Baker v. Wahrmond, 5 Tex. Civ. App. 268; Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 828; Newton v. Chicago, R. I. & P. R. Co. 66 Iowa, 423; Vanderbilt v. Schreyer, 91 N.Y. 392; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 563, 47 Am. Rep. 75; Robinson v.

Jewett, 116 N. Y. 40; Sherwin v. Brigham, 39 Ohio St. 187; Wimer v. Overseers of Poor, 104 Pa. 817; Successive Promises of the Same Performances, 8 Harvard L. Rev. 27, 1894.

There are two English cases which state a contrary rule.

Scotson v. Pegg, 80 L. J. Exch. N. S. 325; Shadwell v. Shadwell, 80 L. J. C. P. N. S. 145.

Scotson v. Pegg seems to be, however, directly in conflict with *Herring v. Dorell, 8*

tract whenever requested by another to do so, his surrender will furnish no consideration for a new promise by the other. *Proctor v. Thompson, 13 Abb. N. C. 340.*

In case one has by fraud obtained a satisfaction piece of a judgment under such circumstances that a court of equity would compel him to return it, his retention of it is not a consideration for a promise on the part of the judgment creditor that the judgment should be subordinated to mortgages subsequently executed. *Crosby v. Wood, 6 N. Y. 260.*

An agreement by a mortgagor to surrender possession of the mortgaged premises after condition broken, as is required by the law of the land, will not furnish a consideration for a new promise on the part of the mortgagee. *Wendover v. Baker, 121 Mo. 273.*

The surrender of a satisfied note, and the cancellation of a mortgage given to secure it, are not alone sufficient considerations to support a new note. *Smith v. Boruff, 75 Ind. 413.*

The delivery by an executor to a legatee of property to which he is entitled under the will is no consideration for a release of all other demands which the legatee may have against the executor. *Bruton v. Wooten, 15 Ga. 570.*

The surrender by the creditor of collateral security after the signing of a release by a composition deed is not a sufficient consideration for a promise by the debtor to pay money to the creditor. *Cowper v. Green, 7 Mees. & W. 633.*

A promise by one for whom a boat is being built, that in case it is delivered to him he will pay all demands of those who have worked on it under contract with the builder, is without consideration. *Jones v. Miller, 12 Mo. 408.*

If one acting for the benefit of a corporation procures the renewal of a lease a contract to induce him to assign the lease to the corporation is without consideration. *Robinson v. Jewett, 115 N. Y. 40.*

Agreement to comply with lease.

A new promise by a landlord after the execution of a lease is not sufficient to maintain an action in favor of the tenant when it is founded only upon the promise of the tenant to perform his contract. *Jackson v. Cobbin, 8 Mees. & W. 790, 1 Dowl. N. S. 93.*

Gratuitous agreements in variation of a lease, if unexecuted, will not prevent the specific enforcement of the lease as originally written. *Price v. Dyer, 17 Ves. Jr. 264.*

An agreement after the execution of the lease of a farm, that the tenant will not use the pasture for horses without extra compensation to the landlord, is without consideration. *Tryon v. Mooney, 9 Johns. 258.*

A promise by a tenant in possession of a farm to do things not required by the contract is without consideration and void. *Brown v. Crump, 1 Marsh. 607.*

Where a covenant requires a house to be in repair, a subsequent agreement that a man shall be employed three or four days about the repair of the house is without consideration and will not satisfy the obligation. *Adams v. Tapling, 4 Mod. 88.*

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If after the destruction of a fence on leased premises the lessee is still under obligations to continue to occupy the premises, a promise on the part of the landlord to repair the fence in consideration of the lessee's remaining on the property is without binding force. *Proctor v. Keith, 13 B. Mon. 253.*

A promise by the landlord to make repairs which he is not bound by the lease to make, in consideration that the tenant remain on the premises, when his contract binds him to do so, cannot be enforced. *Eblin v. Miller, 73 Ky. 371; Libbey v. Telford, 45 Me. 316, 77 Am. Dec. 229; Purcell v. English, 86 Ind. 34, 44 Am. Rep. 256; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 648; Doupe v. Gennin, 37 How. Pr. 5; Speckels v. Sax, 1 R. D. Smith, 253.*

A promise by a landlord during the continuance of the lease to make certain repairs on the mere consideration of the rent reserved in the lease is without consideration. *Miller v. Ridgely, 19 Ill. App. 306.*

If after the execution of a lease the lessee objects to taking possession because of the defective condition of the premises, whereupon the landlord promises to make repairs, the promise is without consideration. *Gottsberger v. Radway, 2 Hilt. 342.* The court says that a binding contract having been made it was necessary that some new consideration should exist to support a promise to make repairs or constitute an agreement which would take the place of, change, or alter the conditions of the one already existing.

But if the premises become untenable a promise of the tenant to remain may furnish a sufficient consideration for a promise by the landlord to pay for all damages done to his furniture by so doing. *Dunn v. Robins, 48 N. Y. S. R. 45.*

So, an agreement by a landlord to reduce the rent reserved in the lease at a time when the tenant has not refused to execute the terms of the lease, and has no right to do so, is without consideration and void. *Goldborough v. Gable, 140 Ill. 299, 15 L. R. A. 294; Wheeler v. Baker, 59 Iowa, 90; Crowley v. Vitty, 7 Exch. 322, 21 L. J. Exch. N. S. 135.*

Conversely, a promise to pay more rent during the existence of the term, is without consideration. *Taylor v. Winters, 6 Phila. 123.*

An executory agreement in writing, without any consideration, to reduce the rents secured to be paid by a lease, is a mere *nudum pactum*. *Loach v. Farnum, 80 Ill. 368.*

After suit brought to recover rent in arrears an agreement by the tenant to pay the arrearages and the costs of the suit is no consideration for an agreement to abate the rent in the future. *Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120.*

But an agreement for a different rent may be made at any time in case of a tenancy at will. *Hanson v. Hellen (Me.) 3 New Eng. Rep. 229.*

And if a reduction of rent is necessary to enable the tenant to continue business, and the landlord considers that it would be of advantage to him to have the business continue, there is a sufficient consideration for a reduction of the rent. *Jaffray v. Greenbaum, 64 Iowa, 492.*

So, if during the term of a lease, under which a certain number of bushels of corn are to be paid as

Dowl. P. C. 604; *Atkinson v. Settras*, Willes, Rep. 483; *Jones v. Wait*, 5 Bing. N. C. 841; Clark, Cont. pp. 188, 189; 1 Parsons, Cont. 8th ed. 452.

Mr. Henry L. Parker for plaintiff.

Allen, J., delivered the opinion of the court:

The plaintiff had given his accommodation note to a corporation, which had had it dis-

counted at a bank, and left it unpaid at its maturity. The defendant being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff, whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and

rent from the crop raised, the crop is destroyed by an unprecedented storm, whereupon the persons agree that the tenant shall plant another crop and give the landlord one half of what is raised, there is a sufficient change of consideration to support the agreement. *Raymond v. Kraushopf*, 87 Iowa, 602.

In *Nicoll v. Burke*, 8 Abb. N. C. 513, the court, without discussing the question of consideration, holds that an agreement to take less rent for the future was binding after the agreement was executed by the completion of the term and the payment of the rent for the term at the altered rate.

Agreement to comply with marriage contract.

A note executed by a husband living separate from his wife, to induce her to return to him, is without consideration. *Copeland v. Boaz*, 9 Baxt. 223, 40 Am. Rep. 89.

But since some cases treat the consideration in such cases as illegal rather than as wanting entirely (*Merrill v. Peaslee*, 146 Mass. 460), that branch of the subject does not properly fall within the scope of this note, and the cases are reserved for a full treatment of the subject elsewhere.

Promise to do duty.

The general question of compliance with a duty imposed by law, such as cases of public officers, witnesses, etc., are not included in this note. But there are a few cases which are so close to the line of contract obligations, that they are inserted here.

An agreement by a father to pay his minor daughter wages if she will stay at home and help her mother in the care of the household is without consideration. *Boiton v. Terpeny*, 14 N. Y. Week. Dig. 533.

Where it appears that scales of the buyer by which articles subject to a contract of purchase and sale have been weighed were incorrect, an agreement by the seller to pay the buyer a bonus for reweighing them correctly is without consideration, since it is the duty of the buyer to ascertain the correct weight. *Billings v. Filley*, 31 Neb. 511.

In *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370, it is said that a promise is without consideration where the only consideration for it is the promise of the other party to do, or his actual doing, something which he was previously bound by law to do.

It is impossible to say there is a valuable consideration where the debtor does no more than the law compels him to do, and the creditor receives no more than he is entitled to receive. *Keffer v. Grayson*, 76 Va. 317.

Where a mortgagor has agreed in the mortgage to procure insurance on the property and assign the policy to the mortgagee, an agreement by the mortgagee upon receiving the assignment to account to the mortgagor for one half of the proceeds of the policy in case of loss is without consideration and void. *Lewis v. McReavy*, 7 Wash. 294.

Cases to be distinguished.

Where there is breach on both sides.

If the contract has been broken by the other
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party, so that one who is demanding additional consideration is under no obligation to go on with the performance, there may be a valid new contract. Thus, if under a building contract the owner does not pay the instalments when they are due, and the builder then refuses to go on without security, an agreement for security is valid. *Byington v. Simpson*, 134 Mass. 145.

Additional promises on both sides.

If the service is not contemplated in the original contract, a new agreement for extra compensation in regard to it is valid. *Richardson v. Hooper*, 13 Pick. 446.

If the modification requires the doing of something additional on the part of one party, the other after accepting performance cannot escape liability on the ground that the contract was without consideration. *Maxwell v. Graves*, 59 Iowa, 614.

If after the making of a contract to melt iron in a mill at a certain amount per ton the mill stops, and before it resumes there is an agreement to take less per ton, the starting of the mill is a sufficient consideration to support the agreement. *Church v. Florence Iron Works*, 45 N. J. L. 123.

Unforeseen difficulties may entitle to a new contract for extra compensation. *Osborne v. O'Reilly*, 43 N. J. Eq. 497.

If one party has a right to terminate the agreement at his option, a promise by the other to pay a certain compensation as an inducement not to exercise the option is not without consideration. *Spangler v. Springer*, 23 Pa. 454.

Work already completed when additional promise made.

After the work has been completed a promise by the owner of the building to pay by a different scale of prices or at higher rates than those provided by the original contract is without consideration. *Randolph v. Perry*, 3 Port. (Ala.) 376, 37 Am. Dec. 659.

Waiver of conditions.

More cases of waiver of the performance of conditions in a contract, such as *Fleming v. Gilbert*, 3 Johns. 523, are distinguishable from those of the making of new contracts.

A provision in a lease for three months' notice of intention to quit at the end of the term may be waived by the landlord making a new contract within three months of the expiration of the term for the payment of rent at a different time than that provided for in the original lease. *Wilgus v. Whitehead*, 6 W. N. C. 537.

Acceptance of performance.

Where one person contracts to fix on a proper location and build a mill, the acceptance of the mill after it is finished is a waiver of any objection to the locality, or to the time, or to the manner of building. *Emerson v. Cogswell*, 16 Me. 77.

Where an engine contracted for was not delivered at the time called for by the contract, but was subsequently delivered under an agreement to waive any claim for damages for the delay, and the buyer claimed that the agreement was void because without consideration because he received

the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank. It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait awhile, but that the defendant's

interests were imperiled by a delay, and indeed required that the note should be paid at once, and that the corporation whose duty it was primarily to pay it was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon, nor under duress, knew what he was about,

no more than he was entitled to under the old contract, the court states that the case is within the rule that a contract may be modified by a new agreement without any new consideration, but finally decides that the real question is not so much whether there was any consideration for the waiver of a legal right by the buyer as whether at the time when the delivery was made the contract, according to the understanding of the parties, was performed. If the buyer consented to receive the engine in satisfaction of the contract after the time for delivery had passed, the acceptance was as much binding on him as if he had consented to receive it in time, waiving some defects in material or finish. *Moore v. Detroit Locomotive Works*, 14 Mich. 266.

Promise of additional compensation for completing contract.

It is in this class of cases that the difficulty has arisen. Application of the rules so overwhelmingly established by the decisions cited above would seem to lead to the conclusion that a promise of additional compensation for completing work called for by a contract would be *nudum pactum*. And such was the rule of the earlier cases. But some of the later decisions by the application of what would appear to be false principles, or the assumption of facts which did not exist, have gone far towards establishing a rule that if one under contract to do certain work, during its progress demands additional compensation therefor, which is promised him, he can enforce the promise. This result may perhaps properly follow in two classes of cases:

(1) Those in which while the contract is yet progressing toward completion one party becomes so convinced that the other is not receiving sufficient benefit that he is willing to give him something extra, and so, without breach by either, the parties rescind the old contract and then make a new one providing for additional benefit.

(2) If one party has refused to go on so that his contract is broken, and both parties recognize it as terminated, so that all that remains is his adversary's right of action for the breach, then the contract obligation no longer exists, and it would seem that the parties could make any new contract they wish to although it involves the same subject-matter as the old one. In such case the liability for damages for the breach still exists and a consideration is necessary to release it, although of course if so agreed the consideration may be found in the undertakings of the new contract. It is the failure to apply these rules to the actual facts of the cases which has involved the cases in such confusion.

General rule.

The general rule is that if the rights of one contracting to work on a building are fixed by the contract, any promise to pay him extra for doing what the contract binds him to do is without consideration. *Nelson v. Pickwick Associated Co.* 30 Ill. App. 333.

A promise to pay one to do what he is already bound to do by contract is without consideration. *Ritenour v. Mathews*, 42 Ind. 7.

In *Laboyteaux v. Swigart*, 103 Ind. 596, the court in deciding that payment by a third person to a surety liable for a debt of a less amount than was

due was a sufficient consideration for his agreement to pay off the whole debt, says that it is a general principle that a promise to one to pay him if he will do that which by law or by contract he is already bound to do, is without consideration and cannot be enforced.

When a party merely does what he has already obligated himself to do he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as a *nudum pactum*, and will not lend its process to aid in the wrong. *Lingenfelder v. Wainwright Brewing Co.* 103 Mo. 573.

Illustrations of the rule.

A sailor cannot recover on a promise for extra wages. *Harris v. Watson, Peake*, 72.

So, a seaman is not entitled to sue on a promise made by the master of the vessel to induce him to stay by the ship when others of the crew have deserted. *Stilk v. Myrick*, 2 Campb. 517, 6 Esp. 129; *Harris v. Carter*, 3 El. & Bl. 559, 23 L. J. Q. B. N. S. 295, 2 C. L. Rep. 1532, 18 Jur. 1014.

So, a promise to pay seamen additional wages, made at a foreign port on their threat of desertion, is without consideration and void. *Bartlett v. Wyman*, 14 Johns. 260.

So, where a seaman shipped for a voyage at a certain price per month, the articles providing that he might be transferred to another ship in the same service, and during the voyage he was so transferred under articles which provided for higher wages, the court refused to enforce the new contract, holding that it was without consideration. *Fraser v. Hatton*, 2 C. B. N. S. 512.

But this rule may be changed if the conditions of the voyage are so far changed as to release the seamen from their contract. *Hartley v. Ponsonby*, 7 El. & Bl. 872, 26 L. J. Q. B. N. S. 822, 5 Jur. N. S. 744; *Turner v. Owen*, 3 Post. & F. 177.

Where a person had contracted to enter the military service of the United States to the credit of a certain township for a certain bonus, and afterwards refused to do so because of an offer from another township of a greater bonus, whereupon he was offered the same by the first township, the court held that there was no consideration for the latter promise, and that it would not be enforced. *Reynolds v. Nugent*, 26 Ind. 823.

Where one who had contracted for the construction of a railroad refused to proceed without extra pay, which was promised, the court held the promise to be without consideration. *Ayres v. Chicago, R. L. & P. R. Co.* 53 Iowa, 473.

Where one party to a contract refuses to perform it unless promised some further pay or benefit than the contract provides, and the promise is made, and such refusal and promise are one transaction, the promise is without consideration unless the promise was induced by substantial and unforeseen difficulties in the performance which would cast upon the party additional burdens not anticipated when the contract was made. *King v. Duluth, M. & N. R. Co.* 61 Minn. 432.

Where an architect refused to comply with his contract to supervise the erection of a building because a part of the work was given to a business rival of a concern of which he was president, and the owner of the building in order to induce him to

and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it. In this commonwealth, it was long ago decided that even between the

original parties to a building contract, if, after having done a part of the work, the builder refused to proceed, but afterwards, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised. *Munroe v. Perkins*, 9 Pick. 298, 30 Am. Dec. 475.

comply with his contract promised him a commission on the work done by such rival, the court refused to enforce the contract, saying, to permit a plaintiff to recover under such circumstances would be to offer a premium on bad faith and invite men to violate their most sacred contracts that they may profit by their own wrong. *Lingenfelder v. Wainwright Brewing Co.* 108 Mo. 578.

An agent for the sale of machines, who has undertaken to pay the freight and storage charges on them, cannot rely on a subsequent promise by the manufacturer, made upon his importunity, to pay such charges. *Esterly Harvesting Mach. Co. v. Pringle*, 41 Neb. 255.

Where a sealed covenant for the erection of a building provides for such alterations and additions as the owner may direct, the making of an alteration or addition is not such a consideration for an oral agreement by the owner modifying the sealed instrument as will make the oral agreement binding on the owner. *Tinker v. Geraghty*, 1 E. D. Smith. 687.

A promise to pay a contractor extra for excavating hardpan is not binding if his contract bound him to do that work without extra pay. *Nesbitt v. Louisville, C. & C. R. Co.* 2 Speers, L. 687. In that case the court says if the contractor had stopped his work and had preferred to abandon his contract rather than make the excavation, and the other party to induce him to go on, had agreed to pay him for it, then that would have been a new consideration enough to support the contract. And that case was followed in *Colcock v. Louisville, C. & C. R. Co.* 1 Strobb. L. 820.

A promise to one engaged to work for a year for a certain amount, of payment at an increased rate at the expiration of the term if his conduct merits it, is a mere gratuity and cannot be enforced at law. *Toimie v. Dean*, 1 Wash. Ter. 47.

A promise to a salesman of certain additional compensation after the signing of a written contract providing that his compensation for the year shall be a certain sum is without consideration. *Cogray v. New England Piano Co.* 41 N. Y. Supp. 668.

Cases which apply the opposite rule.

If one party refuses to go on with the contract without modification, and thereupon the other agrees to the modification, such agreement is on a valid consideration. *Bryant v. Lord*, 19 Minn. 396.

That doctrine was, however, subsequently repudiated by the Minnesota court.

A promise by a brewery company to pay a largely increased price for ice upon the refusal of the ice company to deliver it at the contract rates will not, after the ice has been delivered, be so far without consideration as to justify a refusal to pay for it at the increased rates. *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723.

But in case the fact of modification of the original agreement is disputed, and the claim raised that the new contract was simply for the purpose of mitigating damages for breach of the original contract, the question is for the jury. *Endries v. Belle Isle Ice Co.* 49 Mich. 279.

Where a master notifies his servant that he will thereafter pay him less than the contract price, and the servant continues to work without notifying the master that he will claim more, it constitutes a new agreement which will preclude any

recovery at the original contract rates. *Spicer v. Earl*, 41 Mich. 191, 33 Am. Rep. 123.

An agreement to warrant the soundness of a slave for the purpose of inducing one who has contracted on the previous day to purchase him, without warranty to comply with his contract is based on a sufficient consideration and may be enforced. *Stoudenmeyer v. Williamson*, 30 Ala. 558.

In *Scotson v. Peggs*, 6 Hurst. & N. 295, 30 L. J. Exch. N. S. 325, 3 L. T. N. S. 753, 9 Week. Rep. 280, Martin, B., asks, if a builder is under contract to finish a house by a certain date and the owner promises to pay him a certain amount of money if he will do it, what is to prevent the builder from recovering the money?

The resignation of an office in a corporation is a sufficient consideration for a promissory note, although the payee had previously agreed for a valuable consideration to resign the office on demand of the maker. The court says on plaintiff's refusal to resign, he still held the office but was liable to defendant for the breach of his agreement. Defendant could not displace him or in any way compel the immediate performance of the agreement. He had only his legal remedy against the plaintiff for the breach. By the new contract he obtained from the plaintiff his actual resignation, and in consideration thereof he gave the note. By the surrender of an office which he had a right to retain the plaintiff suffered a detriment, and the defendant thereby gained an advantage which furnished a valid consideration for the note. *Peck v. Requa*, 13 Gray, 467.

Grounds for upholding new contract.

So long as the maxim *ex nudo pacto non oritur actio* remains a part of the law, it is impossible that while a valid contract exists that *a* on one side shall equal *b* on the other a proposition shall be enforced that *a* shall be considered equal to *b + c* if *c* has any value. Therefore to enforce the latter proposition it is necessary to extinguish the former. This is easily accomplished if the right course is taken. But the difficulty is the contracting parties do not take such step. The almost universal rule is that without any express rescission of the old contract the promise is made simply for additional compensation, making the new promise a mere *nudum pactum*. But the courts, for the purpose of doing what the parties did not do, but should have done, *i. e.* getting rid of the old contract, have adopted various expedients none of which seems satisfactory.

a. Waiver.

The Massachusetts case, which together with *Lattimore v. Hansen*, 14 Johns. 381, seems to be the foundation upon which all the cases upholding the new promise rest, seems to have been placed on the ground of waiver.

A contract under seal to erect a house for a certain price which was not adequate compensation was changed by parol agreement that the contractor should have more pay if he would go on and finish the work, and it was contended that there was no consideration for this promise. But the court said this depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do subjecting himself to such damages as the other party might show he was entitled to recover, after-

See also *Holmes v. Doane*, 9 Cush. 185; *Peck v. Regua*, 18 Gray, 407; *Rogers v. Rogers*, 189 Mass. 440; *Hastings v. Lovejoy*, 140 Mass. 261, 265, 54 Am. Rep. 463; *Thomas v. Barnes*, 156 Mass. 581. In other states there is a difference of judicial opinion, but the following cases sanction a similar doctrine:

Lattimore v. Harsen, 14 Johns. 330; *Stewart v. Keeltas*, 86 N. Y. 388; *Lawrence v. Davey*, 28 Vt. 264; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723; *Cooke v. Murphy*, 70 Ill. 96. In England and in others of the United States a different rule prevails. But when one,

wards went on upon the faith of the new promise and finished the work. This was a sufficient consideration. *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Rep. 475; and that case is cited as authoritative in *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 463.

And in an Alabama case it is said that if two persons make a contract one of them may waive performance of the contract by the other, and assume some new and additional obligation as the consideration of the performance by the other, and such obligation will be binding on him. *Johnson v. Sellers*, 33 Ala. 285.

It is difficult to understand how a contract can be gotten rid of by waiver. Strict performance either as to time or as to details may be waived. But the use of the word "waive" to express the idea "rescind" is inaccurate. And to rescind requires mutual promises based on mutual consideration. The breach may be waived.

But the doctrine of waiver will, if applied to the breach, not operate to release the liability under the old contract, because waiver of the breach simply reinstates the old contract instead of terminating it.

b. Mutual agreement.

Some of the cases have been put upon the ground of mutual agreement.

Mutual agreement to rescind an existing contract while it is still executory on both sides will be effectual. But, as will be seen from the cases, the agreement was not to rescind but to do or give something additional, and in some cases this was plainly done after one party had refused to continue and so was in default, and the other party entitled to his release.

In *Thomason v. Dill*, 30 Ala. 454, the court in holding that an agreement of one who after he has entered into a contract to purchase property agrees to furnish sureties upon the security given therefor, which the original contract did not require, would be binding if it was affected by mutual agreement between the parties, says, persons before or after the consummation of a contract may either rescind or modify it, and no other consideration is necessary to support such contract of rescission or modification than the mutual agreement of the parties.

Where one who had contracted to care for defendant's ward refused to proceed with the contract without a modification thereof, a new contract was made which defendant alleged to be without consideration, but the court said that the new contract operated as a rescission of the old one, stating that the release of one from the stipulations of the original agreement is the consideration of the release of the other; and the mutual releases are the consideration for the new contract and are sufficient to give it full legal effect. *Rollins v. Marsh*, 128 Mass. 116.

Where a carpenter had contracted to build a refrigerator for a merchant, and while it was in process of construction the merchant made some objections to the way in which the work was being done, whereupon the carpenter warranted it and the merchant accepted the warranty, the court held the warranty binding, saying the contract when modified by the subsequent oral agreement is substituted for the contract as originally made, and the original consideration attaches to and supports

the modified contract. *Thomas v. Barnes*, 156 Mass. 581.

In that case compromise of the dispute might have furnished a consideration for the warranty. But the case was not put on that ground.

Where one who had contracted to erect a building refused to go on without a promise of additional pay, which was promised, the court says, one promise is a sufficient consideration to support another. Where one person does an act beneficial to another, or agrees to do so, that forms sufficient consideration to support an agreement. Here were mutual promises, one to perform labor and to furnish material, and the other to pay for them. The performance of labor and the furnishing of materials were of benefit to one, and of loss and injury to the other, and the new and additional contract was binding. *Cooke v. Murphy*, 70 Ill. 96.

Where, after a person had contracted to erect a building for a certain amount, the price of labor and material went up so that he could not have complied with his contract without great loss, whereupon he refused to do so without more pay, which was promised him, the court held the promise binding, on the ground that the mutual promises of the parties were a sufficient consideration to support the contract. But in that case it also appears that the plan of the building was changed and the promise to build on the changed plan was a sufficient consideration for the promise for the extra pay, so that what the court said about mutual promises was not necessary to the extent to which it was apparently intended to go. *Bishop v. Busse*, 60 Ill. 403.

In the above cases there appears to have been no express agreement for rescission. There was simply the promise of something additional by one party. Where there is modification only by additional promise by one of the parties during the existence of the contract it would seem that the doctrine of mutual promises is misapplied. To constitute a consideration, a promise must involve something which if performed would itself be a consideration. A promise by one person to permit another to make him a present is no consideration to uphold the promise to give. And yet a promise of extra pay for performing a contract is nothing more than that. Furthermore some of the above cases involve facts in which it is doubtful if mutual promises, even if express, would rescind the contract.

In case one of the parties has absolutely refused to continue performance it would seem that the doctrine of mutual promises of rescission is inapplicable, especially where it is implied, as it is in the above cases. In such case the contract of the defaulting party is broken and the obligation of the other party released. Mutual promises will no longer rescind the contract or remove the liability for the breach, because the party not in fault being already released from his liability to perform the contract, the promise of the other party to release him therefrom is no advantage to him or detriment to his adversary, and so is no consideration for his promise to release the liability for the breach. If, therefore, the new contract is formed after the recognized breach of the old one the liability for the breach of the old one still remains unless released for a consideration and the damages on it would in all probability be the difference between

who is unwilling or hesitating to go on and perform a contract which proves a hard one for him, is requested to do so by a third person, who is interested in such performance, though having no legal way of compelling it or of recovering damages for a breach, and who accordingly makes an independent

promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract. Take an illustration. A enters into a contract with B to do something. It may be to pay money, to render

the old and the new contract price. Therefore the liability under the old contract and the gain under the new one would offset each other. And the implication by the courts of mutual agreements for the purpose of getting rid of the old contract is clearly inadequate to accomplish that end, and the rulings cannot be made to rest upon that ground.

c. Election.

Some of the cases are placed on the ground of election.

Where a person abandons his contract the opposite party has his election to sue or make a new agreement. And if in the new agreement he makes new or additional promises dependent upon the performance of the work contracted for, and the work is completed, the promises are binding. *Coyner v. Lynde*, 10 Ind. 282.

This doctrine has evidently been abandoned in Indiana, as appears from cases cited above.

A party refusing to perform his contract thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and a substitution of a new one. *Rogers v. Rogers*, 139 Mass. 440.

Where a ship owner agreed to carry a carpenter to a certain place in case he would make certain repairs on the ship, and before the ship sailed he refused to do so unless a certain sum of money should be paid, whereupon the carpenter gave his note for the amount and was thrown out of the ship for failure to pay it, for which he brought suit, the court says the defendant might show that at a period prior to the sailing of the vessel he gave notice to the effect that he would not comply with his agreement and would hold himself responsible for all damages by reason of such breach of contract; and if the plaintiff thereupon elected not to avail himself of his right to recover damages, but chose to make a new contract, giving the defendant more advantageous terms, such new contract would be a valid consideration between the parties. No new consideration is necessary. *Holmes v. Doane*, 9 Cush. 135.

Suing for breach of the old contract and making a new one are clearly not inconsistent remedies to which the doctrine of election will apply, but the wronged party may do either, neither, or both at his option, so that the mere making of the new contract will not of itself release the liability for breach of the old one.

d. Acting on promise.

In one case it is said that it is a sufficient consideration for the new promise that the person claiming the benefit of it went on and completed his contract on the faith of it. *Courtenay v. Fuller*, 65 Me. 156; *Rogers v. Rogers*, 139 Mass. 440.

The party should not be heard to say that he acted on the promise of reward rather than on his solemn obligation to perform.

Besides there is in such case for the old consideration, i. e., the performance of the work, on the one side, the agreement to release damages for the breach in addition to the promise for greater compensation, and there is plainly no new consideration to support such agreements.

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But it is suggested in *Bates v. Starr*, 2 Vt. 536, 21 Am. Dec. 568, that there may be cases in which a contract is terminated by accord and satisfaction, or an executory accord which has been so far executed that it could not be receded from without great inconvenience in which the second contract would supersede the first one.

A contract can be altered or modified only by a distinct and substantive contract between the parties founded on some valid consideration. But if there was no original consideration for the change, yet if it is acted upon until it would work a fraud or injury to refuse to carry it out, it becomes binding and effectual as a contract. The modification cannot be supported by the supposition that it is founded on the continuation or extension of the consideration of the prior contract, which was complete of itself and so far as it went fixed the rights of the parties. *Thurston v. Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 323.

The doctrine of *Bates v. Starr* and *Thurston v. Ludwig* is applicable, however, not so much to promises of extra compensation, as to modification in the manner or time of performance.

e. New contract satisfies claim for damages.

Some of the courts imply that the old liability is merged in the new contract.

When the new contract is made, the old contract is held to be waived or abandoned or the parties are left to their legal rights and remedies for its breach, but that does not operate to make the new agreement invalid for want of consideration. *Peck v. Requa*, 18 Gray, 407.

And that doctrine is carried further in *Rollins v. Marsh*, 128 Mass. 114, so as to hold that the new contract operates as a rescission of the old one, and that the legal remedy for the breach is lost.

If after partial fulfillment of a contract to sell and deliver goods at certain prices the seller refuses to deliver any more at those prices, whereupon a new contract is made at a higher rate, the new contract *prima facie* takes the place of the original agreement as to everything remaining unperformed, and no action will lie for the breach of the old contract. *Rogers v. Rogers*, 139 Mass. 440.

The court says if the parties agreed that orders should be filled at prices stipulated for in the new contract, without considering whether the new agreement would of itself be a discharge of partial breaches, performance of the new agreement would operate as a discharge or an accord and satisfaction, unless it appeared that such was not the intention of the parties.

Where a bid for work was made under an assurance that certain work called for by the specifications would not be required because of the proposed erection of another building which would render it unnecessary because of which the cost of it was not included in the bid, but it was subsequently required, whereupon the bidder refused to do the work without extra pay for that part, which was promised, the court says the owner thus relieved the bidder from all claims he might have had against him for the breach of the contract in refusing to do this work under it, and his subsequent agreement to do it was sufficient consideration to support his promise to pay for it. *Stewart v. Ketteltas*, 36 N. Y. 388.

If the new contract is valid the presumption is certainly strong that it was intended to satisfy all

service, or to sell land or goods for a price. The contract may be not especially for the benefit of B but rather for the benefit of others, as, e. g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving

from B may be executed or executory. It may be money or anything else in law deemed valuable. It may be of slight value, as compared with what A has contracted to do. Now A is legally bound only to B, and, if he breaks his contract, nobody but B can recover damages, and those damages may be

claims under the old contract. But since technically the old contract must be out of the way before the new one can become valid, the use of the fact that the new one exists as a premise from which to prove the annulment of the old involves an assumption which is hardly justifiable. In Massachusetts, where the performance of the old obligation is a sufficient consideration for the new promise (Rogers v. Rogers, 139 Mass. 440), and the new contract *prima facie* takes the place of the old one, of course such assumption is permissible. But in states which still recognize the rule *ex nudo pacto non oritur actio*, and hold that performance of an existing obligation is no consideration for a new promise, there is no ground for implication of satisfaction of the old contract. In case the old contract has been broken a liability for damages exists. This liability can be extinguished by contract upon a consideration. If the parties expressly contract, or by conduct plainly imply, that the extinguishment of this liability is to form one of the terms of the new contract, that will be sufficient. But the mere making of the new promise is not sufficient to raise the implication that all the other necessary steps have been taken. Absence of the other necessary steps is, on the other hand, strong evidence that the new promise is simply on the old consideration and therefore a *nudum pactum*.

The correct reasoning.

Where plaintiffs contracted to build a cart way for a certain sum under a penalty, and after beginning the work became dissatisfied and gave notice that they would abandon the work, whereupon the owner promised them more pay, for which they sued, the court said by the old contract the plaintiffs subjected themselves to a certain penalty for the nonfulfillment, and if they chose to incur this penalty they had a right to do so, and if afterwards the owner made a new agreement with them it was valid. Lattimore v. Harsen, 14 Johns. 381.

In that case the plain implication is that the penalty still existed. But that since the amount was liquidated it was more advantageous for the builder to suffer the penalty and get the additional compensation than to perform the old contract as it stood. Of course the result might not be so advantageous where the damages are not liquidated.

But in Allen v. Jaquish, 21 Wend. 632, Lattimore v. Harsen is explained on the ground that the old contract was rescinded by a new contract executed and fully carried into effect.

Where a tenant upon refusal to pay rent because of the landlord's refusal to repair is notified to quit, the lease is at an end, and if then the landlord, to retain the tenant, promises to make the repairs, the contract is a new one, although the rent is to be the same, and the landlord may be liable on his contract. Conkling v. Tuttle, 52 Mich. 680.

If a contract to perform certain stipulated services for a certain sum is not rescinded by the mutual consent of the parties, then a promise to pay an additional sum for the same services is without consideration and cannot be enforced. Festerman v. Parker, 10 Ired. L. 474. In that case the plaintiff had agreed to erect a mill for a certain price, and after it was partly done he refused to go on without additional pay, which was promised. The court says the variation of a contract is as much a matter of contract as the original agreement. In what was the contract in this question varied? Not in 34 L. R. A.

the work done, that was not altered in the slightest manner. The plaintiff came under no new obligation, he was to do the same work he had previously bound himself to do. It was varied in this, that the defendant promised to give an additional sum if plaintiff would do the work. This would be no valid promise. A consideration is an essential ingredient to the existence of every simple contract. What loss, trouble, or inconvenience, or charge resulted to plaintiff by his executing the work? He was bound to build the mill by his original contract, and he was to do nothing more. What benefit would result to defendant by the promise to pay the additional money? None whatever. He was to get from the plaintiff precisely the same quantum of work without it as with it. The promise was a mere *nudum pactum* not binding in law.

Where a person contracted to do certain work for a certain price, the first instalment of which should be the assignment of a bond and mortgage of a third person, and when the assignment was due refused to take it unless its payment was guaranteed, and suspended work, whereupon the assignor executed the guaranty, the court held that there was no consideration for the guaranty, and that it could not be enforced, saying that the builder had only done what he was before legally bound to do. Even though it lay in his power to refuse to perform his contract he could do this only upon paying the other party the damages occasioned by his nonperformance, and that in contemplation of law would be equivalent to performance. He had no legal or moral right to refuse to perform the obligation of the contract into which upon a good consideration he had voluntarily entered. But the court says it would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original one. Such was the case of Lattimore v. Harsen, *supra*; Vanderbilt v. Schreyer, 91 N. Y. 382, Revereing 21 Hun, 637.

The doctrine that the person is bound by his new promise is stated by the court in King v. Duluth, M. & N. R.-Co. 61 Minn. 482, "not to commend itself either to our judgment or our sense of justice. . . . No amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. . . . Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. . . . Where the promise is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. . . . The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it."

Promise to perform additional duty for same consideration.

Where the owner of a building, under threats of suspending the work, secures from the contractor

slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A is legally bound, the motive to perform the contract may be slight. If after A has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as

B may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A by which A agrees to do that which he was already bound by his contract with B to do, and they agree jointly or severally to pay him a certain sum of money, and give

without any additional consideration a guaranty not embraced in the original contract, it is without consideration and cannot be enforced. *McCarty v. Hampton Bldg. Asso.* 61 Iowa, 387.

If a party has sold and delivered an article of a stipulated quality and at a given price, an agreement to warrant it of a better quality without any further consideration is *nudum pactum*. *McDugald v. McFaddin*, 6 Jones, 1, 80.

Where a contract calls for payment in lawful silver money an agreement to take the pay in legal tender is without consideration. *McCall v. Ely*, 64 Pa. 254.

After the making of a contract to purchase land which is subject to a servient tenement a refusal to comply with the agreement without a promise to abandon such tenement, which results in such promise, does not furnish a consideration for the promise which makes it binding. *Erb. v. Brown*, 60 Pa. 216.

In case of a note given by one partner to another for his interest in the concern, which was given under an undertaking on the part of the former to indemnify the withdrawing partner from all losses of the firm, an agreement to withdraw the note in consideration of the continuing partner's settling certain suits that had been brought against the firm is without consideration. *Malone v. Dougherty*, 79 Pa. 44.

Under a contract for the sale and delivery of hogs at a certain time, payment for which the law would regard as due when they were delivered, a promise to make payment of a portion of the price before the time for delivery is without consideration. *Thurston v. Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 323.

Promise by stranger to the contract.

Another question upon which the cases are not fully agreed is as to how far a promise by a third person to induce a party to comply with his contract is binding.

Statute of frauds.

If the promise of the third person is only to pay what was due by the original contracting party under the contract, it is a promise to answer for the debt of another within the statute of frauds. *Ellison v. Jackson Water Co.* 12 Cal. 542.

Promise where contract obligation not fully fixed.

Before a surety has incurred any liability under his contract a promise by a third person to induce him to remain on the bond is not without consideration. *Carroll v. Nixon*, 4 Watts & S. 617.

If the liability of a surety has not become fixed, and to prevent his taking steps to be relieved from his obligation a third person promises to indemnify him against liability, such agreement is not without consideration to support it. *Drury v. Fay*, 14 Pick. 323.

And this suggestion may support the leading English case of *Shadwell v. Shadwell*, 9 C. B. N. S. 159, 30 L. J. C. P. N. S. 145, 7 Jur. N. S. 811, 3 L. T. N. S. 623, 9 Week. Rep. 163.

In that case a letter by a man to his nephew expressing satisfaction at his engagement to marry a certain person, and promising an annuity to aid the nephew, was held to support an action in favor of the latter when he had entered into the marriage. 34 L. R. A.

Byles, J., dissented, saying that the rule that a promise based on doing what a man was already bound to do applied to the case. And that the reason why the doing what a man is already bound to do is no consideration, is not only that in judgment of law such consideration is of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive.

But the nephew may have intended to postpone the time of marriage until his income was sufficient, in which case his immediate marriage in reliance upon his uncle's promise may have furnished a consideration for the promise.

Compliance with existing obligation.

Some cases have pushed the doctrine of *Shadwell v. Shadwell*, 9 C. B. N. S. 159, 30 L. J. C. P. N. S. 145, 7 Jur. N. S. 811, 3 L. T. N. S. 623, 9 Week. Rep. 163, to the full extent of holding a promise binding if made by a third person to induce a party to comply with his contract.

The performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person if the latter derives a benefit from its performance. Therefore if a person promises a ship owner that if he will deliver a cargo of coal to him in his ship he will discharge it at a certain rate, he is not relieved from the promise by the fact that the ship owner was under contract with third persons to deliver the coal to him. *Footen v. Peag*, 6 Hurst. & N. 295, 30 L. J. Exch. N. S. 223, 3 L. T. N. S. 153, 9 Week. Rep. 230.

So, where a person entered into the services of a captain of a war vessel to act as cook at wages above those to which his rating in the services entitled him, it was contended that the captain was under no liability to him because the promise was without consideration, since he was bound to act for the regular wages, but *Erskine, J.*, said the case is the same as if the contract had been that in consideration of the plaintiff entering into the service of a third person, the captain would pay him wages in addition to the wages given him by such person. In such case there being an express promise it will be no answer to say that the plaintiff did not enter the captain's service. *Clutterbuck v. Coffin*, 8 Macn. & G. 842, 4 Scott. N. R. 509, 1 Dowl. N. S. 479, Car. & M. 273, 11 L. J. C. P. N. S. 65, 6 Jur. 181.

And that doctrine has been recognized in the District of Columbia.

A promise made in consideration of the doing of an act which the promisee is already under obligation to a third person to do, though made as an inducement to secure the doing of that act, is not binding because it is not supported by a valid consideration. At least when the act done on the part of the promisor involves nothing more than performance of the original obligation towards the person to whom it was due. But if the promise is made in consideration of a promise to do the act entered into directly with the promisor, then the promise is binding because not made in performance of a subsisting obligation to another person, but upon a new consideration moving between the promisor and promisee. And if the promisee was already bound by his contract with the third person, and was actually performing it at the time of the promisor's request, the mere fact of the request

their note or notes therefor, and A accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfil their promise. They have got what they bargained for, and A has done what otherwise he might not have done, and what they could not have compelled him to do. This is so held in England, and the view is supported by English text-writers, though not always for precisely the same reasons. *Scotson v. Pegg*, 6 Hurlst. & N. 295; *Shadwell v. Shadwell*, 80 L. J. O. P. N. S. 145; *Pollock*, Cont. 6th

ed. 175, 177; *Anson*, Cont. 4th ed. 87, 88; *Leake*, Cont. 8d ed. 540. In this country the courts of several states have taken the opposite view, though in some instances the cases referred to as so holding, when examined, do not necessarily lead to that result. These cases are collected in the defendant's brief and in Williston's discussion of the subject in 8 Harvard L. Rev. 27. Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A has refused or hesitated to perform an agreement with B and is requested to do so by C, who will derive a ben-

by the new party is not evidence that the performance was caused by that request so as to show a consideration moving between the parties for the performance, which will support the promise. *Merrick v. Giddings*, 1 Mackey, 304.

And it is now adopted in Massachusetts by *Abbott v. Doane*.

But the great weight of authority is the other way.

In *Morrison v. Heath*, 11 Vt. 610, the court, in deciding that after the abandonment of a contract by two persons to erect a meeting house for a committee, the promise by one of the committee to one of the contractors to pay him the additional cost of the house over the contract price in case he would go on and finish the building is a new contract which can be enforced, says it is undoubtedly true as a general rule that the performance of that which a man is already under legal obligation to do can never be the consideration of additional undertakings by the other party, perhaps not even by third persons; but that this case is not of that character.

In *Brownlee v. Lowe*, 117 Ind. 420, the court, in holding that the consideration for the promise in that case was sufficient because the promisee was not bound to go on with the work when the promise was made, states that it is doubtless true that a promise without a new consideration to pay one if he will do that which he is already bound by contract with a third person to do without the promise sued on, is without consideration and void.

A bond is *nudum pactum* whose sole consideration is a payment made by the obligee to a third person in discharge of an existing legal obligation. The performance of an existing legal obligation without more by one person affords no consideration in law for an original undertaking by another person. *Hanks v. Barron Bros.*, 95 Tenn. 275.

Performance by a railroad company carrying mails of its duty towards the government of carrying messengers on its trains is no consideration for a clause in a pass issued to a messenger exempting the carrier from liability for injuries to the messenger caused by its negligence. *Seybolt v. New York, L. E. & W. R. Co.*, 96 N. Y. 552, 47 Am. Rep. 75, affirming 81 Hun, 100.

An agreement by a surety to pay notes on which his liability has become fixed does not form a consideration for an agreement by a third person to repay him the amount so paid. *L'Amoureux v. Gould*, 7 N. Y. 349, 57 Am. Dec. 524.

Payment of money which the buyer is obligated by the terms of a purchase-money mortgage to pay is not a consideration for the promise of the mortgagee who has assigned the mortgage, to give security to indemnify the buyer against claims that might arise against the mortgaged premises. *Conover v. Stillwell*, 34 N. J. L. 54.

A promise to pay a mail contractor for performing his contract with the postoffice department is without consideration. *Putnam v. Woodbury*, 68 Me. 55.

34 L. R. A.

A promise to indemnify persons who have subscribed to procure the location of a college at a certain town after they have made a binding contract with the college authorities to pay the subscription, which at most can merely be additional inducement for the fulfillment of the contract, will not be supported by any consideration. *Schuler v. Myton*, 48 Kan. 232.

A mortgage by the principal debtor to a surety, who is already bound for the payment of the debt, given in consideration that he will pay the debt and release the principal debtor's property from an execution levy, is without consideration. *Harris v. Cassady*, 107 Ind. 158.

A promise by a surety in consideration that the principal will relieve him from liability on the debt is not enforceable. *Kitenour v. Mathews*, 43 Ind. 7.

A promise by sureties that in case the principal will pay the debt out of a particular fund soon to be received they will effect a life insurance for the benefit of the principal, is without consideration. *Ford v. Garner*, 15 Ind. 298.

A promise by a surety on a bond that if the principal will perform the obligation of the bond, the surety will make to him a deed of certain land, is without consideration and void. *Peelman v. Peelman*, 4 Ind. 612.

An agreement to convey to a corporation a license to use a patent in order to induce a stockholder to pay up his subscription, although made by another stockholder with intent to prevent the abandonment of the enterprise, is without consideration. *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115.

A promise to a church that if it will within a certain time pay its indebtedness to its former pastor the promisor will release a claim which he holds against it, although acted on and the debt paid, is a mere gratuity and not enforceable. *Davenport v. First Cong. Soc.*, 38 Wis. 380.

In case of a contract between a man and a board of school trustees that he will bring his wife to teach in the school, a promise by a third person of money to the man to induce him to comply with his contract is without consideration. *Johnson v. Sellers*, 38 Ala. 265.

If to induce the drawer to take up certain bills of exchange which he is under obligations to do, the acceptor gives him his promissory note to enable him to raise the money to do so, the drawer cannot compel the maker to pay the note, since it is without consideration in his hands. *Mallalieu v. Hodgson*, 16 Q. B. 689, 20 L. J. Q. B. N. S. 330, 15 Jur. 817.

The discharge of one of two joint debtors entitles the other to his discharge also, so that a promise by a third person to pay the debt in order to secure his discharge is without consideration. *Herring v. Dorell*, 8 Dowl. P. C. 604, 4 Jur. 800.

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ed from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement, in conse-

quence of such request and promise by C, is a good consideration to support O's promise.
Exceptions overruled.

CALIFORNIA SUPREME COURT.

J. T. JENNINGS, *Appt.*,

J. J. BROWN, *Resp.*

(.....Cal.....)

Adding his party designation, &c. Independent Democrat," to the name of a candidate written upon a ballot, in the same way that party designations follow the names of candidates in the printed list, as required by Pol. Code, § 1191, does not destroy the legality of the ballot when it was manifestly not intended as a distinguishing mark.

(September 18, 1896.)

A PPEAL by contestant from a judgment of the Superior Court for San Mateo County in favor of defendant in a proceeding to contest the declared election of defendant to the office of county supervisor. *Affirmed.*

The facts are stated in the opinion.

Messrs. George C. Ross and Knight & Haggerty for appellant.

Messrs. Sullivan & Sullivan, for respondent.

The addition of a political designation to the ticket has been held not to invalidate the ticket.

Coffey v. Edmonds, 58 Cal. 526; *Coffey v. Lyman*, 92 Cal. 135.

Temple, J., delivered the opinion of the court:

This is a contest for the office of supervisor in the county of San Mateo. The judgment appealed from confirms the election of defendant. The appeal is from the judgment, with a bill of exceptions.

In precinct No. 1 the record shows that 118 votes were counted without objection for contestant, and 11 votes were objected to and reserved by counsel for respondent; 184 votes were counted without objection for respondent, and 19 votes were objected to by contestant. It subsequently appears that all ballots were counted, and as counted the tally stood for Brown 184 votes, for Jennings 128. It is not expressly stated that the ballots objected to by respondent's attorney were ballots for contestant, or that those objected to by contestant were cast for respondent, but it would naturally be supposed that such was the case; and, if so, then the tally clerks must have made a wrong addition. It should have been, on that hypothesis, 153 for Brown, and 129 for Jen-

nings. This would have changed the result as finally declared. The court was requested by the contestant to recount the votes, but declined to do so. There were also 4 ballots which had not been counted by the precinct officers. The bill of exceptions fails to show error in this respect. It surely does not show all that occurred at the trial; for, while it appears that some 80 ballots were objected to, it is impossible to find from the record how the court ruled upon one half that many. There were two tally clerks, and the court reporter also kept tally. All agreed, and the court was satisfied that no mistake had been made. We have carefully examined the ballots which were brought here for our inspection under a previous order. We find nothing upon any of these worthy of notice, unless it is the ballot upon which the voter has written, under the head "State Printer," the name "W. D. Craig, Independent Democrat." It is objected that the voter was only authorized to write the name of the person voted for, and that the addition "Independent Democrat" is unauthorized, and may constitute a distinguishing mark. Section 1191, Pol. Code, provides that after a candidate's name shall be printed his party designation, and they were so printed on the ballot. It would be quite natural, then, that one writing in the name of a candidate not in the list should add such designation. Perhaps the statute should be construed as requiring or permitting the name to be written in the same manner as the others are printed. The designation would then be a *descriptio personae*, and a part of the designation of the person voted for, and authorized by the statute. This state of things existed in *Tebbe v. Smith*, 108 Cal. 101, 29 L. R. A. 678. Upon all the ballots cast at one precinct there appeared, written under the head of "Justice of the Peace," "C. G. Brown, Republican." It was shown that the writing was all in the same hand, and that but one person voting at the precinct was lawfully assisted. This court sanctioned the counting of the vote for the person lawfully assisted. There the word "Republican" was, or might have been, a distinguishing mark, just as "Independent Democrat" is here. The fact was disregarded as of no consequence. I am not inclined to hold that any of the requirements of the election law are directory only, but, while all of its provisions are mandatory, they should be liberally construed. The so-called "Australian Ballot System" only secures secrecy in

NOTE.—For marks to distinguish ballots, see note to *Rutledge v. Crawford* (Cal.) 18 L. R. A. 761; also *Sego v. Stoddard* (Ind.) 22 L. R. A. 483, and cases cited in footnotes thereto; also *Tebbe v. Smith* (Cal.) 34 L. R. A.

29 L. R. A. 678; *Dennis v. Caughlin* (Nev.) 20 L. R. A. 731; *Parker v. Orr* (Ill.) 80 L. R. A. 227; *Buckner v. Lynip* (Nev.) 30 L. R. A. 384.

voting when the elector desires it, and has sufficient independence to insist upon it. But a voter can—and, by one who has sufficient power over him, be forced to—so mark his ballot that it can be identified. Many ways could be suggested in which this could be done without destroying the legality of the ballot. It is quite manifest in this case that the words were not intended as a distinguishing mark, and, as the law may be construed as permitting it, I see no reason for changing the rule followed in *Tebbs v. Smith*.

The judgment is affirmed.

We concur: **McFarland, J.; Garoutte, J.**

PEOPLE of the State of California, *as rel.*
John C. LYNCH,
v.
James H. BUDD.
(.....Cal.....)

1. "At the next election by the people," the time prescribed by Const. art. 5, § 8, for the expiration of commissions granted by the governor for the filling of vacant offices, means the next election provided for the filling of the particular office vacant, not necessarily the next succeeding general election.

2. No election to fill a vacancy in the office of lieutenant governor can be held in the absence of any constitutional or statutory provision for it.

(September 3, 1906.)

APPPLICATION for a writ of mandamus to compel defendant to issue in his proclamation for the coming election a call to fill the office of lieutenant governor for an unexpired term. *Denied.*

The facts are stated in the opinion.

Mr. J. J. De Haven, for petitioner:

The Constitution declares that the term for which Mr. Jeter was temporarily appointed shall expire at the next general election by the people.

People, Casserly, v. Fitch, 1 Cal. 530.

There is no provision in our Constitution, nor in any statute, which declares that the people shall only have the right to elect a lieutenant governor for a full term, and that if such officer shall die upon the day of his induction into office or the day after that the people shall have no right to choose a person to fill such vacancy. In regard to the right to fill the vacancy occurring in that office the Constitution expressly declares that the people have delegated the power—the right to make a temporary appointment until the next election by the people. So far and so far only and during that brief period of time and until they can conveniently act have the people deprived themselves of the right to fill the vacancy in that office.

Mechem, Pub. Off. § 140; State, Weeks, v.

Gamble, 18 Fla. 9; *Henshaw v. Foster*, 9 Pick. 817; *State, Whitney, v. Johns*, 8 Or. 583.

The Constitution not authorizing the executive to fill the vacancy to the end of the term, this power must be exercised by the people or the legislature.

People, Barbour, v. Mott, 3 Cal. 505.

It is a maxim that is no less true in law than in logic that the greater includes the less, and it is a political axiom that the power to fill an office for a full term includes the lesser right to fill a vacancy therein, unless there is something in the Constitution or law which deprives such original power of this right and delegates it elsewhere.

People, Casserly, v. Fitch, 1 Cal. 519; *People, Gorham, v. Campbell*, 2 Cal. 135.

All political power is inherent in the people. Under our form of government the people have the right to choose all officers from the highest to the lowest, and the consequent right to fill any vacancy in any office unless they, by the Constitution which they have formed for their own government, have delegated the power elsewhere.

In regard to the right to fill vacancies in elective offices, it is the express declaration of the Constitution that the people have delegated the power to fill such vacancies only during the period between the happening of the vacancy and the first general election thereafter.

It is perhaps necessary before the Constitution shall become self-executing that the legislature should pass general laws for the regulation of elections, prescribing the hours between which the ballots shall be deposited upon the day of the general election prescribing the mode of the appointment of officers of such election and the manner in which the ballots shall be returned and canvassed; but when they have done that, and the people assemble at a general election thus authorized by law, then they have the right to vote to fill any office which the Constitution contemplates should be filled at such an election.

State, Goodin, v. Thoman, 10 Kan. 191.

Messrs. W. W. Foote and Garret W. McEnerney, for respondent:

Unless there is a provision of the Constitution or of a statute which authorizes the holding of an election to fill an unexpired term in the office of lieutenant governor no election can be held, and the respondent will not be compelled to issue a proclamation therefor.

There is no law for the holding of an election for lieutenant governor except for the full term.

No election can be held except by virtue of some provision of the Constitution or of a statute authorizing the same.

People, McKune, v. Weller, 11 Cal. 49, 70 Am. Dec. 754; *People, Love, v. Mathewson*, 47 Cal. 442; *Kenfield v. Irwin*, 52 Cal. 164; *Mechem, Pub. Off. § 170; Matthews v. Shawnee County Comrs.* 34 Kan. 606; *Swyer v. Haydon*, 1 Nev. 75; *State, Daggett, v. Collins*, 2 Nev. 351; 6 Am. & Eng. Enc. Law, p. 294; *State, McGee, v. Gardner*, 3 S. D. 553; *Satterlee v. San Francisco*, 23 Cal. 314; *Brewer v.*

NOTE.—This case decides a novel question respecting vacancies in the office of lieutenant governor. As to vacancies in the governor's office 34 L. R. A.

caused by sickness, see *Barnard v. Taggart* (N. H.) 25 L. R. A. 613.

Davis, 9 Humph. 208, 49 Am. Dec. 706; *Kimberlin v. State*, 130 Ind. 120, 14 L. R. A. 838.

Even though Mr. Jeter's commission expires with the election of November, 1896, nevertheless there is no implied power to fill the office of lieutenant governor for the unexpired term at that election.

The expiration of an incumbent's term of office does not vacate the office.

People, Parsons, v. Edwards, 98 Cal. 153; *People, Mensies, v. Gunst*, 110 Cal. 447; *People, Love, v. Mathewson, State, McGee, v. Gardner, and Sawyer v. Haydon, supra*.

The Constitutional provision that a commission to fill a vacancy shall expire at the end of the next session of the legislature or at the next election by the people means that the term shall expire at the end of the next session of the legislature when the office is filled by the legislature, and that as to elective officers the term shall expire at the next election for that office by the people.

Muthers v. Shawnee County Comrs. supra; *People, Murphy, v. Hardy*, 8 Utah, 68; *People, Cloud, v. Wilson*, 73 N. C. 155; *State, Watson, v. Cobb*, 2 Kan. 32; *Sawyer v. Haydon, and State, Daggett, v. Collins, supra*; *State, Atty. Gen., v. Philips*, 30 Fla. 579; *State, McGee, v. Gardner, and People, Love, v. Mathewson, supra*.

Mr. Jeter will be entitled to hold his office after the election in November, 1896, until the election and qualification of his successor.

People, Latine, v. Tyrrell, 87 Cal. 475; *People, Richardson, v. Henderson* (Wyo.) 23 L. R. A. 751; *People, Kehoe, v. Fische*, 76 Hun, 80; *People, Parsons, v. Edwards, supra*.

Mr. Jeter's right to hold until the election and qualification of his successor amounts to a right to hold for the balance of the unexpired term.

People, Sweet, v. Ward, 107 Cal. 286; *State, Johnson, v. Albert*, 55 Kan. 154; *Sheen v. Hughes* (Ariz.) 40 Pac. 679.

Temple, J., delivered the opinion of the court:

This is an application for a writ of mandate to compel the governor to include in his proclamation for the coming election a call to fill the office of lieutenant governor for the unexpired term of Spencer G. Millard, deceased. Respondent has filled the vacancy caused by the death of the lieutenant governor by the appointment of William T. Jeter, who has duly qualified.

In this case both parties concede—as, indeed, the exigencies of each require him to do—that the vacancy caused by the death of Millard was one which the governor had the power to fill. If there can be question of the power of the governor in this respect, therefore, we have not considered it. And no question has been made, nor have we considered, whether a mandate will issue to compel the chief executive to perform an act which, if it be his duty to perform, is enjoined upon him by the Constitution as the executive, nor whether he can be compelled to perform any public duty at the instance of one who has no vested right to have it performed, nor any interest special to himself, or other than that which every citizen

has in its performance; or, rather, we have not considered whether to issue the mandate asked for would trench upon the province of the executive.

The Constitution provides (§ 8, art. 4) that members of the assembly shall be elected in 1880 and biennially thereafter. Section 2, art. 5, provides that the governor shall be elected "at the time and places of voting for members of assembly, and shall hold his office for four years from and after the 1st day of January subsequent to his election." Section 15, art. 5, is as follows: "A lieutenant governor shall be elected at the same time and places, and in the same manner, as the governor; and his term of office and his qualifications of eligibility shall also be the same. He shall be president of the Senate, but shall have only a casting vote therein. If, during a vacancy of the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president *pro tempore* of the Senate shall act as governor until the vacancy be filled or the disability shall cease. The lieutenant governor shall be disqualified from holding any other office, except as specially provided in this Constitution, during the term for which he shall have been elected." And in the following section it is provided that in case of the death, resignation, impeachment, absence from the state, or inability to act of the governor, "the powers and duties of his office shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease." It will be seen that in case of a vacancy in the office of governor the vacancy is not to be filled, but the powers and duties devolve upon the lieutenant governor, he does not cease to be lieutenant governor. Under such circumstances it would hardly be contended that when the powers and duties of the governor devolve upon the lieutenant governor the latter thereby becomes governor, and can appoint a lieutenant governor. Nor do I think it could be contended that when the president *pro tempore* of the Senate acts as governor he could appoint a person to fill the vacancy in the office of lieutenant governor. If he could, he would then appoint himself out of office, and it would be his duty to do so.

But it is conceded by the parties that upon the death of the lieutenant governor the governor may fill the vacancy by appointment. This is unmistakably within the language of § 8, art. 5, which reads as follows: "When any office shall from any cause become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature or at the next election by the people." An office has become vacant, and there is no other mode provided by the Constitution or laws to fill it. "The next election by the people" does not mean the next general election or the next election held by the people, but it must mean that the appointee shall hold until some one has

been elected to fill that office. But there is nothing in this provision which indicates when this election shall be held, but only that until someone has been elected to fill the vacancy the appointee shall hold. This section does not direct that such election shall be at the next general election. It provides simply for filling vacancies by appointment, and that such appointees shall hold until the office is filled in the manner provided by law; but does not itself provide for such election or direct when it shall be. If, however, the phrase "the next election by the people" is equivalent to the phrase "the next election," and we assume that it was intended thereby to indicate the election at which such vacancy would be filled, we would feel compelled to hold that the next election is that which the Constitution has provided for filling that particular office; that is, the next gubernatorial election. Many authorities may be cited in support of this proposition. In *Matthews v. Shawnee County Comrs.* 84 Kan. 606, the governor appointed a judge to fill a vacancy. The Constitution provided for an appointment to fill the vacancy until the next regular election. Upon a contest the supreme court said: "The words 'regular election' do not necessarily mean general election, or township election, or any state, county, city, or district election. They simply mean the regular election prescribed by law for the election of the particular officer to be elected." *State, Atty. Gen., v. Philips*, 30 Fla. 579, involved a municipal office. The court said: "When it is declared that the city council shall fill vacancies until the next regular election, it means until the next regular election provided by the charter for electing the officer whose term has become vacant." To the same effect are *State, McGee, v. Gardner*, 3 S. D. 553; *Sawyer v. Haydon*, 1 Nev. 75; *People, Cloud, v. Wilson*, 72 N. C. 155; *State, Watson, v. Cobb*, 2 Kan. 32; and *People, Love, v. Mathewson*, 47 Cal. 442. The effect of these decisions is that the term "next election" means the next election for a lieutenant governor, and that the language used in § 8 cannot be understood as itself directing that at the next succeeding general election the vacancy shall be filled.

Is an election at that time authorized by any law? The Constitution contains no provision for holding an election for filling this vacancy, and is silent as to whether the appointee shall hold for the residue of the term. And this is more noticeable because as to some other officers there are explicit directions upon the subject. In regard to justices of this court and judges of the superior court, it is expressly provided that in case of a vacancy the appointee shall hold until the election and qualification of a successor, "which election shall take place at the next general election." Sections 8, 5, art. 6. In regard to railroad commissioners, the provision is that the appointee shall hold office for the residue of the unexpired term. The Constitution is equally silent in regard to filling vacancies in other executive offices. A similar state of things existed under the Constitution of 1849, and the legislature passed

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a law for filling such vacancies ("An Act Concerning Offices," April 28, 1851: Stat. 1851, p. 415). This act did not provide for the election of a lieutenant governor. Like the governor, he was required, in case of resignation, to resign to the legislature if that body was in session; if not in session, to the secretary of state. Such is also the requirement of the present Code. Pol. Code, § 995. Like the old statute, the present Code contains no provision in regard to an election to fill a vacancy in the office of lieutenant governor. As to other state officers, the provision is that they shall hold for the balance of the unexpired term. There has never been in the laws a provision for an election to fill a vacancy occasioned by the death or resignation of a lieutenant governor. Perhaps it was not supposed that such vacancy would ever be filled, even by appointment. At all events, there is no law, either constitutional or statutory, for such an election. In such case there can be no election. *People, McKune, v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People, Love, v. Mathewson*, 47 Cal. 442; *Kensfield v. Irwin*, 52 Cal. 164. In *Sawyer v. Haydon*, 1 Nev. 75, it was said: "We think no court or judge has gone so far as to hold that the people might hold an election or vote for any particular officer at a general election, unless special provision was made for electing such officer for the particular term to which he was seeking to be elected, either in the Constitution or some statutory enactment." This was also said in *People, Love, v. Mathewson*, 47 Cal. 442. The efficacy of an election depends upon the law in pursuance of which it is held, and the fact that an office is elective does not of itself, without some law authorizing and regulating the election, render valid any attempted election. *The writ is therefore denied.*

We concur: **Beatty, Ch. J.; McFarland, J.; Van Fleet, J.; Harrison, J.; Henshaw, J.**

Garoutte, J., concurring:

I concur in the judgment. The Constitution provides that the powers and duties of the office of governor, in case of vacancy, shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease. The Constitution further provides that in case of a vacancy in both the office of governor and lieutenant governor the president *pro tempore* of the Senate shall act as governor until the vacancy be filled. The Constitution does not provide that the president *pro tempore* of the Senate shall perform the duties of the office of lieutenant governor in case a vacancy exists in that office. And this omission to so provide is, to my mind, an unintentional lapse on the part of the framers of the Constitution. Such appears to be plain when we consider that there is an express provision of that instrument casting upon the president *pro tempore* of the Senate authority to perform the duties of the office of governor if there be no lieutenant governor, taken in connection with the many other provisions of that instrument which all point to that conclusion. But no authority

is found in the Constitution vesting the president *pro tempore* of the Senate with the duties of the lieutenant governor when a vacancy occurs in that office, and hence any such question is foreclosed.

The foregoing conditions being present, a vacancy occurred in the office of lieutenant governor upon the death of the incumbent, and the governor had the power to fill such vacancy by virtue of § 8, art. 5, of the Constitution. That section reads as follows: "When any office shall from any cause become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature or at the next election by the people." It follows that the result of this litigation in part rests upon the true construction of the words "the next election by the people." It is conceded by the present incumbent of the office that the next election by the people since his appointment will be the coming presidential election to be held in November, but he claims the words should be construed to mean "the next election by the people at which a lieutenant governor is regularly to be elected." If the framers of an instrument of the dignity and importance of a state Constitution had intended such to be the law, it was easy for them to have said so, and they should have so declared in terms. And, in the absence of a declaration of that kind, I do not consider myself authorized to so interpret a phrase of that instrument; certainly not unless the intent of its authors to that effect is plainly apparent; and we look in vain for such intent. Upon a question of statutory construction it was said in *Elythe v. Ayres*, 96 Cal. 582, 19 L. R. A. 40: "We are not here to construct a statute, but to construe a statute. We can neither interpolate nor eliminate, and we are bound to assume that the legislature enacted the law as it now stands with a due comprehension of the mean-

ing of words, and of the rules of statutory construction, and that they incorporated into the act all that was intended, and that they intended that effect should be given to all that was found therein." And that principle of construction applies with full force here. If any layman of ordinary intelligence, be he merchant, doctor, or mechanic, should have the question submitted to him as to the proper signification of the words here under consideration, to wit, the officer's commission shall expire "at the next election by the people," he would say without hesitation that the commission expired at the next general election. Such is the fair and legitimate construction of the language. There are some decisions of courts of other states which in a measure look in an opposite direction from the views here expressed. But these decisions are largely based upon provisions of law not identical with the one here involved. Many of those provisions use the term "regular election," and in such cases stress by the court is laid upon the word "regular" as a most material element in arriving at the true construction of the language. Notwithstanding the foregoing construction of the constitutional provision is favorable to the petitioner, still the relief he asks must be denied. For, though the appointee's commission expire at "the next election by the people," still, in the absence of some law authorizing the election of a lieutenant governor at that time, no election can be held, and I find no such law. A provision of Constitution or statute declaring a certain day upon which the commission of an officer shall expire is in no sense a provision that an election shall be held upon that day to fill the office. Under these conditions the present appointee of the governor will hold until his successor is elected and qualified, regardless of the day upon which his commission may expire; and his successor can only be elected at a time fixed by law, which time will be at the regular state election in the year 1898.

COLORADO SUPREME COURT.

Horace G. SMITH Jr., *et al.*, *Appts.*,
v.

Jane H. SMITH.

(.....Colo.....)

1. A fraud upon the rights of a wife is committed when the husband strips himself of all his property just before death by delivering deeds of real estate that had been made some years before and giving a check for money which constituted all his personal property in order to defeat his wife's rights as his heir, after obtaining the full benefit of the property up to the end of his own life.

2. A consolidation of several actions against different defendants cannot be made under Civ. Code, § 20, which authorizes consolidation of causes of action which might have been joined when they are in the same court and "between the same parties."

3. The improper consolidation of several actions attacking deeds of a decedent is ground of reversal where the defendants therein were thereby deprived of the right to each other's testimony.

(May 18, 1896.)

A PPEAL by defendants from a judgment of the District Court for Arapahoe County in

NOTE.—As to fraud in transferring property so as to cut off a wife's interest by way of dower or otherwise, see *Phelps v. Phelps* (N. Y.) 23 L. R. A. 34 L. R. A.

625; *Stroup v. Stroup* (Ind.) 27 L. R. A. 523; *Walker v. Walker* (N. H.) 27 L. R. A. 799; and *Murray v. Murray* (Ky.) 3 L. R. A. 95.

favor of plaintiff in an action brought to set aside certain conveyances of real estate as in fraud of plaintiff's rights. *Reversed.*

Statement by Hayt, Ch. J. :

In this one appeal are embraced three several actions, commenced in the district court by Jane H. Smith, as plaintiff, against Horace G. Smith, Jr., Ralph Smith, and Jessie F. Smith, defendants, respectively. In the court below the actions were consolidated, and tried as one action. The complaints are alike in each of the three cases, except as to the party defendant. It is alleged that appellee, Jane H. Smith, was married to Horace G. Smith in November, 1884, and that she remained his lawful wife until the 17th day of August, 1892, upon which last-mentioned date he died, at the age of seventy-five years; that at the time of the intermarriage of plaintiff and the deceased he had three children living, the defendants in these several cases; that on the 28th day of August, 1888, the deceased, being the owner of a large amount of real estate in the city of Denver, to the value of \$40,000, free and clear from all liens and encumbrances of any kind and nature whatsoever, executed deeds to all of such real estate to the defendants in severalty. Plaintiff alleges that these deeds which bear date August 28, 1888, were made secretly, without her knowledge, and without consideration, with the intent and design to defraud plaintiff in the event of her husband's death. It is further alleged that by these deeds the deceased conveyed to each of the defendants about a one-third portion in value of all his real estate; that the deeds were acknowledged on the 28th day of August, 1888, but that none of them were filed for record until the 16th day of August, 1892, this being the day before the death of the grantor. It is further alleged that at the time the deeds were filed for record the said Horace G. Smith was *in extremis*, and expected to die, and also that from the time of the execution of these deeds until the same were recorded they remained under the exclusive care and control of the grantor; that during all this time he retained the possession, dominion, and absolute control over all the property thus deeded, receiving all the rents, income, and revenues therefrom, the same as if the deeds had never been made, and in all respects exercised the exclusive rights of ownership over all the property. It is further alleged that these deeds are testamentary in character, and were made by the grantor, acting in collusion with the grantees, for the purpose of defrauding plaintiff of her right as heir of her husband. It is further alleged that plaintiff was thereby left without means for her support, and that she was physically frail, and in delicate health, and unable to work for a living. To these complaints a general demurrer was in each instance interposed and overruled. Thereupon the defendants each answered separately. The answers are the same in all the cases. In their answers, the defendants admitted that Horace G. Smith was the owner of the real estate described in the complaints, but denied that the real estate was of the value

of \$40,000, and allege that it was only of the value of \$15,000. They deny that on the 16th day of August, 1892, Horace G. Smith was pronounced to be *in extremis*, or that his death was then and there expected. They deny that the deeds were in his possession, as alleged in the complaint, and allege that the deeds, as soon as executed, were delivered to the defendants, respectively, and retained by them. It is denied that the grantor, after the execution of the deeds, retained possession or control over the property, and also that he received the rents, income, or revenues therefrom. After the answers were filed, the causes were consolidated upon the motion of plaintiff, and against the objection of the defendants, and each of them. Upon these issues the cause was tried to the court without a jury. Upon the evidence the court determined the issues in favor of the plaintiff, and decreed that the defendants, and each of them, be compelled to convey to her the one half of all the real estate described in the complaint, and conveyed to the defendants, respectively, by the quitclaim deeds of August 28, 1888. The defendants, having excepted to the findings and decree, bring the case here by appeal.

Messrs. David Mitchell and N. M. Laws, for appellants:

Plaintiff's husband had a perfect right to dispose of the property if he was entirely free from debt, and in any event only creditors before or subsequent to the act could question it.

Bump, Fraud. Conv. 2d ed. 271, 272; Wait, Fraud. Conv. §§ 89-91.

The deed to defendant was made, acknowledged, and delivered to the defendant by Horace G. Smith, the grantor. This was and is sufficient to transfer the title, even though Horace G. Smith may have desired and intended thereby to prevent his wife, the plaintiff, from ever acquiring any right, title, or interest in or to the real estate so by him conveyed, or from ever deriving any benefit therefrom; she being only an heir and basing her claim on that ground.

Diefendorf v. Diefendorf, 182 N. Y. 100.

The grantor cannot procure his deed to be set aside.

Colee v. Colee, 123 Ind. 109; 1 Story, Eq. Jur. § 871; Woerner, American Law of Administration, § 296.

What the grantor cannot do his heir cannot do.

Bump, Fraud. Conv. 487; Wait, Fraud. Conv. § 121; 1 Story, Eq. Jur. § 871.

The complaint does not allege that the grantor was in any way incapacitated, or that he was moved by undue influence on the part of the defendant in any way or manner, or that defendant did or said anything to procure the making of the conveyance sought to be set aside. In such case the deed must stand.

Wait, Fraud. Conv. § 481; *Smith v. Meaghan*, 28 Hun, 423.

In this state a husband or wife has the right absolutely to do whatever he or she will with his or her property independent of the other to all intents and purposes the same as if sole and unmarried.

Crain v. Wright, 114 N. Y. 811; *Palmer v.*

Hanna, 6 Colo. 55; *Burdsall v. Waggoner*, 4 Colo. 257.

Even if the deed was voluntary it is good and binding on the grantor and his heirs.

1 Story, Eq. Jur. § 871; *Campbell v. Whitson*, 68 Ill. 240, 18 Am. Rep. 555; *Gregory v. Filbeck*, 13 Colo. 379; *Bump, Fraud. Conv.* 2d ed. 808, and cases cited in notes 1, 2.

Being free from debt, Horace G. Smith had the right to do with his property as he saw fit. *Burdsall v. Waggoner*, *supra*.

Heirs taking by descent are estopped by the deed of their ancestor.

Bond v. Swearingen, 1 Ohio, 395.

Neither spouse has any vested right, inchoate or otherwise, in the property of the other so long as both live.

Holladay v. Dailey, 1 Colo. 464, 86 U. S. 19 Wall. 610, 23 L. ed. 189; *Stewart v. Stewart*, 5 Conn. 316; *Bump, Fraud. Conv.* 2d ed. 18-15; *Peaslee v. Barney*, 1 D. Chip. (Vt.) 331, 6 Am. Dec. 743.

If the grantor made the conveyance in furtherance of a fraudulent purpose on his part, a court of equity will not set it aside at his instance.

Tyler v. Tyler, 126 Ill. 525; *Bump, Fraud. Conv.* 2d ed. 436, 437.

Such deed is binding on the grantor, his heirs, executors, and administrators.

Bump, Fraud. Conv. 437, 438; *Hallorn v. Trum*, 125 Ill. 250; *Horner v. Zimmerman*, 45 Ill. 15; *Ward v. Enders*, 29 Ill. 524; *Choteau v. Jones*, 11 Ill. 319; *Wait, Fraud. Conv.* § 121.

The three cases consolidated here are not between the same parties (the plaintiff is the same in each but there is a different defendant in each action); nor are the causes of action or supposed causes of action such as might have been joined.

Denver v. Kent, 1 Colo. 336; *Mayer v. Coffin*, 90 N. Y. 312; *Abbott, Law Dict. title Consolidation of Actions*; 8 Estee, Pl. 148, note 8; *Bech v. Ruggles*, 6 Abb. N. C. 69.

The court misconceived the force and effect of the order of consolidation, and was thereby led into the error as to the competency of the witnesses.

Mowry v. Davenport, 6 Lea, 91.

It is not an effect of consolidation to make the testimony in each case apply as well to the other.

Lofland v. Coward, 12 Heisk. 546; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 706; *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 588, 17 L. R. A. 345.

Each of said defendants has a clear right to show by competent witnesses who had knowledge of the facts that the said several deeds were actually and unconditionally delivered by the grantor to the respective grantees on the day of their date and acknowledged; but this right was denied to each of said defendants by the orders and rulings of the court above excepted to; and each of said defendants was injuriously affected thereby.

Hobart v. Hobart, 63 N. Y. 80; *Smith v. Meaghn*, 28 Hun, 423; *Stewart v. Stewart*, 41 Wis. 624.

An absolute deed takes effect on its delivery, and the right of possession in the grantee cannot be limited or postponed by parol agreement between the parties, and if the grantor

remains in the possession of the deeded premises after the execution and delivery of the deed he is a tenant at will of the grantee.

Wright v. Graves, 80 Ala. 416.

If the several deeds were delivered to the several grantees on the day of their date such delivery was the consummation of conveyances which the grantor had the right to make; and the several grantees had the right to receive these several conveyances and enjoy the benefit thereof.

Bump, Fraud. Conv. 2d ed. 15, 16.

When the deed has a date it will be presumed that it was executed and delivered on that day.

5 Am. & Eng. Enc. Law, p. 446.

The possession of a deed by the grantee, duly signed and acknowledged, is prima facie evidence of delivery on the day of its date, and casts the burden of proof on the party who claims that it was delivered on another day or that it was not delivered at all.

3 Greenl. Ev. § 297; *Brown v. State*, 5 Colo. 496; *Blair v. Howell*, 68 Iowa, 619; *Stewart v. Stewart*, 50 Wis. 445.

And the proof, before it will be held sufficient to rebut the presumption of delivery, must be clear and convincing.

McCann v. Atherton, 106 Ill. 31; *Tunison v. Chamblin*, 88 Ill. 378.

Messrs. V. D. Markham and Bartels & Blood, for appellee:

Where the defenses are the same, or where there are no defenses, then consolidation may be compelled by the defendant. The same rule would apply to the plaintiff.

Powell v. Gray, 1 Ala. 77.

The question of consolidation is addressed to the discretion of the court and cannot be reviewed on error.

McRae v. Boast, 3 Rand. (Va.) 481; *Den, Smith, v. Fen*, 9 N. J. L. 417.

The court will order a consolidation of several actions of ejectment where there are the same question and defense in all the cases.

Hartman v. Spiers, 87 N. C. 80; *Jackson, Pionier, v. Schaubert*, 4 Cow. 78; *Burnham v. Dalling*, 18 N. J. Eq. 132; *Wilson v. Riddle*, 48 Ga. 609; *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 W. Va. 645; *Wilkinson v. Johnson*, 4 Hill, 46.

Conveyance by a husband to his children of all his property, made a short time before his death without a valuable consideration, and securing to himself the use and control thereof during his life, is fraudulent against his wife and will be set aside in equity.

Thayer v. Thayer, 14 Vt. 107, 39 Am. Dec. 211; *Killing v. Reidenhauer*, 6 Serg. & R. 531; *Youngs v. Carter*, 10 Hun, 194; *Jiggitts v. Jiggitts*, 40 Miss. 719; *Bigelow, Fr. § 96*; *Brown v. Bronson*, 35 Mich. 415; *Smith v. Hines*, 10 Fla. 258; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Brewer v. Connell*, 11 Humph. 500.

A wife may maintain an action to set aside a conveyance by her husband, made with intent to deprive her of alimony in a divorce suit against him, though the cause for such divorce did not arise until after the conveyance was made.

Gregory v. Filbeck, 13 Colo. 379; *Johnson v. Johnson* (Ky.) 2 S. W. 437; *Hanna v. Palmer*, 6 Colo. 156, 45 Am. Rep. 524.

Where the husband during coverture secretly makes a conveyance of all his property, and keeps the knowledge thereof from his wife, and thereafter retains the control and management of his property, such instrument should be treated and considered as a will, for it is testamentary in its nature, and not as a deed; and considering it as such, inasmuch as it deprives his wife of more than one half of the property, it should be held to be void as to her.

Lines v. Lines, 142 Pa. 149; *Swaime v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 818; *Gilson v. Hutchinson*, 120 Mass. 27; *Cranson v. Cranson*, 4 Mich. 280, 68 Am. Dec. 534; *Jones v. Jones*, 64 Wis. 801; *Tucker v. Tucker*, 83 Mo. 464; *Smith v. Smith*, 12 Cal. 216, 78 Am. Dec. 583.

The same rule applies to personalty which is given with the intent of depriving a widow of her distributive share. It will be set aside as a fraud upon her.

Manitake v. Beard, 85 Ky. 20.

Hayt, Ch. J., delivered the opinion of the court:

The record in this case discloses that the real estate deeded to his children, the issue by a former wife, was all the real estate owned by Horace G. Smith, Sr.; that, aside from this, he had no other property or choses in action, except a few hundred dollars in cash, deposited to his credit in a bank; and that a few hours before his death he executed a check for this to one of his sons. As a result of these transactions, he left his widow absolutely penniless at his death. She was then old and infirm, and has since been dependent upon the charity of friends for her support. Appellants contend that under the statutes of this state the obligation of the husband to provide for his wife upon his decease is simply a moral obligation, and one that cannot be enforced by the courts. Wherever the common law has prevailed, it has from the earliest times required the husband to support the wife so long as the marriage relation existed between them, and she remained true to her marital vows. Moreover, it imposes the duty upon the husband having property to provide for the support and comfort of his widow after his demise. The obligation in this latter respect is to a large extent mutual, and the books are full of authorities to the effect that, where either husband or wife attempts secretly to convey property on the eve of marriage, such conveyances would be set aside for the benefit of the defrauded party. So, also, where the husband has attempted to convey real estate in fraud of his wife's right of dower, the courts have never been called upon in vain to protect such rights. Although in this state dower and the tenancy by curtesy are abolished, the statute provides that whenever either party shall die intestate, possessed of real estate, if such intestate leave a husband or wife and children, one half of such estate shall descend to such surviving husband or wife. *Mills' Anno. Stat.* § 1524. It is also provided that, if any decedent leaves a widow, residing in this state, she shall be entitled to certain personal property, particularly describing the same, and that she may have the same set apart for her, not subject to the pay-

ment of his debts. *Id.* § 1534. It is further provided that, when an inventory shall have been made of such personal estate, the widow may relinquish her rights to all property allowed to her, and that in lieu thereof she may claim the value of such property in money or other personal property, at her election. *Id.* § 1535. It is also provided: "In case any married man shall hereafter deprive his wife of over one half his property, by will, it shall be optional with such married woman, after the death of her husband, to accept the condition of such will, or one half of his whole estate, both real and personal." *Id.* § 8011. It is the obvious intent and purpose of the foregoing acts to provide the widow with the necessary means for her support in case of the death of the husband, whenever his property is sufficient for that purpose. Under these statutes, appellee contends that where the husband, during coverture, secretly makes conveyance of all his property, and keeps the knowledge thereof from his wife, thereafter retaining control and management of the same, such conveyance should be treated and considered as testamentary in character, and not as a deed; and, in so far as the wife is deprived thereby of more than one half the real property, it should be held void as to her. To this proposition the zeal and ability of counsel have been largely directed, and our attention has been called to numerous authorities upon either side of the controversy, some of them directly in point, and others bearing more or less upon the question presented. Our examination of the cases cited, however, does not disclose one showing a parallel to the heartlessness and inhumanity manifested by the deceased. In many of the cases the husband has attempted to convey his personal property by a gift, to the exclusion of his widow, leaving for her reliance such interest as she might be entitled to in his real estate under the law. In other instances the husband has attempted to convey his real estate, leaving his personal property to be shared by his widow and other heirs; but this decedent has attempted to strip his widow, at his death, of all his property, both real and personal. As to whether such a transaction should be upheld, the authorities are not uniform, and to reconcile them would be impossible. In *Stewart v. Stewart*, 5 Conn. 316, the husband executed a deed conveying all his real estate to his children, placing the conveyance in the hands of a third person, to be delivered to them upon his death, on the happening of which event, two years after the execution of the deed, it was delivered pursuant to the trust, and the court held that the instrument was strictly a deed, and not a testamentary disposition; second, that it was not fraudulent in relation to the widow's right of dower. The case is the strongest we have found in favor of appellants' position. The action was, however, at law, and not in equity, and the court in the course of the opinion mentions the fact that that may be a fraud in equity which is not at law. The case of *Small v. Small*, 56 Kan. 1, 80 L. R. A. 243, is strongly relied upon by appellants. It is held in that case that, subject to

certain limitations, and against any claim of the widow made after death, a married man in Illinois or Kansas may, during coverture, give away to his children the bulk of his property, although the well-known effect of the gift will be to deprive the widow of a fair share of the property, which would otherwise have fallen to her. In the course of the opinion the Kansas court quotes with approval the following language from the case of *Williams v. Williams*, 40 Fed. Rep. 521: "The main question in its broadest sense, is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be that if such gift is bona fide, and accompanied by delivery, the widow cannot reach the property after the donor's death.

Neither the wife nor children have any tangible interest in the property of the husband or father during his lifetime, except so far as he is liable for their support, and hence he can sell it or give it away without let or hindrance from them. Of course, the sale or gift must be absolute and bona fide, and not colorable only. And if the sale or gift would bind the grantor it would bind his heirs." The writer of the foregoing seems to have understood that a colorable sale could be set aside. Set aside by whom? If made for the purpose of defrauding an heir, it could only be set aside at the suit of the party defrauded, while the grantor, being a party to the fraud would be refused relief by the courts; hence it does not necessarily follow, as stated by him, that all sales or gifts which are binding upon the grantor are likewise binding upon his heirs.

As our statutes are borrowed from Illinois, decisions in that state are entitled to great weight. The case of *Padfield v. Padfield* was before the supreme court of Illinois three times. 68 Ill. 210, 72 Ill. 322, 78 Ill. 16. The conclusion of the court is, we think, fairly expressed in the following from Kerr on Fraud and Mistake, which is quoted with approval in the last opinion: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life independently of the concurrence, and exonerated from any claim of his wife, provided the transaction is not merely colorable and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition by the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her." Kerr, Fraud & Mistake, p. 220. Accepting this as a correct statement of the law, we think the case made by the pleadings and proofs before us brings the present case within the exception; for here, as we have shown, the transaction was merely colorable, and made under circumstances strongly indicative of fraud upon the rights of the wife. The proof shows that these three several deeds were held from record for the period of four years after their execution. If one of these deeds had been withheld from record for that length of time, this would be a suspicious circumstance, while the fact that all were thus withheld leads very strongly

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to the conclusion that they were so withheld as a result of an understanding between the grantor and the three grantees, and that these grantees were guilty of collusion in the matter for the purpose of preventing information of the transfer from reaching the wife of the grantor, and to permit the grantor in the meantime to continue to exercise exclusive dominion and control over the property. In the case of *Youngs v. Carter*, 10 Hun, 194, the facts were that Daniel Youngs, a widower, was engaged to be married to the plaintiff in August, but in consequence of his sickness the marriage was put off until September. In the interim he, without the knowledge of the plaintiff, conveyed nearly the whole of his real estate to two daughters by a former marriage, and took back from them a lease for his life. The plaintiff did not learn of this conveyance until after marriage, and then immediately brought suit to have the same set aside. The court held that the conveyance was a fraud upon the inchoate right of the wife to dower, and adjudged her entitled to dower in the land so conveyed. In the course of the opinion, which is an instructive one, the court advances the following argument: "When the conveyance in controversy was executed, the relation of the grantor to the plaintiff was of a strictly confidential nature, and a natural expectation inspired as well as implied by it was, that upon its consummation, she should succeed to all the legal rights of a wife in the property owned by him. She acquired by means of it an equitable claim upon him to that extent. But, at the same time, it was not so entirely controlling as to prevent him from discharging such other equitable obligations as he might have previously incurred to his children. It simply restrained him from disposing of his property, fraudulently, for the purpose of preventing it from becoming subservient to the rights which the laws of the state secured to a wife." This principle is announced and carried to its logical result in the case of *Manikes v. Beard*, 85 Ky. 20, where the husband, in contemplation of death, gave to his children the whole of his personal estate, with the fraudulent intent to deprive his wife of the interest therein to which she would be entitled as his widow; and the court did not hesitate to set aside the gift at the suit of the widow. This case is a much stronger one in favor of the widow than that case, for the reason that there the gift was of personal property only, over which the owner has, by the commercial law, greater freedom than over his real estate; and her dower interest remained in the lands left by the husband at his demise, and this dower interest was sufficient to support her. Here, by the fraudulent conduct of the husband, the wife was stripped of all her rights as heir to his personal estate and to his real estate as well. It is not necessary in this case, and it is not our intention, to say anything that will prevent the husband, during his lifetime, from selling his personal property or transferring his real estate for such consideration as he may be willing to accept, or without consideration, provided always that the transaction shall be absolute and bona fide, and not

colorable only; but what we do say is, where, as here, the complaint charges, and the evidence shows, that the transaction complained of is colorable merely, and resorted to by the husband for the purpose of defeating his wife's rights as his heir, he hoping thereby to obtain the full benefit of the property to the last hour of his life, and at the same time to be able to deprive her of all interest therein as his heir, is as much of a fraud on the part of the husband as it is for a debtor having in contemplation the incurring of an indebtedness to put his property beyond his control, and the courts have universally declared the latter to be in violation of the statute of frauds. The same principle should govern in this case. The transaction is shown to have had its inception in a desire on the part of both the grantor and grantees to deprive the wife and stepmother of the benefits conferred upon her as an heir of her husband under our statutes, and the action of the district court in characterizing the transaction a fraud upon the rights of the wife as an heir is founded upon the plainest principles of justice and equity, and must be sustained.

We have thus far considered the cause as made by the pleadings and evidence. We are satisfied, however, that a great injustice was done the defendants by the order of consolidation, made by the district court, as thereby they were prevented from fully presenting their defenses. The cases were consolidated upon the motion of the plaintiff and against the objection of the defendants and each of them, and by reason of such consolidation each defendant was deprived of the evidence of the defendants in the other suits; i. e. of the evidence of his codefendants after the consolidation. The ruling excluding these witnesses is based upon § 4816, Mills' Anno. Stat., which provides, among other things, "that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, . . . when any adverse party sues or defends as the trustee or conservator of an idiot, . . . of any deceased person," etc. The argument of appellee in support of the ruling of the court below proceeds upon the basis that, after the consolidation, there was but one suit, to which all the defendants were parties. If the suits were properly consolidated, the exclusion of the witnesses must be upheld, but if the order of consolidation was not proper, the subsequent exclusion of the witnesses was also erroneous. The Civil Code provides at § 20 that, "whenever two or more actions are pending at one time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated into one." At 84 L. R. A.

least one of the essential conditions to consolidation under this provision was lacking in these suits, namely, they were not between the same parties. It is urged, however, by appellees, that courts have the inherent right, independent of statute, to consolidate suits at law and actions in equity, where the interest of the parties and the public may be subserved by such consolidation. An examination of the authorities leads to the conclusion that, in the absence of legislation, the power of consolidation of actions has been exercised with the greatest freedom according to the will of the particular judge before whom the actions may have been pending, without any definite rule having been established for the guidance of the courts with reference thereto. The provisions of our Code with reference to consolidation are similar to those to be found in many of the other code states. See 4 Enc. Pl. & Pr. p. 676. No case has been cited, and we know of none, where a consolidation has been permitted under such a statute, unless all the prescribed conditions existed; and in a number of states the code provision has been referred to as controlling. In the case of *Mayor v. Coffin*, 90 N. Y. 312, the court says: "The order of consolidation must be reversed because the special term had no power to make it. The authority to consolidate actions is given by § 817 of the Code, and permits it only where both actions are pending between the same plaintiff and the same defendants for causes of action which might have been joined." See also *Kipp v. Delamater*, 58 How. Pr. 183; *Blesch v. Chicago & N. W. R. Co.* 44 Wis. 593. For error in ordering the consolidation, and in depriving each of the defendants of the evidence of the others, the judgment must be reversed, and the cause remanded.

Judgment reversed.

Campbell, J., concurring specially:

Upon the ground that the order of consolidation was erroneous, I concur in the judgment of reversal. From that portion of the opinion in which the Chief Justice holds the conveyance by the husband to be a fraud upon the property rights of the wife, I dissent. While joining with my associates in characterizing the husband's conduct, from a moral standpoint, as most reprehensible, I am not, as at present advised, prepared to say that the law of this state does not permit him to do what the evidence in the case shows that he has done. My reading of the authorities is that the rule announced in the majority opinion should prevail where tenancy by the curtesy and dower exist; but the application of the principle to the case at bar, where, as in our state, dower and tenancy by the curtesy have been abolished, does not seem to me to be warranted.

MARYLAND COURT OF APPEALS.

John B. HANNA, *Appt.*,

v.

James C. YOUNG, The Treasurer of Bel Air.

(.....Md.....)

1. The qualifications of voters at municipal elections may be prescribed by the legislature as by requiring them to be taxpayers, in the absence of any constitutional provision to the contrary.
2. The right to vote "at all elections," given by Const. art. 1, § 1, to every male citizen of full age "who has been a resident of the state for one year and of the legislative district of Baltimore city or of the county in which he may offer to vote for six months," does not extend to municipal elections outside of the city of Baltimore.

(October 23, 1896.)

APPPEAL by defendant from an order of the Circuit Court for Harford County granting a writ of mandamus to compel defendant to turn over the property in his possession as treasurer of the town of Bel Air to a person who was alleged to have been elected as his successor in office. *Reversed.*

The facts are stated in the opinion.

Messrs. Thomas H. Robinson, Gilbert S. Hawkins, and H. J. Jewett, Jr., for appellant:

Municipal corporations are institutions designed for the local government of towns and cities; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character.

Dill. Mun. Corp. 4th ed. § 12.

Charters can be changed at pleasure when the constitutional rights of creditors are not invaded.

Dill. Mun. Corp. 4th ed. § 63; *Ex parte Harrington v. Rochester*, 10 Wend. 547; *People v. Morris*, 12 Wend. 325; *State v. Baltimore & O. R. Co.* 12 Gill & J. 899, 38 Am. Dec. 819; *Cooley*, Const. Lim. 3d ed. 192; *Baltimore v. State, Board of Police*, 15 Md. 881, 74 Am. Dec. 572; *Groff v. Frederick City*, 44 Md. 78.

The power of local government is the instinctive purpose and the distinguishing feature of a municipal corporation proper.

Dill. Mun. Corp. 4th ed. § 20.

The controlling voice ought to be with those who have to bear the burden.

Dill. Mun. Corp. 4th ed. § 17.

The mayor of a city is not an officer under the state within the meaning of a constitutional provision giving the supreme court jurisdiction only when title to an office under the state is in contest.

Britton v. Steber, 62 Mo. 870.

The right of suffrage is not regarded as one of the inalienable rights enumerated in the Declaration of American Independence and in the bills of rights of the states.

1 Story, Const. 580; 1 Bl. Com. 171; *Huber v. Reilly*, 53 Pa. 115; *Paine*, Elections, 2.

Citizenship and the right of suffrage are not inseparable; the latter is not a universal, inalienable right, but is altogether conventional. *Anderson v. Baker*, 23 Md. 581.

The elective franchise is conferred on the citizen by the sovereign power of the state to subserve a public general purpose.

Anderson v. Baker, 23 Md. 584.

A franchise not having for its purpose the public general interest is not created or affected by art. 1 of the Constitution.

If special or extra municipal powers be granted not affecting civil, political, or other rights which concern all but which involve directly the expenditure and payment of money, it is but just that the project should be required to have the support of a majority in value of those who must pay the expense.

Dill. Mun. Corp. 4th ed. § 15.

In some of the states it is provided by constitutional provision that to entitle a man to vote he must as a prerequisite have paid within two years next preceding the time of the election at which he claims a right to vote a state or county tax.

McCrary, Elections, § 74.

Any office established by statute may be abolished by statute.

Davis v. State, 7 Md. 161, 61 Am. Dec. 831; *Standford v. Wingate*, 2 Duv. 440.

If the legislature can say who shall be elected can it not say who shall elect?

State, Hardwick, v. Shearingen, 12 Ga. 23; *Stewart v. Foster*, 2 Binn. 110.

No municipal elections except those held in the city of Baltimore are within the terms or meaning of the Constitution.

Smith v. Stephan, 66 Md. 388.

"Voters of the county," a phrase used in the Constitution of Wisconsin, is interpreted to mean "those who have a right to vote at the elections held for the purpose of choosing state officers."

State v. Williams, 5 Wis. 308; *State, Cothren, v. Lean*, 9 Wis. 283.

The clauses of art. 95, La. Const., which restricted eligibility to parish offices to persons who have the right to vote in the parish, contemplated state offices.

State v. Blanchard, 6 La. Ann. 515.

The Wisconsin Constitution undertook to designate who should vote at municipal elections, and declared that "the electors of such cities, towns, or villages" should be entitled.

It was held in *State, Cornish, v. Tuttle*, 53 Wis. 45, that the words "electors of such cities" meant residents therein who were electors.

Long prior to and ever since the adoption of the Constitution it has been the legislative rule, rather than the exception, to fix in the charters of towns and cities a qualification for electors different from that prescribed in the Constitution for county and district electors.

Buckner v. Gordon, 83 Ky. 665.

The presumption must always be in favor of the validity of laws if the contrary is not clearly

NOTE.—As to legislative power over municipal elections, see *State, Lamar, v. Dillon* (Fla.) 22 L. R. A. 124; also (as to power to give women the right to

vote in city elections) *Coffin v. Thompson* (Mich.) 21 L. R. A. 662, and note.

demonstrated; it must be a clear and unequivocal breach of the Constitution—not a doubtful and argumentative implication.

Baltimore v. State, Board of Police, 15 Md. 476, 74 Am. Dec. 572; *Anderson v. Baker*, 23 Md. 628; *State v. Baltimore & O. R. Co.* 12 Gill & J. 438, 88 Am. Dec. 819; *Dorchester County Comrs. v. Meekins*, 50 Md. 39; *Groff v. Frederick City*, 44 Md. 73; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83.

Constitutions are not to be construed according to words used in a particular clause, but the whole must be considered.

Manly v. State, 7 Md. 135; *Anderson v. Baker*, 23 Md. 581.

Mr. George L. Van Bibber, for appellee: The Constitution having prescribed the qualifications of electors, these qualifications cannot be changed or added to by the legislature.

Dill. Mun. Corp. 3d ed. § 195; Cooley Const. Lim. 5th ed. 753; *People v. Canaday*, 78 N. C. 198, 21 Am. Rep. 465; *St. Joseph & D. O. R. Co. v. Buchanan County Ct.* 39 Mo. 485.

Municipal corporations are parts of the state government exercising delegated political powers for public purposes.

Regents of University v. Williams, 9 Gill & J. 397, 31 Am. Dec. 72; *State v. Baltimore & O. R. Co. supra*; *Baltimore v. Root, Armstrong*, 8 Md. 102, 63 Am. Dec. 603; *Frederick v. Groshon*, 80 Md. 444, 96 Am. Dec. 591; *St. Mary's Industrial School v. Brown*, 45 Md. 481; *Pumphrey v. Baltimore*, 47 Md. 147, 28 Am. Rep. 446; *Daly v. Morgan*, 69 Md. 468, 1 L. R. A. 757; *Baltimore & E. S. R. Co. v. Spring*, 80 Md. 517, 27 L. R. A. 72; *Baltimore v. Keeley Institute*, 81 Md. 115, 27 L. R. A. 646; *Revell v. Annapolis*, Id. 9.

Municipal corporations have no powers except such as are delegated to them by the legislature, and the legislature cannot delegate a power prohibited by the Constitution.

Baltimore & E. S. R. Co. v. Spring, supra.

Roberts, J., delivered the opinion of the court:

The sole object of this appeal is to test the validity of the 30th section of the act of the general assembly of Maryland, passed at January session, 1896, chap. 359, entitled, "An Act to Repeal Section 23 of Article 13 of the Code of Public Local Laws, Entitled Harford County, Sub-title Bel Air, as Repealed and Re-enacted by the Acts of 1890, chap. 154, and also to Repeal Section 80 of Article 13 of the Code of Public Local Laws, Entitled Harford County, Sub-title Bel Air, and to Re-enact the Same with Amendments."

The facts proper to be stated are that an election for five town commissioners was held in the town of Bel Air on the 1st Monday of May, 1896, and was conducted in accordance with the provisions of its charter as amended by the act of 1896, except that the judges of election as required by § 30 of said act did not, as a condition precedent, require of each person offering to vote at such election to show that he was assessed with \$100 worth of real or personal property on the tax book of said town before he was entitled to vote. The said judges of election ignored this provision of the

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act of 1896 and allowed all male citizens residing within the corporate limits of Bel Air, above the age of twenty-one years, to vote, notwithstanding the right of a number of said citizens to vote was challenged, upon the ground that they were not assessed with the requisite amount of property. The election was accordingly conducted as if the act of 1896 had not been passed or was void of legal effect. The result of the election was that the five persons receiving the highest number of votes acted as if they had been duly elected; having qualified and organized, they proceeded to elect James C. Young, the petitioner in this case, treasurer of the town of Bel Air for the ensuing year.

The petitioner and appellee here, having qualified, demanded of the appellant, who had on the 1st Monday of May, 1895, been elected treasurer of Bel Air, the possession of the books, papers and other property of the town then in his possession. This the appellant refused to do, and the appellee accordingly filed his petition in the court below, for the writ of mandamus to compel the delivery to him of said books, etc. The appellant answered said petition, denying the validity of said election and justifying his refusal to deliver said books, etc., because the judges conducting said election had failed and refused to observe and give effect to the provisions of the act of 1896, which prescribed a property qualification for said electors voting at said election. Whereupon issues were joined and the case was heard by the court below, without the aid of a jury. The court directed the writ to issue and from the order of the court this appeal is taken. The question lies within very circumscribed limits, but it is nevertheless a question which has not heretofore been passed upon by this tribunal. Whilst it has received consideration in some of the courts of the other states of the Union, it does not, however, appear to have been determined except in a very limited number of cases.

The contention here is that the 30th section of the act of 1896 is directly in conflict with the provisions of art. 1, § 1, of the Constitution of the state, which reads as follows: "All elections shall be by ballot and every male citizen of the United States of the age of twenty-one years or upwards, who has been a resident of the state for one year, and of the legislative district of Baltimore city, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district in which he resides, at all elections hereafter to be held in the state."

It is contended on the part of the appellant that this section of the Constitution plainly comprehends and includes within its express terms all elections, whether state, Federal, county, or municipal. Yet there is but one municipality mentioned in this section of the organic law, and, in fact, Baltimore city is the only municipality mentioned *eo nomine* in any part of the Constitution. This court in *Smith v. Stephan*, 66 Md. 381, Mr. Justice Bryan delivering the opinion of the court, said: "It is sufficient to say that no municipal elections except those held in the city of Baltimore are within the terms or meaning of the Constitution." Whilst the Constitution, art. 3, § 48, authorizes and empowers the general assembly

to create corporations for municipal purposes, it nowhere prohibits the legislature from imposing upon the qualified voters, residing within the corporate limits of a town, any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise in the selection of its officers. In this respect the power of the legislature is unlimited. The argument advanced at the hearing in this court, to the effect that the act in question is void because the Constitution has conferred the right and prescribed the qualifications of all electors in this state, the legislature is without authority to change or add to them in any manner.

If the premises of this contention were correctly stated, the argument and sequence would undoubtedly be correct. But, as already observed, the Constitution (art. 3, § 48) only in general terms authorizes the creation of corporations for municipal purposes, and leaves to the legislature the enactment of such details as it may deem proper in the management of the concerns of the corporation or which may be regarded as beneficial in the government of the same. The Constitution of this state provides for the creation of certain offices, state and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections, held within the state (outside the corporate limits of Baltimore city), can be properly termed elections under the Constitution, such as state and county elections; or that the framers of the Constitution ever contemplated that art. 1, § 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment.

In the creation of a new municipality, the Constitution devolves upon the general assembly the entire duty of giving vitality to and of organizing and fostering the body corporate without any other constitutional regulation than the mandate to provide for the system itself. It is therefore the mere creature of legislative sanction and the subject of statutory regulation. In the case of *State, Lamar, v. Dillon*, 82 Fla. 545, 23 L. R. A. 124, it was held that the suffrage provision in the Constitution of that state (which is substantially the same as art. 1, § 1, in the Constitution of this state), prescribing the qualifications of electors at all elections under it, does not apply to elections for municipal officers, but such elections are subject to statutory regulations; and further, that it is competent for the legislature to prescribe the qualifications of voters at the same.

It is only at elections which the Constitution itself requires to be held, or which the legislature under the mandate of the Constitution makes provision for, that persons having the qualifications set forth in said § 1, art. 1, are by the Constitution of the state to be qualified electors. Nowhere in the Constitution are the governments of municipalities in this state, or their officials, either clothed with power or designated as any part of our state government, but their very creation, together with all the powers and attributes which attach to their management, are

lodged by the Constitution with the legislative department of our state government, save in some respects the city of Baltimore. The same question now under consideration here arose in the case of *McMahon v. Savannah*, 66 Ga. 217, 43 Am. Rep. 65. The suffrage clause in the Constitution of the state of Georgia is almost *in totidem verbis* the same as that in the Constitution of this state. The statute sought to be declared unconstitutional was assailed upon the ground that it imposed upon the electors of the city of Savannah the payment of a poll tax as a condition essential to their qualification as voters at any municipal election. The court held the statute to be a valid exercise of legislative power; and further held that "all legislative acts in violation of the Constitution are void, and it is the duty of the judiciary so to declare. But in considering and passing upon the question of the constitutionality of the law, the rule is too well established and settled to be departed from, that it must be made to appear that the statute, before it is declared inoperative for that cause, must be 'plainly and palpably' in violation of the Constitution." *Beall v. Beall*, 8 Ga. 210. The solemn act of the government will not be set aside by the courts in a doubtful case.

The incompatibility or repugnancy between the statute and the Constitution must be "clear and palpable." *Parham v. Decatur County Inferior Ct. Justices*, 9 Ga. 858. We also refer to the cases of *Buckner v. Gordon*, 81 Ky. 666, and *Valverde v. Shattuck*, 19 Colo. 104, as sustaining the views expressed in this opinion. The last-mentioned case was a special proceeding under a statute of the state of Colorado praying for the dissolution of the town of Valverde and its annexation to the city of Denver. In such proceeding the county court made an order requiring the mayor and trustees of the town to call an election for the purpose of determining the question of dissolution and annexation; this order required the question to be submitted to a vote of the qualified electors of said town at such election. The mayor and trustees of the town sought to vacate the order on the ground of the unconstitutionality of the statute under which it was obtained. The statute required that the question of dissolution and annexation be submitted "to a vote of such of the qualified electors of such town or city (to be annexed) as have in the year next preceding paid a property tax therein." The suffrage clause, § 1 of art. 7 of the Constitution of the state of Colorado, is substantially the same (in so far as it involves the question under consideration in this case) as that of the Maryland Constitution.

Mr. Justice Elliott delivering the opinion of the court observes: "It is manifest that some restriction must be placed upon the phrase 'all elections,' as used in § 1 [of the Constitution] else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with the affairs of others in which he has no interest or concern. In our opinion, the word 'elections,' thus used, does not have its general or comprehensive signification, including all acts of voting, choice, or

election without limitation, but is used in a more restricted political sense,—as elections of public officers.”

Without extending the discussion of this question we are clearly of opinion, both upon

reason and authority, that the appellee's contention is not sustained.

For the reasons stated, the order of the court below directing the writ of mandamus to issue is reversed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

OPINION OF THE JUSTICES.

(186 Mass. 539.)

1. A preference of veterans over all other persons except women, given by Stat. 1896, § 2, when they have passed the civil service examination, is not unconstitutional.
2. The discretion to appoint veterans to certain offices and employment without an examination, which is given by Stat. 1896, § 3, if in the opinion of the appointing power the public service requires this to be done, is not unconstitutional.
3. The provision that civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women, which is made by Stat. 1896, § 6, if construed to mean that only those found competent shall be preferred, is within the constitutional power of the legislature.

(Allen, Lathrop, and Barker, JJ., contra.)

(September 26, 1896.)

SUBMISSION to the Justices of the Supreme Judicial Court of questions as to the validity of a statute and rules of the civil service commissioners relative to the civil service of the state.

The following order was passed by the council on June 16, 1896, and transmitted on June 20, by his Honor the acting governor, to the justices of the supreme judicial court:

Council Chamber, State House,
Boston, June 16, 1896.

Whereas certain amendments to the civil service rules have been prepared by the civil service commissioners, pursuant to § 2 of chap. 320 of the Acts of the legislature for 1884,—to carry out certain provisions of chap. 517 of the Acts of the legislature for 1896,—and said amendments have been submitted to the governor and council for approval;

And whereas such amendments involve the question of the constitutionality and validity of the provisions of §§ 2, 3, and 6 of said chap.

NOTE.—For other cases as to civil service laws, see *Rogers v. Buffalo* (N. Y.) 9 L. R. A. 579; *Com. v. Hensel*, *v. Fittler* (Pa.) 15 L. R. A. 205; *Newcomb v. Indianapolis* (Ind.) 28 L. R. A. 733; *People, McClelland, v. Roberts* (N. Y.) 31 L. R. A. 309; and *Brown v. Russell* (Mass.) 33 L. R. A. 253.
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517 of the Acts of 1896,* and the preference in appointment and employment in the public service thereby provided for persons who served in the army or navy of the United States in the time of the war of the Rebellion, and were honorably discharged therefrom, and also citizens of Massachusetts who have distinguished themselves by gallant and heroic conduct while serving in the army or navy of

*Sec. 2. Veterans may apply for examination for any position in the public service classified under chapter 320 of the Acts of the year 1884 and acts in amendment thereof, and the civil service rules thereunder, subject to said rules; and if such veterans pass the examination they shall be preferred in appointment to all persons not veterans; and it shall be the duty of the civil service commissioners to cause the names of veterans passing examination to be placed upon the eligible list for the position sought, in the order of the respective standing of such veterans, above the names of all applicants not veterans. The commissioners shall cause to be certified to the appointing officers for appointment the names of all such veterans in preference to applicants not veterans, so long as there are names of veterans upon the eligible list, and the appointment shall be made from the list so certified. But nothing herein contained shall be construed to prevent the certification and employment of women.

*Sec. 3. Veterans may apply for appointment to or for employment in any position in the public service classified as aforesaid, without examination. In such application such veteran shall state under oath such facts as may be required by the civil service rules. Age, loss of limb, or other physical impairment, which shall not in fact incapacitate, shall not disqualify such veteran from appointment under this section. Appointing officers may by requisition call for the names of any or all such veterans so applying without examination, and appoint or employ any of them in the office or position sought.

*Sec. 6. The civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and of the cities and towns thereof, in the class for which they make application, in preference to all other persons except women. The civil service commissioners may recognize an age limit in certifying persons for employment in the labor service, provided the appointing officer shall certify in his requisition that the work to be performed is so arduous as to require the services of young and vigorous men, and provided also that the commissioners shall upon investigation become satisfied that such certificate is true. In towns and cities in which the civil service act and the rules of the civil service commissioners have not been applied to the labor service the selectmen of the towns and the city councils of the cities shall take such action as may be necessary to secure the employment of veterans in the labor service of their respective towns and cities, in preference to all other persons, except women. Citizens of Massachusetts who have distinguished themselves by gallant and heroic conduct while serving in the army or navy of the United States, and who have received a medal of honor from the President of the United States, shall be deemed to be veterans under the meaning of this act, and shall receive all the benefits thereof."

the United States, and who have received a medal of honor from the President of the United States:

And whereas doubt has been raised as to the constitutionality of said sections of said act and of said proposed amendments to the civil service rules thereunder, and the governor and council before approving said amendments desire the opinions of the justices of the supreme judicial court thereon;

And whereas said questions of law are important, and the occasion is solemn,—

It is therefore voted: That the opinions of the justices of the supreme judicial court be required, under art. 2 of chap. 8 of the Constitution, upon the following important questions of law:

First: Is it within the constitutional power of the general court to provide, as in § 2 of said chapter of the Acts of the legislature for 1896, that veterans and medal holders, as defined in said act, applying for examination for any position in the public service classified under the civil service rules, and passing the required examination, shall be preferred in appointment to all persons not such veterans, although the latter may have a higher marking or standing upon the eligible list for such position?

Second: Is it within the constitutional power of the general court to provide, as in § 3 of said chap. 517 of the Acts of the legislature for 1896, that appointing officers may by requisition call for the names of any or all veterans or medal holders, as defined in said act, applying for appointment to or employment in any position in the public service classified as aforesaid, without examination; and to appoint or employ any of such unexamined veterans or medal holders in the office or position sought, in preference to persons not such veterans or medal holders, who have passed the required examination for such office or position, and whose names are upon the eligible list therefor?

Third: Is it within the constitutional power of the general court to provide, as in § 6 of said chap. 517 of the Acts of the legislature for 1896, that in the labor service of the commonwealth and the cities and towns thereof, the civil service commissioners shall establish rules to secure the employment of veterans and medal holders, as defined in said act, in the class for which they make application, in preference to all other persons except women?

Fourth: Are §§ 2, 3, and 6 of said chap. 517 of the Acts of the legislature for 1896 constitutional?

Fifth: Would the amendments to the civil service rules, prepared by the civil service commissioners under said chap. 517 of the Acts of the legislature for 1896, and herewith submitted to the justices (numbered respectively, for this purpose, 1st, 2d, and 8d), be constitutional and valid, if approved by the governor and council?

Proposed amendments to civil service rules, prepared by the civil service commissioners and submitted to the justices of the supreme judicial court, under question 5th.

First: Section 1 of Civil Service Rule 12

is hereby rescinded, and in place thereof the following is substituted:

"Sec. 1. The word 'veteran' in these rules shall mean a person who served in the army or navy of the United States in the time of the war of the Rebellion, and was honorably discharged therefrom; and also a citizen of Massachusetts who has distinguished himself by gallant and heroic conduct while serving in the army or navy of the United States, and who has received a medal of honor from the President of the United States."

Second: Civil service Rule 27 is hereby rescinded, and the following rule is substituted therefor:

"Rule 27. 1. Whenever any officer or board having the power of appointment to any office or employment under these rules shall make requisition not expressly calling for women, the commissioners shall certify the names of all veterans who have passed the examination for the position sought, in the order of the respective standing of such veterans upon the list; and in case there is no such veteran upon the list, then the commissioners shall certify the names of the three most eligible persons not veterans upon the list. In case such officer or board shall in the requisition request the certification of women, then the commissioners shall certify the names of the three most eligible women upon the list.

"2. The appointment or employment shall be made from the list of names so certified, subject to the provisions of the following section.

"3. Whenever any officer or board having the power of appointment to any office or employment shall in his requisition so request, the names of any or all veterans registered under Rule 12 shall be certified, and any of the veterans so certified may be appointed or employed in the office or position sought."

Third: Section 2 of Civil Service Rule 45 is hereby rescinded, and in place thereof the following sections are substituted:

"1. When the services of laborers are required, the officer or board having the appointment or selection shall notify the commissioners, stating the number of men wanted, the precise nature of the labor in which they are to be employed, and the time and place of employment; and the commissioners shall thereupon certify the names with the residences of the veterans registered for the required labor, and the employment shall be made from the list so certified; provided, however, if any age limit is specified in the requisition, such limit may be recognized by the commissioners, if the appointing officer shall certify in his requisition, and the commissioners upon investigation are satisfied that the work to be performed is so arduous as to require the services of young and vigorous men.

"2. In case there is not a sufficient number of veterans so registered and within the age limit for the work required (where such limit is made and recognized as above provided) the commissioners shall certify twice the number of men called for, over and above the number of veterans, if any, certified, making an impartial selection, and giving preference, first, to those who have had experience in the work

required, and, second, to those having families dependent upon them for support."

To His Honor the Acting Governor of the Commonwealth, and to the Honorable Council:

We, the undersigned justices of the supreme judicial court, in compliance with the order of the council of June 16 last, and the request of the acting governor of June 20 last, copies of which are annexed, respectfully submit the following opinion:

The principal questions are whether §§ 2, 3, and 6 of chap. 517 of the Acts of 1896 are within the constitutional power of the general court. Sections 2 and 3 of the statute are substantially re-enactments of pre-existing statutes which were expressly repealed by § 8. See Stat. 1887, chap. 437; Stat. 1889, chap. 473; Stat. 1895, chap. 501, § 1. The authority given to the general court by the Constitution to pass statutes on the subject has been often cited, and is found in chap. 1, § 1, art. 4, of the Constitution. So far as civil officers are concerned, it has full power and authority "to name and settle annually, or provide by fixed laws for the naming and settling all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this Constitution." So far as public employments are concerned which do not constitute the employee a public officer, the authority is "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof." Section 2 of the statute of 1896 authorizes veterans to apply for examination under the civil service statutes and rules, and provides that, if such veterans pass the examination, they shall be preferred in appointment to all male persons not veterans. The effect of the section is that the veterans must first be found qualified, by an examination in accordance with the civil service statutes and rules, to perform the duties of the office or employment which they seek, and, if they are found so qualified, they are to be preferred in appointment to all other persons, except women. The general court may have been of the opinion that a person who had served in the army or navy of the United States in the time of the war of the Rebellion, and had been honorably discharged therefrom, or who was a citizen of Massachusetts, and had distinguished himself by valiant and heroic conduct in the army or navy of the United States, and had received a medal of honor from the president of the United States, is a person who has shown such qualities of character that it is for the interest

of the commonwealth to appoint him to certain offices or employments in preference to other male persons, if he is found otherwise qualified to perform the duties. The general court may have so thought, on the ground either that such a person would be likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the service of the veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the state which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section.

Of the wisdom of such legislation we are not made the judges. The section does not purport to give an absolute preference to veterans, without regard to their qualifications, and the constitutionality of similar legislation was not considered in the recent decision of the court of which we are the justices. See *Brown v. Russell*, 166 Mass. 14, 32 L. R. A. 258.

Section 3 of the Statute of 1896 gives a discretion to the appointing power to appoint veterans to certain offices and employments without an examination, if in its opinion the needs of the public service require this to be done. Before the enactment of the civil service statutes the qualifications of the persons to be appointed or employed in the offices and employments covered by these statutes usually were left to be ascertained by the appointing power in such manner as it saw fit. The effect of this section is to permit veterans to be appointed to office or employment in the old way, if it seems best to the power having the right of appointment. It may be that the general court was of opinion that there were certain offices and employments in which it was important that the appointee should have the qualifications usually found in veteran soldiers and sailors; and that the good of the public service would be promoted by giving this discretion to the appointing power. Undoubtedly this, like the preceding section, gives a certain advantage to veterans over other persons, in being appointed to office or employment, but the section implies that the veteran to be appointed shall be found qualified by the appointing power in its own way, and it was not intended to provide for the appointment of veterans who are not qualified to perform the duties pertaining to the office or employment which they seek. The section does not necessarily exclude the appointment of other persons if the appointing power is of opinion that the appointment should be made under the civil service statutes and rules. We cannot say that this section is an enactment beyond the constitutional power of the general court. The constitutionality of § 6 of the statute of 1896 depends, we think, upon the meaning to be given to it. If the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and of the cities and towns in preference to all other persons except women, which rules shall secure the employment of veterans whether they are or are not found qualified to perform the labor

which pertains to the service, and thus shall compel the commonwealth and its cities and towns to pay wages to veterans for labor which they do not and cannot perform, we should have great difficulty in sustaining it as a constitutional enactment. This section does not relate to public offices, and without suggesting that any distinction can be made between public offices and public employments in the matter we are considering, the section was passed under the authority given to the general court to make all manner of wholesome and reasonable laws. We doubt whether a statute which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court. The civil service rules provide generally that applicants for the labor service, who produce satisfactory evidence of their capacity for labor and their habits as to industry and sobriety, shall be registered in the order of their application, at such convenient times and place or places as shall be designated by the commissioners. Rule 45, § 1. The special regulations in relation to the employment of laborers and mechanics which have been adopted by the commissioners provide not only that the applicant must produce a certificate, signed by two reputable citizens of his city, of his capacity for labor and of his habits of industry and sobriety, but also that before entering the name of an applicant on the register such further inquiry may be made in regard to his character and capacity as the commissioners may deem practicable or expedient, and that in case an applicant is found to be unfit, or in any way disqualified, to perform the service which he seeks, his name shall not be entered on the register, and the reason therefor shall be indorsed on the applicant's statement. Regulations 4, 7, 9. These rules and regulations were adopted before the passage of the Statute of 1896, and were contained in the reports of the civil service commissioners to the general court. It may be presumed that the general court knew of the existence of these rules and regulations when they passed the Statute of 1896, and the authority given by the 6th section to establish rules to secure the employment of veterans in the labor service in preference to all other persons except women, considered with reference to the existing statutes and rules, makes it reasonable to infer that the intention of the general court was that the rules so established might provide for determining in some manner that the veterans who make application to be employed in the labor service should have the capacity to perform the labor involved in the service. The section should be so construed as to be within the constitutional power of the general court if it reasonably can be. Without unequivocal language to that effect, we should hesitate

to impute to the general court an intention to give to persons entirely incapacitated for labor an absolute right to be employed and paid in the labor service of the commonwealth and of its cities and towns, as if they could and did perform the labor. Such a provision would seem inconsistent with a purpose to promote efficiency in the public service, and to legislate in the interest of all the people. The requirement that the commissioners shall establish rules to secure the employment of veterans "in preference" to others implies that the employment of veterans is to be regulated in the interest of the public service, as well as to secure to them a preference, and that they are not to be employed in the labor service if they have not the ability to labor. It could hardly have been the intention of the general court that women should be employed in the labor service who could not perform the labor, or that the proviso of Stat. 1896, chap. 449, should give an absolute preference to veterans in employment, even although the veterans were incapable of performing the duties of the employment. The 6th section of Stat. 1896, chap. 517, does not purport to define what the preference shall be which the rules established by the commissioners are to secure, but the preference intended is probably not greater than the preference conferred by the 2d and 3d sections of the statute. Unless, then, the appointing officers call for the names of veterans for labor service whose qualifications have not been ascertained by the commissioners in any manner, we think that the commissioners may provide by rules for determining the qualifications of the veterans. Construing the 6th section in this way, we are of opinion that it is an enactment within the constitutional power of the general court. Mr. Justice Holmes concurs in this construction of the section, but is not prepared to say that it would be unconstitutional upon a different construction.

The remaining questions relate to the civil service rules which the commissioners have prepared and submitted to the acting governor and council for approval. We perceive no constitutional objection to the approval of these rules, although we think that the rule relating to the appointment of veterans in the labor service under the 6th section of the Statute of 1896 might have made explicit provisions for determining the qualifications of the veterans who seek service under this section, unless the appointing officers call for veterans who have not submitted to anything in the nature of an examination.

WALBRIDGE A. FIELD.
OLIVER WENDELL HOLMES.
MARCUS P. KNOWLTON.
JAMES M. MORTON.

To his Honor the Acting Governor of the Commonwealth, and to the Honorable Council:

In the opinion of the undersigned, there is no difference in the constitutional principles which govern the selection of persons for public office and for public employment, and the reasons given in *Brown v. Russell*, 166 Mass. 14, 32 L. R. A. 253, for holding Stat. 1895, chap. 501, §§ 2, 6, unconstitutional as to public office apply to public employment as well. In both cases the important matter is to get the

best possible service, and the selections should be made with reference to the qualifications or fitness for the performance of the duties which are to be performed. And, since this is so, it is not within the constitutional power of the legislature to fix as a decisive test anything which does not bear such a relation to the duties to be performed as to show special fitness for the performance of those duties. The fact of being a veteran, as defined in Stat. 1896, chap. 517, does not bear such a relation to the duties of a present office or employment in the civil service of the commonwealth that it can be made a decisive test in the selection of persons for such offices or employments. A veteran may or may not have special fitness for such positions. Certainly to have served honorably in the army or navy is not the only way in which one can acquire such fitness. However useful the training may be which many of the veterans received in the army or navy, it cannot be laid down as a universal proposition that every veteran who can pass the examination to which all applicants are subjected is better qualified for such office or employment than any other person now is or can become. The appointing power cannot be required to pass by cases of conspicuous fitness, and to accept service of a lower character, simply because a veteran applies for the position. In requiring this to be done, the statute sets apart a class of persons, who, in consequence of what they did in the war, and irrespective of present qualifications, are to be preferred, so that nobody else, however well fitted,

or however meritorious by reason of valuable or distinguished services in other occupations—calling for fidelity and fortitude, can be considered as eligible for appointment, or can become eligible in the future, in competition with them. No matter what may have been the services, training, and discipline, or what may be the natural ability or acquired skill of others, the power of selecting them for public office or employment is cut off. This involves a compulsory disregard of actual fitness and qualifications, to the detriment of the public service. Nor can the fact that a veteran has passed the prescribed examination be made a decisive test in favor of his appointment. This may merely show that he has the minimum qualifications required, but cannot be made to entitle him to a compulsory preference over those who are better qualified. It is therefore not within the constitutional power of the legislature to enact that veterans shall be preferred for public office or employment to others who may have higher standing or superior qualifications; and the first and third questions are answered in the negative.

The second question is answered in the affirmative, for the reasons given in the opinion signed by a majority of the justices.

The fourth and fifth questions are answered in the negative, to the extent hereinbefore explained.

JOHN LATHROP.
JAMES M. BARKER.
CHARLES ALLEN.

OHIO SUPREME COURT.

WOODLAND OIL COMPANY, *Plf. in*
Err.,
v.
Thomas J. CRAWFORD.
(.....Ohio.....)

*1. C. granted, demised, and let, by written instrument, a certain tract of

*Headnotes by the COURT.

NOTE.—Effect of assignment of oil and gas lease.

I. Liability of assignor.

II. Liability of assignee.

The liability for rent under an oil and gas lease has been treated in a prior note to the case of *Kunkle v. People's Nat. Gas Co.* 33 L. R. A. 847.

The question of the forfeiture of an oil or gas lease, including that as to the right of the lessee to set up his own default to release him from his obligation, is the subject of a note to *Evans v. Consumers' Gas Trust Co. (Ind.)* 31 L. R. A. 673.

The effect of an assignment of such a lease upon the rights and liabilities of the parties has been passed upon in a considerable number of cases. These are harmonious and do not materially differ from decisions on a similar point in respect to leases of other property.

The general subject of the liability of an assignee of a leasehold for rent was treated at length in a note to *Bonetti v. Treat* (Cal.) 14 L. R. A. 151.

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land and all the oil and gas in or under the same to U. and his assigns, for the purpose, and with the exclusive right, of drilling and operating the land for gas and oil for five years, and as much longer as oil or gas should be found thereon in paying quantities, upon the consideration of \$1 paid, and a promise to pay certain rentals for further delay if default should be made in drilling a well within one year, and which instrument had the following forfeiture clause: "And a failure on the part of U. to com-

I. Liability of assignor.

It is very clear that a lessee continues liable on his covenants in an oil and gas lease notwithstanding his assignment of the lease, as his privity of contract continues. *Washington Nat. Gas Co. v. Johnson*, 123 Pa. 576; *Edmonds v. Mounsey* (Ind. App.) 44 N. E. 196.

So, the owner of an oil and gas lease, who, to settle differences with the owner of a seam of coal through which an oil well has been drilled, agrees to pay a certain sum for the well then being drilled, and in addition a like sum for each additional well drilled upon said land thereafter, cannot escape liability for the payment of the stipulated amount for each well thereafter drilled in operations under the oil lease by the fact that it had assigned the lease and the additional wells were drilled by assignees, where the assignment was *ex parte* and not assented to by the owner of the coal. *Pittsburg Consol. Coal Co. v. Greenlee*, 164 Pa. 549.

plete such well or wells as above specified, or instead thereof to pay the rental as above provided, shall render this lease and agreement null and void, together with all rights and claims, and not binding on either party, and not to be revived without the consent of both parties hereto in writing." Default having been made in drilling, in an action to recover the promised rental,—*Held*, First, that such instrument is a lease of the land, oil, and gas for the limited time and purpose expressed therein. Second. That the forfeiture is for the benefit of the lessor, and at his option. Third. That the promise to drill a well or pay rental cannot be discharged by a mere failure to perform the promise. Fourth. Upon failure to drill the well, or instead thereof to pay the agreed rental, such rental may be recovered by action as rental, and need not be sued for as unliquidated damages.

2. U. assigned the lease to the oil company, and in such assignment stipulated that the oil company should have and hold the lease under the terms thereof, and under and subject to the rents and covenants therein reserved and contained, on part of the lease to be paid, kept, done, and performed, and the oil company accepted the assignment and received the lease thereunder. *Held*, that thereby the oil company stepped into the shoes of U., and assumed his obligations, and became liable for the rentals due under the lease.

ERROR to the Circuit Court for Monroe County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover rent alleged to be due under an oil and gas lease. *Affirmed*.

II. Liability of assignee.

The liability of an assignee of an oil and gas lease to pay the rent arises, not from any express assumption or agreement to pay it which may be contained in the written assignment, but from the privity of estate by reason of the ownership and right to enjoy the benefits of the lease. *Edmonds v. Mounsey* (Ind. App.) 44 N. E. 196.

So, the assignee of an oil and gas lease is liable for the payment of all rents and royalties which accrue while he holds the assignment of the lease. *Fennell v. Guffey*, 155 Pa. 38; *Id.* 139 Pa. 341.

And an assignee of a lease containing a covenant that the lessee will prosecute the oil business with due diligence for the common benefit of the parties is bound by the covenant. *Bradford Oil Co. v. Blair*, 113 Pa. 63, 37 Am. Rep. 442.

And an assignee of an oil and gas lease by written assignment, who receives and holds the lease as sole and exclusive owner, becomes bound for the performance of the conditions therein stipulated respecting the payment of a year's rental during delay to complete a well. *Brookenridge v. Parrott* (Ind. App.) 44 N. E. 66.

The fact that possession of the land was never actually taken by the assignees of an oil and gas lease does not prevent them from being liable on a covenant in the lease to pay a specified rent until the completion of an oil well on the premises. *Edmonds v. Mounsey*, *supra*.

A purchaser of an oil lease at sheriff's sale takes subject to all the covenants and conditions contained in the lease, and if he fails to inquire as to them he is fixed with notice of all that inquiry would have disclosed, including the fact that failure to complete a well within a specified time

Statement by Burket, J.:

On the 23d day of March, 1889, Thomas J. Crawford, defendant in error, his wife joining to release dower, entered into a contract in the nature of an oil lease with one Cyrus Underwood, which lease, omitting the acknowledgment, is as follows:

This agreement, made the 23d day of March, A. D. 1889, by and between Thomas J. Crawford and Mary A. Crawford, his wife, of the township of Perry, county of Monroe, and state of Ohio, of the first part, and Cyrus Underwood, of Jamestown, state of New York, of the second part, witnesseth: That the said parties of the first part for and in consideration of \$1 to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and of the agreements hereinafter mentioned, have granted, demised, and let unto the party of the second part all the petroleum and gas in or under that certain tract of land hereinafter described, and also all the said tract of land, for the purpose and with the exclusive right of drilling and operating upon said premises for said petroleum and gas; the said tract of land being situated in the township of Perry, county of Monroe, and state of Ohio, and is bounded and described as follows, to wit, north by lands of John T. Duvall and David G. Crawford, east by lands of Peter Eddy and David G. Crawford, south by lands of Chas. Biggle and Fanny Scales, west by lands of Fanny Scales and Wm. Robinson; containing one hundred and twenty-eight (128) acres, be the same more or less,—together with the right of way over said premises to the places of operating, the right to lay pipes to

makes a liability to pay a specified annual rental until the well is completed, and also the terms upon which the lease can be terminated. *Aderhold v. Oil Well Supply Co.* 158 Pa. 401.

But an assignee of an oil and gas lease, who subsequently assigns it to another party, is liable only for a breach of the covenants which occurred while he had title to the premises, and not for anything which occurred before or after. *Bradford Oil Co. v. Blair*, *supra*.

And, on the other hand, an assignee of an oil and gas lease who acquires title after the time when a well should have been completed is not liable for the money called for by the lease in case of default to complete such well, as he is liable only upon covenants which are broken while his privity of estate exists. *Washington Nat. Gas Co. v. Johnson*, 123 Pa. 576.

The rule is simply that an assignee of an oil and gas lease who is in possession when the time for performance arrives is liable on a covenant in the lease because of the privity of estate which arose on his acceptance of the assignment; but as his liability grows out of privity of estate, it ceases when the privity ceases, and if he assigns before the time for performance his liability ceases with his title. *Ibid*.

Each successive assignee of an oil and gas lease is therefore liable for covenants maturing while the title is held by him because of privity of estate, but is not liable for those previously broken or subsequently maturing because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits he bears its burdens, but he lays down both the estate and its burdens by an assignment. *Ibid*.

B. A. B.

convey water, oil, and gas; also to use water from said premises, and to remove any machinery or fixtures placed on said premises by the party of the second part. To have and to hold the same unto the said party of the second part, his heirs and assigns, for the term and period of five years from the date hereof, and as much longer as oil or gas is found in paying quantities thereon. In consideration thereof, the said party of the second part agrees to give or pay to the parties of the first part the full equal one-eighth part of the petroleum produced and saved by the party of the second part from the premises, and to deliver the same free of expense, into tanks or pipe lines to the first party's credit. And should gas be found in any well in sufficient quantities to justify marketing the same, the party of the second part shall pay to the parties of first part at the rate of two hundred (\$200) dollars per annum for each of such wells so long as the gas shall be sold therefrom. It is also agreed that no wells shall be drilled within 300 feet of the buildings now on the premises without the consent of both parties. It is further agreed that the party of the second part shall complete a test well in the township of Perry, county and state aforesaid, or within two (2) miles of the above-described premises, within one year from the date hereof, or, in default thereof, pay to the parties of the first part, for further delay, a yearly rental of \$128 for the above-described premises from the said time for completing the said test well until such well be completed; and, in case oil is found in paying quantities in said test well, the party of the second part agrees to complete a well on the above-described premises within one year from the completion of said test well, or, in default thereof, pay to the parties of the first part, for further delay, a yearly rental of thirty-two (\$32) dollars for the above-described premises from the time set for completing a well thereon until such well shall be completed. The rentals, as they become due under this contract shall be deposited to the credit of the parties of the first part in the Monroe Bank, of Woodsfield, Ohio, or paid direct to the said first parties. And a failure on the part of the second party to complete such well or wells as above specified, or instead thereof to pay the rental as above provided, shall render this lease and agreement null and void, together with all rights and claims, and not binding on either party, and not to be revived without the consent of both parties hereto in writing. The parties of the first part reserve a sufficiency of water for the use of the stock kept on the premises, and also for household use. It is understood that all the conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators, and assigns. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

T. J. Crawford.

Mary A. (her mark) Crawford.

Cyrus Underwood.

Sealed and delivered in the presence of
George Neff,
D. Crawford.

Six other parties entered into the same kind of contracts with Mr. Underwood as to lands owned by them, all of which contracts were
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duly recorded. On the 10th day of April, 1889, Mr. Underwood made an assignment of said seven contracts to the Woodland Oil Company, and which assignment, with a description only of the lands of defendant in error, is as follows:

"Assignment of Leases.

Know all men by these presents that Cyrus Underwood, of Jamestown, New York, for and in consideration of the sum of \$1, to me in hand paid by Woodland Oil Company at and before the enrolling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, and transferred, and by these presents doth grant, bargain, sell, assign, and transfer, unto the said Woodland Oil Company, its successors and assigns, all the whole of the grantees' or lessees' interest and estate of, in, and to the following mentioned indentures of lease, grants, and conveyances, and the lands, and premises therein granted, leased and demised and intended so to be, situate in the county of Monroe, and state of Ohio, to wit, Thomas J. Crawford and wife to C. Underwood, dated March 23, 1889, 128 acres in Perry township, recorded June 27, 1889, in Book 4, page 23. With the appurtenances, together with the same interest of, in, and to all the tubing, casing, buildings, improvements, rigs, machinery, boilers, engines, oil and gas well supplies, connections and fixtures upon the said premises, or any part thereof, and to the grantees' or lessees' interest belonging and appertaining; and also all my estate, rights, title, interest, claim and demand whatsoever of, in, to, and out of the said leases, grants, or conveyances, lands and premises, and other property hereby conveyed or intended so to be. To have and to hold the said interests in the said leases, grants, conveyances, lands, and premises unto the said Woodland Oil Company, its successors and assigns, to the use of the said Woodland Oil Company, its successors and assigns, for and under the terms, limitations, and conditions and reservations of the said leases or grants respectively, and under and subject to the rents, royalties, and covenants in the said lease or conveyances respectively reserved and contained on the part of the grantees or lessees thereof to be paid, kept, done, and performed, and to have and to hold the said interests in the remaining property hereby conveyed unto the said Woodland Oil Company, its successors and assigns, forever. In witness whereof I have hereunto set my hand and seal the 10th day of April, 1891.

Cyrus Underwood. [Seal.]

Signed, sealed, and delivered in presence of

H. S. Grayson,

H. J. O'Donnell.

Afterwards Thomas J. Crawford commenced an action against the Woodland Oil Company for breach of said contracts, and to recover the rental therein agreed to be paid. The first cause of action in his amended petition is as follows: "For a first cause of action, the plaintiff, Thomas J. Crawford, says: That the defendant, the Woodland Oil Company, is a corporation organized and doing business under the laws of the state of Pennsylvania, and owning real estate and personal property in Monroe county, Ohio, that on the 23d day of March,

1889, said plaintiff and Mary A. Crawford, his wife who has since died, entered into a certain indenture of lease (of which reference is hereto made, marked 'Exhibit A,' in the petition herein filed, and which exhibit is made a part of this amended petition as if hereto annexed or attached as an exhibit), with one Cyrus Underwood, for the consideration of \$1, paid said plaintiff by said Cyrus Underwood; that in said indenture of lease said plaintiff and his said wife granted, demised, and let unto the said Cyrus Underwood, his heirs and assigns, all petroleum in or under a certain tract of land hereinafter described, and also said tract of land for the purpose and with the exclusive right of drilling and operating upon said premises for said petroleum and gas, together with the right of way over said tract of land to the place of operating, the right to lay pipe lines to convey water, oil, and gas; also to use water from said premises, and also to remove any machinery or fixtures placed on said premises; the said tract of land or premises being situated in the township of Perry, county of Monroe, and state of Ohio, and is bounded and described as follows, to wit, north by the lands of John T. Duvall and David G. Crawford, east by lands of Peter Eddy and David G. Crawford, south by the lands of Charles Biggle and Fannie Scales, west by the lands of Fannie Scales and William Robinson,—containing one hundred and twenty-eight (128) acres, be the same more or less,—for the term and period of five years, and as much longer as oil and gas are found in paying quantities thereon. Plaintiff says that in said indenture of lease said Cyrus Underwood agreed to give or pay to said plaintiff the full equal one-eighth part of the petroleum produced and saved by said Cyrus Underwood from the said premises, and deliver the same, free of expense, into tanks or pipe lines to the credit of the plaintiff; and, should gas be found in any well in sufficient quantities to justify marketing the same, the said Cyrus Underwood shall pay plaintiff at the rate of \$200 per annum for each of such wells as long as the gas shall be sold therefrom. And said plaintiff further says that said Cyrus Underwood covenanted and agreed therein to complete a test well in the township of Perry, in the county of Monroe, and state of Ohio, or within 2 miles of the above-described premises, within one year from the 23d day of March 1889, or, in default thereof, pay to the said plaintiff, for further delay, a yearly rental of one hundred and twenty-eight (128) dollars for the above described premises from the said time for completing the said test well until such well shall be completed. The rentals as they become due under this indenture of lease shall be deposited to the credit of the plaintiff in the Monroe Bank, of Woodsfield, Ohio, or paid direct to said plaintiff. Plaintiff says that on the 10th day of April, 1891, said Cyrus Underwood assigned and transferred all his rights, title, and interest in and under said indenture of lease to the defendant, the Woodland Oil Company, said defendant assuming as a part of the consideration all his (Underwood's) liabilities thereunder; that neither said Cyrus Underwood nor said defendant has ever drilled, put down, begun, or completed a test well or any

other well, as prescribed in said indenture of lease, in said township of Perry, county of Monroe, and state of Ohio, or within 2 miles of said premises, or paid to plaintiff, or deposited in the Monroe Bank, aforesaid, to plaintiff's credit, any rentals or money in default thereof as stipulated under said indenture of lease, although often requested so to do. Plaintiff says that he has duly performed all the conditions on his part to be performed under said indenture of lease, and that said Mary A. Crawford joined in said indenture of lease merely to release her inchoate right of dower, and had and claimed no interest in said rentals, the same being the sole property of plaintiff; and that said plaintiff on the 28d day of March, 1889, owned, and still owns, said premises described in said indenture of lease. Wherefore plaintiff prays for judgment against said defendant for the sum of \$384.00, with interest on \$128.00 from March 28, 1891, on \$128.00 from March 28, 1892, on \$128.00 from March 28, 1893."

There were eight other causes of action, two of which were abandoned, and the other six were each like the first, except that they were on other contracts which had been assigned to defendant in error after a failure to drill or pay rental, and a total recovery of over \$2,000 was asked for a breach of the seven contracts.

The oil company demurred to each cause of action of the amended petition upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and exceptions taken. The oil company then answered, and as a first defense stated that two other named persons had an interest in the subject of the action and in obtaining the relief demanded. The second, third, and fourth defenses to the whole of the amended petition are as follows: "Defendant, for a second defense to the amended petition, and to each cause of action thereof, admits that it is a corporation, and it admits that all the leases named in the petition were made to Cyrus Underwood at the time stated; and it admits that said Underwood assigned the same (except No. 9, Exhibit 1) to defendant about the time stated therein; it admits that no well was completed in one year, and no rental has been paid by defendant, but it denies that it assumed or agreed to assume any of the liabilities of said Underwood to plaintiff under said leases, or to any one of the lessors under whom Underwood held; and it denies that the acceptance of the assignments of said leases from said Underwood created any liability, or in any way obligated this defendant to pay to said lessors, or either of them, or to plaintiff, any yearly rental then due, or hereafter to become due, on any of said leases; and it denies that it is indebted to plaintiff in any sum on either cause of action of his petition; and it denies each and every allegation of the petition not herein admitted. Defendant says, for a third defense to the amended petition, and to each and every cause of action thereof, that each and every lease described in the several causes of action in said petition contained, among other provisions, the following: 'And a failure on the part of the second party to complete a well or wells as above specified, or instead thereof to pay rental as above provided, shall render this lease and

agreement null and void, together with all the rights and claims, and not binding on either party, and not to be revived without the consent of both parties hereto, in writing.' And defendant avers that before the assignment by Cyrus Underwood to it of the leases described in the petition, the time for completing a test well according to the terms of each and all of said leases had expired, and one yearly rental was overdue, yet no test well was completed, and no rental has been paid, which rendered said leases and each of them null and void; and neither of said leases was revived by said Cyrus Underwood and plaintiff or the other lessors, or by any other person or persons, and defendant says that each and all of the leases described in the petition were null and void when the same were assigned to it, and that neither of them has since been revived. Defendant, for a fourth defense to the amended petition, and to each cause of action thereof, says that the sums of money to be paid for delay in completing wells called 'yearly rental' in each of said leases was intended and understood by the parties thereto to be a penalty, and was intended to indemnify the plaintiff and the other lessors for all damages actually sustained by delay or failure to complete a test well and other wells on the lands leased; and it avers that neither plaintiff nor any of the lessors under whom he claims have sustained damages by reason of defendant having failed to complete a test well or other wells on said lands, for at the time of the execution of said leases and at the commencement of this action there was neither oil nor gas in paying quantities under the land described in said lease or either of them."

The oil company also filed three separate defenses to the first cause of action of the amended petition, the first of which is as follows: "Defendant, without waiving any of its defenses to the amended petition, but insisting on each of them the same as if this separate answer were not made, answers the first cause of action as follows: Defendant says that the lease described in the first cause of action was executed March 23, 1889, and the first yearly rental claimed by plaintiff thereunder became due March 23, 1891, as stated in the amended petition; and defendant avers that it is not liable under the assignment of the lease for yearly rental which accrued before said assignment, and it denies that it is liable for any subsequently accrued rental." The second and third defenses to the first cause of action are not material here.

The plaintiff below demurred to the third defense in the general answer to the amended petition, and also to the first special answer to the first cause of action in the same petition, both of which demurrers were sustained, and exceptions taken. The reply of the plaintiff below, as to what was left of the answers after sustaining these two demurrers, was a general denial. The case was tried to a jury, and verdict returned for plaintiff below for \$463.07, and motion made for a new trial, which was overruled, and judgment entered on the verdict; to all of which defendant below excepted. The circuit court affirmed the judgment, and thereupon a petition in error was filed here to reverse both judgments.

34 L. R. A.

Messrs. J. P. Spriggs & Son and Mallory & Jeffers, for plaintiff in error:

No possession was ever taken by the licensee or his assignee under any of these instruments, so that they were all unexecuted licenses.

Ohio Oil Co. v. Toledo, S. & F. R. Co. 4 Ohio C. C. 210; *Herrington v. Wood*, 6 Ohio C. C. 826; *Meridian Nat. Bank v. McConica*, 8 Ohio C. C. 442; *Shepherd v. McCalmont Oil Co.* 88 Hun, 87.

Failure to drill a test well or to pay the rental at the time it became due rendered the license void.

The assignee of one of the instruments in suit is not liable for rental overdue at the time of the assignment, unless under a special agreement.

Stern v. Florence Sewing Mach. Co. 53 How. Pr. 478; *Le Gierse v. Green*, 61 Tex. 128, *Johnston v. Bates*, 16 Jones & S. 180.

In general a sum of money in gross to be paid for the nonperformance of an agreement is considered as a penalty.

Taylor v. Sandisford, 20 U. S. 7 Wheat. 18, 5 L. ed. 884; *Baird v. Tolliver*, 6 Humph. 186, 44 Am. Dec. 398; *Wallis v. Carpenter*, 13 Allen, 19; *Cheddick v. Marsh*, 21 N. J. L. 463; *Bell v. Truit*, 9 Bush, 287.

Equity will relieve the lessee from such a contract made by mutual mistake.

Moore v. Platte County, 8 Mo. 467; *Colwell v. Lawrence*, 88 Barb. 643; *Goldsbrough v. Baker*, 3 Cranch, C. C. 48; *Greer v. Tweed*, 13 Abb. Pr. N. S. 427; *Colwell v. Lawrence*, 88 N. Y. 71.

Messrs. C. S. Buchanan, L. E. Matz, and C. L. Weems, for defendant in error:

A lease is voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declares that it shall be void.

1 Parsons, Cont. 506, 507; *Taylor, Land. & T. S. 492*; 1 Smith, Lead. Cas. 102; *Smith v. Whitbeck*, 18 Ohio St. 471; 3 Kent, Com. 464, 465; *Gay v. Davey*, 47 Ohio St. 396; *Wms. Real Prop.* 396; 12 Am. & Eng. Enc. Law, p. 758.

A clause providing that the agreement shall be void if the lessee does not complete the well or pay the rent does not take away the lessee's liability to pay the rent where he fails to complete the well.

Leatherman v. Oliver, 151 Pa. 646; *Ray v. Western Pennsylvania Nat. Gas Co.* 138 Pa. 576, 12 L. R. A. 390; *Clark v. Jones*, 1 Denio, 516, 43 Am. Dec. 706; *Galey Bros. v. Kellerman*, 128 Pa. 491; *Jones v. Western Pennsylvania Nat. Gas Co.* 146 Pa. 204; *Wills v. Manufacturers' Nat. Gas Co.* 180 Pa. 222, 5 L. R. A. 603; *Ogden v. Hatry*, 145 Pa. 640; *Smith v. Miller*, 49 N. J. L. 521; *Garnhart v. Finney*, 40 Mo. 449, 98 Am. Dec. 803.

The assignee of a lease is bound in favor of the lessor to know the contents of the lease and for all rents in arrears.

Barroillet v. Battelle, 7 Cal. 450; 12 Am. & Eng. Enc. Law, pp. 681, 1031, 1033; *Smith v. Harrison*, 42 Ohio St. 180; *Worthington v. Hewes*, 19 Ohio St. 66; *Babcock v. Scoville*, 56 Ill. 461; *Rawlings v. Duvall*, 4 Harr. & McH. 1.

Where the agreement is for the performance or nonperformance of only one act, and there is no adequate means of ascertaining the pre-

discharge which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such a purpose will be treated as one for liquidated damages.

1 Pom. Eq. Jur. 604, § 442; *Grasselli v. Lowden*, 11 Ohio St. 349; *Cothrel v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Clement v. Cash*, 21 N. Y. 253; *Lange v. Werk*, 2 Ohio St. 519; *Lehigh Zinc & I. Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215; *Bamford v. Lehigh Zinc & I. Co.* 83 Fed. Rep. 677; 15 Am. & Eng. Enc. Law, pp. 599, 600; *McKean v. Wharton*, 121 Pa. 424; *Gilmore v. Ontario Iron Co.* 86 N. Y. 455; *Clark v. Midland Blast Furnace Co.* 21 Mo. App. 58; *Bradford Oil Co. v. Blair*, 113 Pa. 83, 57 Am. Rep. 442; *Westmoreland & C. Nat. Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 751.

Burket, J., delivered the opinion of the court:

By the instrument in question the plaintiff below granted, demised, and let the oil, gas, and tract of land for the purpose and with the right of drilling and operating for oil and gas for five years, or as much longer as oil or gas should be found in paying quantities in the land. This is more than a license. It is a lease of the land, oil, and gas for a limited time and purpose, with a right of possession to the extent reasonably required for such purpose, the landlord retaining all that should not be so required. The principal contention in this case arises upon that part of the lease which provides that a test well should be drilled within one year, and, in default, payment of a yearly rental of \$128 for further delay, and the further provision that a failure to drill the test well or pay the rental should render the lease null and void, and not binding on either party, and not to be revived without the consent in writing of both parties. It was this provision that was relied upon in the demurrer to the amended petition, and in the third general defense in the answer of the oil company. Reduced to its essence, this is a promise in writing, upon sufficient consideration, to pay a yearly rental of \$128 for the right to use, to a limited extent, certain premises, with a further provision in the same instrument that a failure to pay should discharge the debt, that a default of payment should be the equivalent of payment, that failure should be performance, that nonpayment should be payment. Such contradictions in like instruments have caused courts to look critically into such instruments to ascertain the real intention of the parties, because such contracts cannot be enforced according to their letter. A promise to pay cannot be fulfilled by a failure to pay. A promise to drill a well cannot be satisfied by failure to drill such well. The proper construction to be placed upon such an agreement is that upon failure of the lessee to drill a well, or pay the rental, or both, as the case may be, the lessor may elect to put an end to the lease, and enforce payment of the promised rental, or sue for damages for failure to drill the well; or he may elect to have the lease continue in force to the end of the term, and

enforce the drilling of wells and the payment of rentals as provided in the lease. Such provisions of forfeiture are for the benefit of the lessor, and not for the benefit of the lessee. The lessee cannot plead his own default or wrong in discharge of his obligation to drill or pay rental. Parties may agree that, in the case of failure to drill, or failure to pay, or both, the lessee shall be relieved of his obligation upon such terms as the parties may agree upon in the lease, whether the terms be of value to the lessor or loss or inconvenience to the lessee; but a naked default and nonperformance, as in this lease, cannot be held to discharge the obligations of the lessee. The following authorities are in point: *Leatherman v. Oliver*, 151 Pa. 646; *Ray v. Western Pennsylvania Nat. Gas Co.* 138 Pa. 576, 12 L. R. A. 290; *Clark v. Jones*, 1 Denio, 516, 43 Am. Dec. 706; *Galley Bros. v. Kellerman*, 128 Pa. 491; *Jones v. Western Pennsylvania Nat. Gas Co.* 146 Pa. 204; *Wills v. Manufacturers' Nat. Gas Co.* 130 Pa. 222, 5 L. R. A. 608; *Ogden v. Hatry*, 145 Pa. 640; *Smith v. Miller*, 49 N. J. L. 521; *Taylor, Land. & T.* § 492; 1 *Smith, Lead. Cas.* 102, 119.

It would also be competent for an owner of land to give an option to another party, upon a sufficient consideration, to drill one or more wells within a stated time, and, upon failure to drill such wells within the time limited, all rights to cease as to both parties. And it is contended by the oil company in this case that the leases in question are such options, or else are mere unexecuted licenses. In case of an option, a certain consideration is paid or agreed to be paid to tie up the land for a given time, and during that time the owner is prevented from using or disposing of the land contrary to the terms of his contract. But in such cases the consideration for the option must be paid, and cannot be satisfied by a naked default. If such default could be held as satisfaction of the consideration, the instrument would be without consideration, and therefore void. In the leases in question the consideration is \$1 paid, and certain rentals promised to be paid in default of drilling a well; and, considered as an option, the whole consideration for the option must be paid. The same result follows if the instruments be regarded as unexecuted licenses. The consideration paid and agreed to be paid for the license is \$1 paid and certain rentals to be paid, and the licensor not having interfered with the rights of the licensee, the latter is bound to pay the full consideration promised for the license, even though he never availed himself of its privileges. So that, whether the instruments in question are regarded as leases, options, or licenses, the plaintiff below is entitled to receive the considerations or rentals agreed to be paid.

The first defense to the first cause of action of the amended petition, to which a demurrer was sustained, raised the question whether the oil company became liable, under the assignment to it, for the rentals which had matured and remained unpaid at the time of the assignment of the leases, as well as for the rentals which thereafter accrued. We think that the demurrer was properly sustained. In his assignment of the leases Mr. Underwood stipu-

lated that the oil company should have and hold the leases under the terms thereof, and under and subject to the rents and covenants therein reserved and contained on part of the lessee to be paid, kept, done, and performed. By accepting this assignment with that stipulation, and causing the same to be recorded, and receiving the leases thereunder, the oil company became bound to perform all the unperformed terms of the leases. It stepped into Mr. Underwood's shoes, and assumed his obligations.

It is also urged that the failure to drill the required well, and failure to pay the agreed rental, did not entitle the lessor to recover the

amount named as rental, but at most would only entitle him to recover unliquidated damages. We regard the case as one of rental. The amount agreed to be paid was for the exclusive right of drilling and operating the premises for oil and gas. Failure to exercise the right would not relieve the company from payment of the amount agreed upon as the price of such exclusive right.

There are some other questions made in the record, but we find no error as to them, and do not regard them as of sufficient general interest to warrant a further report.

Judgment affirmed.

WASHINGTON SUPREME COURT.

City of TACOMA, *Respt.*,

v.

Henry KRECH, *Appt.*

(.....Wash.....)

A city ordinance making it unlawful for barbers to pursue their calling on Sunday, without applying to other kinds of employment, is unconstitutional as class legislation.

(September 28, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Pierce County convicting him of violating a city ordinance prohibiting barbers from pursuing their occupation on Sunday. *Reversed.*

The facts are stated in the opinion.

Messrs. O'Brien & Robertson, for appellant:

The state has passed a general Sunday law which by its terms does not forbid a person carrying on his trade or calling on Sunday.

State v. Krech, 10 Wash. 166.

This being the case the city of Tacoma has not under its enabling act and the charter adopted by the city thereunder power to pass such an ordinance as was attempted herein.

1 Dill. Mun. Corp. §§ 89, 317 *et seq.*, 329; *Champer v. Greencastle*, 188 Ind. 839, 24 L. R. A. 768; *Crawfordville v. Braden*, 130 Ind. 149, 14 L. R. A. 268; 15 Am. & Eng. Enc. Law, pp. 1166, 1167, and authorities there cited.

This ordinance is unreasonable in its operation, unjust and special, and, under the provisions of our Constitution guaranteeing individuals freedom and forbidding encroachments on their rights, is void as being in conflict therewith.

Keim v. Chicago, 46 Ill. App. 445; *Virgo v. Toronto*, 22 Can. Sup. Ct. Rep. 447.

NOTE.—See, in accordance with the above decision, those of *Eden v. People* (Ill.) 32 L. R. A. 659; *Ex parte Jentzsch* (Cal.) 32 L. R. A. 664; and *contra*, *People v. Havnor* (N. Y.) 31 L. R. A. 689.

For constitutionality of Sunday laws generally, see note to *Judetind v. State* (Md.) 22 L. R. A. 721. 34 L. R. A.

Messrs. J. P. Judon, W. H. H. Kean, and Stacy W. Gibbs, for respondent:

If legislation affects all engaged in the same business or pursuit, and is in partial, but not total, restraint of trade, it is not class legislation.

People, Nechamaus, v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718.

This legislation is a valid exercise of police power. It is in aid of public health, in a less degree of public morals.

People v. Bellet, 99 Mich. 151, 22 L. R. A. 696; *People v. Havnor*, 1 App. Div. 459.

It is too late to begin to deny the constitutionality of Sunday laws against worldly labor. *Judetind v. State*, 78 Md. 510, 22 L. R. A. 721.

The ordinance in question relates to the public health and public morals.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223; *Boston Beer Co. v. Massachusetts*, 97 U. S. 82, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 663, 24 L. ed. 1037; *Stone v. Mississippi*, *Harris*, 101 U. S. 814, 25 L. ed. 1079; *Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *New York Health Department v. Trinity Church*, 145 N. Y. 82, 27 L. R. A. 710.

Article 2, § 10, of the Constitution grants powers to cities of the first class, co-ordinate with those possessed by the legislature, to govern in local matters with a reserved power in the legislature.

St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 37 L. ed. 810; *People v. Hoge*, 55 Cal. 612; *State, Kansas City, v. Field*, 99 Mo. 352; *Scurry v. Seattle*, 8 Wash. 278; *Howe v. Barto*, 12 Wash. 627.

Article 2, § 102, of the Constitution is self-executing, and gives municipalities this power without any legislation.

Re Cheney, 90 Cal. 617; *Ex parte Tuttle*, 91 Cal. 589; *Re Linehan*, 72 Cal. 114; *McCloskey v. Kreling*, 76 Cal. 511; *Ex parte Casnelio*, 62 Cal. 598; *Re Stuart*, 61 Cal. 874.

The general welfare clause in the case of a city of this class is sufficient, and is not incon-

sistent with the general policy of the state. On the contrary it is in harmony with it.

Theisen v. McDavid, 84 Fla. 440, 26 L. R. A. 234; 1 Dill. Mun. Corp. 4th ed. § 397, and cases cited; *McPherson v. Chebanse*, 114 Ill. 46, 35 Am. Rep. 857.

Laws against worldly labor on Sunday are constitutional.

Cooley, Const. Lim. 5th ed. 589; 1 Dill. Mun. Corp. 5th ed. § 397, and note.

This law does not abridge the rights of citizens of this state.

People v. Hasbrouck, 11 Utah, 291.

It is not class legislation.

People v. Bellef, 99 Mich. 151, 23 L. R. A. 696; *People v. Hannon*, 1 App. Div. 459; *Leiberman v. State*, 26 Neb. 464; Black, Const. Prohibition, § 71; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Foster v. Police Comrs.* 102 Cal. 433.

Barbering is not a work of necessity.

Com. v. Waldman, 140 Pa. 89, 11 L. R. A. 563; *State v. Frederick*, 45 Ark. 347; *State v. Wellott*, 54 Mo. App. 310.

Per Curiam:

The appellant was convicted in the municipal court for violating a city ordinance of the city of Tacoma, which ordinance prevents barbers from pursuing their calling, from shaving or doing any work in connection with their trade, for compensation, on Sunday. Appeal was taken to the superior court of Pierce county. On the trial, appellant was again convicted, and from the judgment of that court this appeal is taken.

This judgment is attacked for various reasons by the appellant, but, with the view we take of his last contention,—viz. that the law is special, and is obnoxious to the provisions of our Constitution in relation to special legislation,—a discussion of the other propositions

will not be necessary. One class of people is singled out by this law, while other laboring people, in different characters of employment, are allowed to prosecute their work. Conceding, for the purpose of this case, the right of the legislature to pass a law restricting or forbidding manual labor on Sunday, yet, under the provisions of our Constitution, the restriction must be imposed alike upon all residents of the state, or the effect of the law would be to work privileges and immunities upon one class of citizens which did not equally belong to all citizens. If this law is valid, then the legislature would have the right to prohibit farm labor on Sunday, to prohibit working by printers on Sunday, to prohibit nine-tenths of the employments which citizens usually engage in in this country, and leave the other one-tenth of the people to pursue their vocations. This would plainly be granting privileges and immunities to one class which did not belong equally to all citizens. The object of the Constitution was to prohibit special legislation, and substitute in its place a general law, which bore on all alike. It seems to us that the ordinance in question is "special legislation," within the meaning of the Constitution; and, of course, if the legislature had no right to pass such a law, it could not delegate such power to a city council. This view is sustained by *Ex parte Jentsch* (Cal.) 32 L. R. A. 664; *Keim v. Chicago*, 46 Ill. App. 445; *Pasadena v. Stimson*, 91 Cal. 238; *State v. Granneman*, 182 Mo. 826; and *Elden v. People*, 161 Ill. 296, 32 L. R. A. 659. It is true, there have been some decisions, notably in the state of New York, holding the contrary view; but we are satisfied with the reasoning of the cases cited, and therefore hold the ordinance to be unconstitutional.

The judgment will be reversed, and the cause dismissed.

NEW YORK COURT OF APPEALS.

John D. CHEEVER, *Appt.*,

v.

PITTSBURG, CHENANGO, & LAKE ERIE
RAILROAD COMPANY, *Respt.*

(150 N. Y. 50.)

One who takes the negotiable note of a corporation from its president as collateral security for a loan to him or a firm to which he belongs is not precluded from claiming as a bona fide holder by reason of the fact that the note was signed by the president, where it was payable to a third person who had indorsed it.

(*Bartlett, Haight, and Vann, JJ., dissent.*)

(October 6, 1894.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York County Circuit in favor of defendant in an action brought to recover the amount alleged to be due on certain promissory notes. *Reversed.*

The facts are stated in the opinions.

Messrs. James J. Myers and Austen G. Fox, with *Messrs. Theall & Beam*, for appellant:

The presumption is that the rights and relations of parties to negotiable paper are precisely such as they appear upon its face.

Hoge v. Lansing, 35 N. Y. 136; *Colson v. Arnot*, 57 N. Y. 259, 15 Am. Rep. 496.

NOTE.—For some authorities as to circumstances giving notice of fraud to the purchaser of negotiable paper, see *Cana Joharie Nat. Bank v. Diefendorf* (N. Y.) 10 L. R. A. 677.

34 L. R. A.

As to the power of the president of a corporation, see note *Walt v. Nashua Armory Assn.* (N. H.) 14 L. R. A. 354.

When these notes were offered as collateral security for a loan to the firm of M. S. Frost & Son, each note upon its face appeared to be, not a corporate obligation created by the president in his own favor, but rather a corporate obligation issued regularly for value to a stranger, John T. Bruen, and indorsed by him for value to M. S. Frost & Son, who were then the ostensible owners.

What they appeared to be Mr. Brooks had a right to assume they were.

Hoge v. Lansing, *supra*; *Mechanics' Bkg. Asso. v. New York & S. White Lead Co.* 85 N. Y. 505; *Belmont Branch of State Bank v. Hoge*, Id. 65; *Magee v. Badger*, 84 N. Y. 247, 90 Am. Dec. 691; *Colson v. Arnot*, 57 N. Y. 259, 15 Am. Rep. 496; *Central Bank v. Hammett*, 50 N. Y. 158; *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L. R. A. 776; *Goodman v. Simonds*, 61 U. S. 20 How. 365, 15 L. ed. 941.

The mere fact that Mr. Frost, who presented the notes on behalf of M. S. Frost & Son, was president of the defendant corporation did not show as matter of law that the firm of M. S. Frost & Son were not the owners of the notes.

Ex parte Bushell, 3 Mont. D. & De G. 615; *Exchange Bank v. Monteath*, 26 N. Y. 506; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 148 N. Y. 559; *Jarvis v. Manhattan Beach Co. supra*; *Bank of Genesee v. Patchin Bank*, 18 N. Y. 309; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125; *Smith v. Lusher*, 5 Cow. 688; *Gale v. Miller*, 44 Barb. 420; *Ridley v. Taylor*, 18 East, 175; *Swan v. Steele*, 7 East, 210; *Murphy v. Camden*, 18 Mo. 122; *Tutt v. Addams*, 24 Mo. 186; *Eckert v. Cameron*, 48 Pa. 120; *Attenborough Bank v. Mackenzie*, 25 L. J. Exch. 244; 1 Ames, Cases on Bills & Notes, 743, note (8); 7 Harvard L. Rev. 307; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513; *Walker v. Kea*, 14 S. O. 142; *Lafayette Sav. Bank v. St. Louis Stoneware Co.* 4 Mo. App. 276, 2 Mo. App. 299; *Edwards v. Thomas*, 66 Mo. 468; *Tewis v. Tewis*, 24 Mo. 535; *Chapman v. Remington*, 80 Mich. 552; *Freeman's Nat. Bank v. Savery*, 127 Mass. 80, 84 Am. Rep. 845.

The president having been authorized to give the corporate notes to the amount of \$10,000, it is no defense as against a purchaser for value without notice for the corporation to show that the president abused his authority and did not apply the notes to the purpose which was indicated in the resolution of authority.

Jarvis v. Manhattan Beach Co. 148 N. Y. 652, 31 L. R. A. 776; *Lexington v. Butler*, 81 U. S. 14 Wall. 282, 20 L. ed. 809; *Bank of Bengal v. Macleod*, 7 Moore, P. C. C. 35; *Ridgway v. Farmers' Bank*, 13 Serg. & R. 256, 14 Am. Dec. 681; *Exchange Bank v. Monteath*, 17 Barb. 171.

Mr. Frank Sullivan Smith, for respondent:

The plaintiff is not a bona fide holder of the notes for value without notice of facts affecting their validity before maturity and in the usual course of business, and therefore cannot recover upon said notes.

Wilson v. Metropolitan Elav. R. Co. 120 N. Y. 145; *American Exch. Nat. Bank v. New* 34 L. R. A.

York Bk. & P. Co. 148 N. Y. 698; *Manhattan L. Ins. Co. v. Forty-second Street & G. S. F. R. Co.* 139 N. Y. 146; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234; *Pendleton v. Fay*, 2 Paige, 302; *Shaw v. Spencer*, 100 Mass. 388, 1 Am. Rep. 115, 97 Am. Dec. 107; *Garrard v. Pittsburgh & O. R. Co.* 29 Pa. 154; *Farrington v. South Boston R. Co.* 150 Mass. 406, 5 L. R. A. 849; *Petrie v. Clark*, 11 Serg. & R. 877, 14 Am. Dec. 636; *Culver v. Reno Real Estate Co.* 91 Pa. 367; *Life & F. Ins. Co. v. Mechanic's F. Ins. Co.* 7 Wend. 31; *Adriance v. Roome*, 53 Barb. 399; *Stainer v. Tyson*, 3 Hill, 279; *Mages v. Badger*, 84 N. Y. 247, 90 Am. Dec. 691; *Chemung Canal Bank v. Bradner*, 44 N. Y. 680; *Kraft v. Freeman Printing & Pub. Asso.* 87 N. Y. 623; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

Where a party has knowledge of such facts as would induce a man of ordinary prudence to make further inquiry, a failure to make inquiry is visited with all the consequences of notice.

Wade, Law of Notice. § 11; *Petrie v. Clark*, *Life & F. Ins. Co. v. Mechanic's F. Ins. Co.*, *Adriance v. Roome*, *Stainer v. Tyson*, and *Culver v. Reno Real Estate Co. supra*.

The original holder was not a holder in good faith.

Knowing Frost's agency for the railroad company, and that he was acting for himself in furtherance of a personal interest adverse to the railroad company, Francis A. Brooks was put upon inquiry to ascertain whether he was authorized by the railroad company to make personal use of the notes. To rely upon the assurances of Frost without obtaining knowledge of the truth was but permitting Frost to commit a fraud upon the railroad company as well as the indorsees.

Story, Agency. § 186; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 134; *Dowden v. Cryder*, 55 N. J. L. 829; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 148 N. Y. 559; *Columbia Bank v. Gospel Tabernacle Church*, 127 N. Y. 361; *Life & F. Ins. Co. v. Mechanic's F. Ins. Co. supra*; *German-American Bank v. Brenham*, 85 Fed. Rep. 185; *Anderson v. Kissam*, Id. 699; *Mechem, Agency*, § 898; *Union Nat. Bank v. Underhill*, 103 N. Y. 336; *Moore v. National Bank*, 15 Fed. Rep. 141; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 28 L. ed. 885.

There is no presumption that the president of a corporation has power to bind it.

Lyndon Mill Co. v. Lyndon Literary & B. Inst. 63 Vt. 581.

The notes in suit having been obtained and negotiated in fraud of the railroad company, the onus was upon the plaintiff of showing that he acquired the said notes in good faith.

Grant v. Walsh, 145 N. Y. 503; *Joy v. Dieffendorf*, 180 N. Y. 6; *Canajoharie Nat. Bank v. Dieffendorf*, 128 N. Y. 191, 10 L. R. A. 676; *Vosburg v. Dieffendorf*, 119 N. Y. 857; *Nickerson v. Ruger*, 76 N. Y. 283; *Ocean Nat. Bank v. Carll*, 55 N. Y. 441; *First Nat. Bank v. Green*, 43 N. Y. 298.

The pledge of the notes in suit by the president of the railroad company was unauthorized and cannot bind the defendant.

Shaw v. Saranac Horse Nail Co. 144 N. Y.

320; *Owning v. Williamson*, 1 Sandf. Ch. 17; *Waldron v. McComb*, 1 Hill, 111; *Bloomer v. Waldron*, 3 Hill, 361; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Wright, Agency*, 79; *Mechem, Agency*, § 356; *Story, Agency*, 78; *Randolph, Com. Paper*, § 794; *Bank of Bengal v. Macleod*, 7 Moore, P. C. C. 85; *Francis v. Joseph*, 3 Edw. Ch. 182; *Perry v. Council Bluffs City Waterworks Co.* 67 Hun, 456; *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 578.

It is immaterial whether the notes were taken in good faith and for value before maturity if the circumstances attending their issue were sufficient to put Mr. Brooks upon his inquiry, and if the result of such inquiry diligently pursued would have acquainted him with the facts which rendered the transaction unlawful.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145; *Pendleton v. Fay*, 2 Paige, 202; *Garrard v. Pittsburgh & C. R. Co.* 29 Pa. 154; *Shaw v. Spencer*, 100 Mass. 888, 1 Am. Rep. 115, 97 Am. Dec. 107.

When fraud in fact is self-evident, as in a case of deception, or misrepresentations found or attempted, it is the duty of the court to adjudge upon it without submitting it to the jury.

Thomp. Trials, § 1981, citing *Williams v. Bantshorn*, 30 Ala. 211; *Hardy v. Simpson*, 18 Ired. L. 182; *Sturtevant v. Ballard*, 9 Johns. 337, 6 Am. Dec. 281; *Worseley v. Demattos*, 1 Burr. 467; *Bigelow*, Fr. 1st ed. 468; *Gage v. Parker*, 25 Barb. 141; *Erwin v. Voorhees*, 26 Barb. 127.

Proof that a promissory note purporting to be made by a corporation was signed by the president and secretary is not sufficient without proof of the authority of the president and secretary to sign the note.

McCullough v. Moss, 5 Denio, 567; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512; *National Bank v. Navassa Phosphate Co.* 56 Hun, 186; *Dabney v. Stevens*, 40 How. Pr. 341; *First Nat. Bank v. Council Bluffs City Waterworks Co.* 56 Hun, 412; *Wahlig v. Standard Pump Co.* 30 N. Y. S. R. 890.

O'Brien, J., delivered the opinion of the court:

The complaint in this action contained four separate causes of action, each upon a promissory note of the defendant. The last two causes of action were not defended, and upon these the plaintiff recovered, but was defeated upon the two notes embraced in the first and second causes of action. The defense to these two notes was that they were made by the defendant's president, one M. S. Frost, and by him wrongfully diverted from the uses and purposes for which they were intended to his own personal or private benefit, or the benefit of a firm of which he was a member, and that the plaintiff is not a bona fide holder, but chargeable with notice of these facts. The following are copies of the two notes in controversy, with the indorsements thereon when put in circulation by the defendant's president.

\$5,000.

Greenville, Pa., Feby 24th, 1898.

Four months after date the Pittsburgh, Shenango, & Lake Erie Railroad Company
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promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City. Value received.

The Pittsburgh, Shenango, & Lake Erie Railroad Company, by M. S. Frost, President.

Attest: E. S. Templeton, Secretary.

Indorsed: Pay to the order of M. S. Frost & Son.

John T. Bruen.

M. S. Frost & Son.

\$5,000.00.

Greenville, Pa., Feby 24th, 1898.

Three months after date the Pittsburgh, Shenango, & Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City. Value received.

The Pittsburgh, Shenango, & Lake Erie Railroad Company, by M. S. Frost, President.

Attest: E. S. Templeton, Secretary.

Indorsed:

John T. Bruen.

M. S. Frost & Son.

The body of these notes, and every part of them except the signature of the president, was in the handwriting of Templeton, the secretary. The president was authorized by the board of directors to issue the corporate notes to the extent of \$10,000 for the purpose of purchasing flat cars. In March, 1898, before the notes became due, Frost went to Boston, and there negotiated a cash loan of \$30,000 from Francis A. Brooks for the benefit of M. S. Frost & Son, giving the firm note therefor, and delivering to him the two notes in question, indorsed as they now appear, with other obligations, as collateral security for the payment of this loan. Subsequent to the maturity of the notes, Brooks became the absolute owner, by consent of the pledgor, and the proceeds applied upon the debt, and still later he transferred them to a third party, and they have come to the hands of the plaintiff, for value. It is not claimed that the plaintiff occupies any other or different position than Brooks would if he had brought the action upon the notes at maturity. Bruen, the payee of the notes, was the private secretary of Frost, the president; and the notes were made payable to him by Templeton, the secretary of defendant, who drew them in that form at the suggestion of the president. There is not, and cannot be, any dispute with respect to the authority of Frost to make the notes. They were made with sufficient authority, the fraud upon the defendant consisting in the wrongful use of them when made for a legitimate purpose, by the president for his own private business. Nor is there any dispute with respect to the fact appearing on the plaintiff's case, that Brooks paid value for the notes, and made present advances in cash to Frost in the sum already stated. It is equally clear upon the record that Brooks had no actual knowledge of the facts surrounding the origin of the paper, or of the diversion of it by the president. He received the notes and made the advances in Boston, whereas they were made, and the transactions stated with respect to them took place, in a distant state, where the office of the company was, and is indicated on the paper as the place where made.

The learned trial judge held, as matter of law, that the plaintiff could not recover upon the notes, for the reason that he was chargeable with knowledge of the facts and circumstances that rendered them invalid in the hands of Frost. The plaintiff is doubtless chargeable with such knowledge or notice as to the antecedent equities of the defendant as Brooks, his assignor, had, but with no others. If the notes were valid obligations in the hands of Brooks, the plaintiff may assert every right that he could have asserted. It needs no argument to show that if Brooks had knowledge or notice, or is in law chargeable with knowledge or notice, of the fraud by means of which the notes were diverted from the purpose for which they were authorized to be made, the plaintiff cannot recover. But it is not claimed that he knew anything about the origin or diversion of the paper, in fact. All that is claimed is that when it was presented to him in Boston by Frost, whom he knew to be the president of the railroad, there was enough upon the face of the paper to put him upon inquiry, and therefore to charge him with knowledge of all the facts that such inquiry would have disclosed. He knew nothing, so far as appears, outside of the paper itself, except the fact that the party presenting it was defendant's president, and that he was proposing to pledge the notes for his own debt, or rather for the debt of his firm, which, for all the purposes of the question, may be assumed to be the same thing. The question in the case is therefore reduced to a very narrow inquiry, and that is whether Brooks, standing in all other respects in the position, and sustaining the character, of a bona fide purchaser of negotiable paper, is deprived of that character and the benefits of that position by reason of anything appearing upon the face of the notes themselves.

The mind, at the threshold of the inquiry, encounters two principles that point in opposite directions, and lead to different conclusions, as the one or the other is allowed to preponderate in the mental process of determining the legal rights of the parties. On the one hand is the principle which protects a bona fide holder of commercial paper from existing, antecedent equities between the parties, and on the other the principle which protects a corporation from the unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party to whom negotiable paper is presented for discount or sale before due. He is not bound, at his peril, to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts the paper afloat the duty of active inquiry, in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part, evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *malà fide*, his title, according to settled doc-

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trine, will prevail. *Magee v. Badger*, 34 N. Y. 249, 90 Am. Dec. 691; *American Exch. Nat. Bank v. New York Belt & P. Co.* 148 N. Y. 705; *Knox v. Eden Musee American Co.* Id. 454, 31 L. R. A. 779; *Canajoharie Nat. Bank v. Dieffendorf*, 123 N. Y. 202, 10 L. R. A. 676; *Vosburgh v. Dieffendorf*, 119 N. Y. 357; *Jarvis v. Manhattan Beach Co.* 148 N. Y. 653, 31 L. R. A. 776.

Applying these rules to the conceded facts of the case, it seems to me to be impossible to impute bad faith to Brooks in the transaction. He advanced a large sum of money on the faith of the paper, without any actual knowledge that the relations of the party with whom he dealt to the paper were different from what they appeared to be on the face of it. The question now is, not what the facts were, but what they appeared to be, and what he had the right, from the notes themselves, to assume. He had the right to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be. *Hoge v. Lansing*, 85 N. Y. 136. He had the right to believe that the notes had been issued by the defendant to Bruen for value, in the regular course of business, and were by him transferred to Frost & Son in like manner. There was nothing to suggest to him that Frost was dealing with paper that belonged to the railroad, for his own benefit. The appearances were that the defendant had put the notes in circulation by delivery to Bruen, and that they came to Frost's firm in the regular course of business, for value, and were then the property of the firm. It is quite true that all these appearances were deceptive, and that the actual facts were otherwise. But how was a banker or business man in Boston to know or suspect that Bruen was only the nominal payee, and a mere instrument in the transaction to enable the president to divert the paper to his own use? The name of the party who presented it and had it in his possession appeared on the face of the paper to have signed it as president. The name of another officer of the corporation was upon it also, attesting its regularity, and everything was in his handwriting, except the signature of the president and the indorsement of the payee. So far as Brooks was concerned, the paper showed that it had been issued to a stranger in the regular course of business, and, through his indorsement, had come to the hands of a mercantile firm of which the president of the corporation was a member. If this were the fact, there is no doubt as to his right to use it in the business of the firm. The holder of a note, who has no actual knowledge or notice of a defect in the title, or other equities between the parties, when circumstances come to his knowledge sufficient to put him upon inquiry, is chargeable with knowledge of all the facts that such inquiry would have revealed. The difficulty in this case is to find the circumstance which can be said to be sufficient to put Brooks upon the inquiry. There was absolutely nothing on the face of the paper, except the signature, as president, of the party who was dealing with it; and that, we think, was not sufficient, in view of the fact that the appearances were that he was a purchaser from a third party. The principle that applies in a case where an officer of a

corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit, does not aid in solving the question in this case. When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it. *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612; *Bank of New York Nat. Bkg. Assn. v. American Dock & T. Co.* 143 N. Y. 559; *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 145; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234. There are numerous cases that belong to that class cited by the learned counsel for the defendant in his brief. There is a manifest distinction between them and the case at bar. Here the officer was not dealing with corporate notes payable to himself, but with notes that had been regularly issued, so far as appeared from their face, to a stranger, and by him transferred to a firm of which the officer was a member, and for which he acted as agent in procuring the loan from Brooks, and pledging them as security. The presence of Frost's name upon the paper, as one of the agents who issued it, was not naturally or reasonably calculated, under the circumstances, to arouse suspicion in the mind of Brooks, or to lead him to believe that the president was attempting to defraud the corporation in disposing of the notes. None of the cases cited by the learned counsel for the defendant sustain the proposition that such a circumstance is sufficient to put the purchaser of negotiable paper upon inquiry, or charge him with knowledge of the fact in case he fails to make it; and there are many cases that tend to support the contrary view. *American Exch. Nat. Bank v. New York Belt & P. Co.* 148 N. Y. 698; *Müller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 475; *Walker v. Kes*, 14 S. C. 143.

It is said that, if the plaintiff's right to recover in this case is sanctioned by this court, an easy way will be opened for the perpetration of frauds upon corporations by officers intrusted with its negotiable obligations, and that the device of making the paper payable to the order of a nominal payee, interested or aiding in the fraud, will be a favorite one to accomplish the end. We must leave all such cases to be dealt with upon the peculiar facts and circumstances as they arise. It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers, than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts, upon such circumstances as exist in this case.

We think that there was nothing on the face of the paper, or in the facts shown, to warrant the court in holding, as matter of law, as it did, that the obligations were received by Brooks, and the advances made on them, *mala fide*. That is the effect of the ruling at the trial, and the conclusion was not supported by the facts.

It follows that *the judgment must be reversed*, and a new trial granted; costs to abide the event.

Andrews, Ch. J., and Gray and Martin, JJ., concur.

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Bartlett, J., dissenting:

The contest in this case arises over two notes for \$5,000, constituting the first and second causes of action set forth in the amended complaint. The plaintiff's exceptions were heard in the first instance at general term, were overruled, and as to these causes of action the complaint was dismissed. The material facts to be considered on this appeal are undisputed. On the 17th day of February, 1888, the board of directors of the defendant railroad company held a meeting, and adopted the following resolution: "Resolved, that the president be, and he is hereby, authorized to make a contract for the purchase of fifty flat cars for the use of this company, and is authorized, in carrying out this purpose, to give the notes of this company, to the sum of \$10,000." M. S. Frost, the president of the company, on the day the resolution was passed, asked the secretary to prepare the notes in blank, and, upon objection being made, suggested that they be payable to Mr. Bruen, his private secretary; stating that, when he wished to negotiate the notes, Bruen could indorse them. It is admitted that the president of the company fraudulently appropriated these notes to his own use, and that no part of the proceeds was used in procuring cars under the resolution, or for the benefit of the company in any way. The disposition made of these notes by Frost, the president of the defendant is set forth in the testimony of Francis A. Brooks, of Boston, the alleged holder in good faith. He states: "I had business transactions with Mr. Frost . . . on the 19th day of March, 1888. I took of him the note of M. S. Frost & Son for \$30,000. . . . He then applied to me for a loan of \$30,000, and I made such loan, and took the note of M. S. Frost & Son, of him, for that amount. I received of him, as collateral security for said note of \$30,000, certificates or receipts representing bonds of the Pittsburgh, Shenango, & Lake Erie Railroad Company, deposited with a certain trust company or companies, of a par value of \$21,000; also two notes, of \$5,000 each, of the Pittsburgh, Shenango, & Lake Erie Railroad Company, dated February 24, 1888, one payable on three months' time, and one payable on four months' time." Brooks also testifies that he did not become the absolute owner of the notes until long after they were due, and that in the October or November before he swore to his deposition in this action he transferred them. At the time the notes fell due they were not presented to the company for payment. The two notes were in the following form, except one was for three months, and the other four months:

\$5,000. Greenville, Pa., Feb'y 24, 1888.

Three months after date the Pittsburgh, Shenango, & Lake Erie Railroad Company promises to pay to the order of John T. Bruen five thousand dollars, at the American Exchange National Bank, New York City. Value received.

The Pittsburgh, Shenango, and Lake Erie Railroad Company, by M. S. Frost, President.

Attest: E. S. Templeton, Secretary.

One note was indorsed: "John T. Bruen. M. S. Frost & Son." The other was indorsed:

"Pay to the order of M. S. Frost & Son. John T. Bruen. M. S. Frost & Son."

It is not claimed that Bruen, the private secretary of Frost, and the payee of these notes, had any interest whatever in them. One note was indorsed by him to M. S. Frost & Son, and the other in blank. It is not claimed that this transfer was for value. The one question is whether Brooks was the bona fide holder of the notes, for value, in the usual course of business, before maturity, and without notice of facts affecting their validity; it not appearing that he had knowledge of the fraudulent acts of Frost in diverting the paper of the corporation to his own use, although he did know that Frost was president of defendant, and was using these notes for his own purposes. In other words, was there enough upon the face of this negotiable paper, and the transaction in which he took it, as collateral security for the loan he then made, not only to have put Brooks, as a prudent man, upon inquiry, but to enable the court to say, as matter of law, on the undisputed facts, that he acted *mala fide* in not requiring Frost to disclose his authority to transfer his company's notes as collateral in his own business? Counsel do not agree as to whether the evidence shows that the loan was made to Frost, or to his firm. Brooks's testimony may be read either way, possibly. At all events, it does not seem perfectly clear, but we do not regard it as important. Frost was borrowing this money and using the notes of his company for his own purposes, either as an individual, or for his firm. Although a partnership is to be regarded as a legal entity for certain purposes, this fiction may not be invoked to shield one of the copartners, or to enable him to do as a partner that which the law prohibits him from doing as an individual. *Jones v. Blun*, 145 N. Y. 333.

It is the contention of the learned counsel for the appellant that, when these notes were offered to Brooks as collateral security, they were not, upon their face, corporate obligations created by Frost in his own favor, but rather a corporate obligation issued regularly, for value, to a stranger, John T. Bruen, and indorsed by him, for value, to M. S. Frost & Son, who were then the ostensible owners. I do not think, upon the face of the notes and the transaction of loan, there was enough to warrant Brooks in assuming that M. S. Frost & Son were the ostensible holders, for value, from a stranger. In the loan transaction, Frost gave Brooks, as collateral, only securities of the company of which he was president; and, as to the notes in controversy, the original payee indorsed direct to Frost's firm. If this simple device is to serve the purposes of dishonest officers of corporations, who desire to realize upon corporate paper of their own fraudulent creation, then the way is open to them for unrestricted plunder. A president of a corporation executes its note, fills in as payee the name of his office boy, and, upon securing the latter's indorsement to his firm, is possessed of paper issued regularly for value to a stranger, and duly indorsed. Anyone in the commercial world is then at liberty to discount the note without fear of legal consequences. The fact that Frost was in the possession of the notes of the defendant, indorsed to him by

the original payee, which he had executed as its president, and proposed to use for his own purposes, was enough to put Brooks upon inquiry; and, failing to do so, he acted *mala fide*. This is a safe rule, and any other would be fraught with the greatest danger to corporations. It is, of course, quite possible that the president or other officer of a corporation may be lawfully in possession of its commercial paper, executed by himself, and entitled to use it in his own business, but there is no hardship in a rule requiring the proposed purchaser to ascertain the fact. There is no peril to the general business public in such a rule, as the fact that the officer of a corporation desires to use its paper, signed by himself, in his private business, is an unusual circumstance, and naturally suggests inquiry. In the case at bar, if inquiry had been made of the secretary of the company an immediate disclosure of the proposed fraud upon the defendant would have resulted. This rule invokes no new principle, and is in harmony with the law for the protection of the bona fide purchaser for value, as expounded in this country for many years. In *Mayes v. Badger*, 84 N. Y. 249, 90 Am. Dec. 691, this court, in referring to the rights of the bona fide holder of commercial paper, said: "He is not bound, at his peril, to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." This is a clear statement of the rule of law, and its application to the facts in the case at bar defeats recovery. The rule was restated by this court very recently as follows: "In all cases where it is sought to defeat the right of the holder of negotiable paper before maturity to recover against the maker, it is essential that actual notice be proved of the defect in title, or that circumstances be shown evidencing bad faith in the holder and creating reasonable grounds for suspecting his conduct in the transaction." *American Exch. Nat. Bank v. New York Belt & P. Co.* 143 N. Y. 705. Also in *Knox v. Eden Musee American Co.* 143 N. Y. 454, 81 L. R. A. 779, the rule is thus stated: "And the transferee, although he may have been negligent in taking it, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to the doctrine now settled, will prevail." In *Canajoharie Nat. Bank v. Dieffendorf*, 123 N. Y. 203, 10 L. R. A. 676, this court said in regard to the rights of the holder of commercial paper: "What constitutes good faith in such transactions has been the subject of frequent discussion in the books, and while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder. . . . The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of that character." The Supreme Court of the United States, in *Murray v. Lardner*, 69 U. S. 2

Wall, 121, 17 L. ed. 859, said: "The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith."

The burden of establishing good faith is upon the plaintiff, and, when the presumption in his favor is rebutted by defendant's proofs, then he must show affirmatively his good faith. In this case the plaintiff rests upon the face of the notes, and the undisputed facts of the transaction in which they were taken as collateral security, thus making the existence of good faith a question of law. There was no question for the jury. These facts bring Frost, the agent of the defendant, and Brooks, the money lender, together, with full knowledge in Brooks that Frost was the president of the defendant, and proposing to use the corporate notes he had executed for his own purposes, his title being derived from the original payee.

The counsel for appellant, in an ingenious and able argument, starts out with the proposition that Frost was an agent of two principals, —one the defendant corporation, and the other the firm of M. S. Frost & Son; thus making the situation like that of a partnership note made to the order of a stranger, and indorsed by him, and subsequently indorsed and negotiated by another partnership, the person who negotiated the note for the indorsee firm being a member of each partnership. He cites two cases in this connection which he insists should be decisive of this appeal, *viz.*, *Miller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 475, and *Walker v. Kee*, 14 S. C. 142. I have already pointed out that Frost could not shield himself behind his firm. Both he and Brooks must meet this transaction as if the notes were indorsed by the original payee to Frost personally. Even if it be assumed that Frost stood in the attitude of double agency, as suggested, it would not render applicable the principle laid down in the cases cited, as Frost's position as president of the defendant corporation and member of the firm of M. S. Frost & Son would not confer upon him the power to negotiate corporate paper precisely as if the corporation were another firm in which he was a partner. *Miller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 475, just cited, was a case where a partner in two firms drew the note of one firm, indorsed it to the other firm, discounted it at the Consolidation Bank, passed the proceeds of the discount to indorsee firm, and subsequently drew them out and converted them to his own use. The court held, under these circumstances, that the bank properly discounted the paper. Agnew, J., said: "One who is a member of several firms has presumptively the same power in each that his partners have. To say he cannot draw and indorse the same paper, as the representative of different firms, is simply to negative his power to act in the second firm because he has acted in the first. Having in each the power of a partner presumptively as to the public, and acting in 34 L. R. A.

that apparent right, it is no ground of suspicion that his indorsement of the name of one firm is in bad faith to the other, as maker of the note. . . . But here there is nothing out of the usual course of business, and nothing in the face of the paper to indicate that the note was not drawn by the firm of Miller & Persch, in their usual course of business, in a partnership transaction with Persch & Steeb."

No argument is necessary to show that this case, and the one cited with it, have no application to the case at bar, and the same may be said of a large number of authorities on the brief of appellant involving a similar principle. In the case at bar the transaction was entirely out of the usual course of business, and the presumption was that the proposed use of the corporate paper was irregular. This court, in the second division, in *Wilson v. Metropolitan Elec. R. Co.* 120 N. Y. 145, recognized the principle we are now discussing, although holding it did not defeat the recovery in that case, for the reason that the purchaser of a promissory note purporting to have been issued by a corporation, who makes the purchase under circumstances which devolve upon him the duty of inquiry as to its validity, assumes no greater risk, by his failure to make inquiry, than the burden of proving that the facts he could have discovered, had he made inquiry, would have protected him. In the case cited the note was drawn by the defendant's president, payable to the order of the corporation, and indorsed by him as president and individually. It was conceded that the president was using the note for his individual benefit, to the knowledge of plaintiff, but, as it appeared that an inquiry would have disclosed a state of facts showing the president was authorized to so use it, the defendant was liable. This court, in disposing of the case, said (p. 150, 120 N. Y.): "Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. Prima facie the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation."

The learned counsel for the respondent submitted an able brief, with an exhaustive reference to the authorities in support of the recovery below, but I deem any further discussion of the cases as unnecessary. I have already suggested that there is no doubt as to the rule applicable to the bona fide holder for value of commercial paper. It is too well settled to admit of serious debate at this late day, and the only question here is whether it can be said, under the admitted facts, that Brooks was put upon his inquiry, and, failing to follow it up, is chargeable with bad faith. I think, as already stated, that this question must be answered in the affirmative. The judgment appealed from should be affirmed.

Haight and Vann, JJ., concur.

FARMERS' LOAN & TRUST COMPANY,
as Trustees, *Resp't.*,

v.

**NEW YORK & NORTHERN RAILWAY
COMPANY *et al.*, *Resp'ts.*,**

and

Artemus H. HOLMES *et al.*, Impleaded, etc.,
Appls.

(150 N. Y. 410.)

1. It is a matter of common knowledge that where the ownership of a majority of the stock of a corporation changes, the board of directors usually changes, unless its members are already in harmony with the policy of its purchasers.
2. A corporation owning a majority of the stock of another company, and assuming control of its business through the control of its officers and directors, assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to stockholders.
3. A corporation purchasing a majority of the stock of another competing one cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders.
4. Evidence that officers of a corporation, acting in the interest of another company which owned a majority of its stock, declined to accept business which would produce a fund with which to pay interest that was due, and diverted its income to other and improper purposes, whereby a default in the interest was occasioned, is admissible in defense of a foreclosure instituted on behalf of such other corporation as owner of a majority of the mortgage bonds.
5. Refusal to find facts material to sustain a defense, and which are established by undisputed evidence, is error.
6. The statutory right of a corporation to purchase stock of another company does not give it any right, as the owner of a majority of the stock and bonds of such company, to manage its affairs so as to cause a default on a mortgage, and obtain control of the property by foreclosure at less than its value to the injury of the minority stockholders.
7. A request to foreclose a mortgage, which must be made by the holders of \$2,000,000 in amount of bonds, is not valid when made only by the holder of \$1,700,000, who is not in fact the owner of them but holds them subject to the order of another, and who claims to represent the owners of other bonds for which the party he represents had a mere contract to purchase.

(October 26, 1894.)

APPPEAL by defendants Holmes and Pick from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a special term for Westchester County in favor of plaintiff in an action brought to foreclose a mortgage. *Reversed.*

NOTE.—As to how far a corporation may own stock in another company, see *note* to *Buckeye Marble & F. Co. v. Harvey* (Tenn.) 18 L. R. A. 252.

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Statement by **Martin, J.:**

This action was brought to foreclose a second mortgage upon the property of the New York & Northern Railway Company, made by it, and given to the plaintiff, as trustee, to secure the payment of second-mortgage bonds issued by that company, amounting to \$3,200,000. This mortgage was made in pursuance of a plan for the reorganization of the predecessor of the New York & Northern Railway Company. The interest on the bonds for the first four years was payable only out of the net income, and no interest became due under the mortgage until June 1, 1892. It provided that no foreclosure could be had until the expiration of one year after default in the payment of the interest, and that then the plaintiff might, and upon the written request of the holders of two millions in amount of such bonds should, apply to a court having jurisdiction for a foreclosure and sale of the mortgaged premises. The capital stock of the New York & Northern Railway Company consisted of \$3,000,000, par value, of common stock, and \$6,000,000, par value, of preferred stock, making a total of \$9,000,000. On July 20, 1893, Drexel, Morgan, & Co., claimed to own a portion and to represent the holders of another portion of the second mortgage bonds, which together amounted to more than \$2,000,000, requested the plaintiff to take proceedings for the foreclosure of the mortgage, and under a provision in it to that effect, to declare the whole principal and interest secured thereby to be at once due and payable. None of the original defendants interposed any defense; but on October 5, 1893, on their own motion, the appellants were made parties defendant in the action, and served an answer. The appellants are stockholders of the New York & Northern Railway Company, representing about 20,000 shares of preferred and common stock, and appear in this action on their own behalf, and also on behalf of the holders of the other shares represented by them. In the answer, the appellants, with other defenses, in substance, allege that this action was brought in pursuance of an unlawful plan and combination by and between the New York Central & Hudson River Railroad Company and others acting for it, to render the stock of the New York & Northern Railway Company valueless, and to secure its property for the benefit of the New York Central & Hudson River Railroad Company; that the latter, in order to carry such plan into effect, purchased a large number of the second-mortgage bonds, and also a majority of the stock of that company; that by virtue of its ownership of a majority of such stock, and preparatory to the foreclosure of the mortgage, it obtained and assumed control of the affairs of the New York & Northern Railway Company, by causing changes in its directory and officers so as to make them favorable to the New York Central & Hudson River Railroad Company, thereby preventing the New York & Northern Railway Company from saving its default in payment of the interest then due, and from taking measures for its safety, or from resisting the New York Central & Hudson River Railroad Company's scheme to acquire its property by such foreclosure; that the railroad of the New York & Northern Railway

Company was a parallel and competing road with the New York Central & Hudson River Railroad, and that by the means already referred to, the latter company sought to secure the property of the former through such foreclosure for its own benefit, and at a price much less than its true value; that this was rendered possible by its acquiring a majority of the stock of that company, and thereby being able to control the affairs of the New York & Northern Railway Company, and to so manage its business in collusion with its directors and officers that its obligations could not be met or its default made good; that such acts on the part of the New York Central & Hudson River Railroad Company were fraudulent, and prohibited by the laws of the state; and that the written request to the plaintiff asking for a foreclosure did not comply with the terms and provisions of the mortgage, as the persons making the request were not at the time holders of \$2,000,000 of the bonds it was given to secure.

On the trial the defendants introduced in evidence the following letters and papers:

The New York Central and Hudson River R. Co. Principal Office.

Albany, N. Y., March 18th, 1893.

Circular letter to the stockholders in respect of according control of the New York and Northern Railway. The New York and Northern Railway extends from One Hundred and Fifty-fifth street, in the city of New York, occupying a line practically midway between this company's Hudson River Division and its Harlem Division, to Brewsters on the line of the latter, a distance of about 60 miles. It has a fine bridge across the Harlem river, and has within the bounds of the city of New York 8 miles of a 100-foot roadway, and it owns 33 acres of terminal property, also within the bounds of the city. The relation and value of this line to this company is too well known to require explanation. To acquire the control of it will cost this company about \$4,000,000, and agreements in respect thereof have been entered into subject to the approval herein asked for. It is proposed, after the control is acquired, to enter into a lease with the present company, or perhaps with a company to be organized in its stead, under which this company will guarantee the principal and interest of \$5,000,000 in 4 per cent 100-year gold bonds. Of this amount \$4,000,000 will represent the cost of control, as above stated, and \$1,000,000 will be reserved for developing, improving, and bettering the line. As will be seen by the form of notice at the top hereof, a special meeting of the stockholders of this company has been called, to be held on the 19th day of April next, to which meeting this matter will be submitted for approval and authorization. Accompanying this is the form of a proxy to be used at the meeting, which, when executed, may be returned to the undersigned in the same envelope with the proxies for other meetings which are sent herewith. What has been said in the other circular letters which go out with this in respect of the desirability of a full vote may be taken to apply, with equal force, to this present letter.

E. D. Worcester, Secretary.

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New York, April 3, 1893.

Drexel, Morgan, & Company.

E. V. W. Rossiter, Esq., Treasurer, New York Central and Hudson River Railroad Company, Grand Central Depot, New York—Dear Sir:

We have paid out for the New York Central as follows:

\$1,700,000 second mortgage bonds,	
at 80.....	\$1,360,000
2,500,000 preferred stock, at 85..	875,000
2,200,000 common stock, at 15....	330,000
Total.....	\$2,565,000

Will you kindly send us your note dated April 1st for that amount, and oblige, yours, truly, Drexel, Morgan, & Company.

P. S. Equipment obligations and floating debt obligations have not yet been delivered. We will report later as to them.

D. M. & Co.

\$2,565,000. New York April 1, 1893.

On demand upon ten days' notice after date, we promise to pay to the order of Drexel Morgan, & Company two million five hundred and sixty-five thousand dollars, with interest. Value received.

New York Central and Hudson River Railroad Company.

Chauncey M. Depew, President.

E. V. W. Rossiter, Treasurer.

The indorsements were: August 1, 1893, interest paid to date; also \$740,996 on account of principal of within. Also further indorsements of full payment, August 1, 1893, for \$1,804,094.89.

New York, April 5, 1893.

E. V. W. Rossiter, Esq., Treas'r, N. Y. C. & H. R. R. Co., City—Dear Sir:

In payment for the following securities of the N. Y. & Northern R. R. Co., viz., \$1,700,000 2d mtg. bonds, \$2,500,000 preferred stock, \$2,200,000 common stock, we have received from you a demand note, on ten days' notice, for \$2,565,000, dated April 1st, 1893, and signed by Chauncey M. Depew, president, and E. V. W. Rossiter, treasurer of the N. Y. Central & H. R. R. Co. We hold the above-mentioned securities subject to your order.

Yours very truly,

Drexel, Morgan, & Co.

The following is a resolution of the stockholders of the New York Central & Hudson River Railroad Company, which was adopted at a stockholders' meeting held April 19, 1893:

Resolved, that the stockholders of the New York Central & Hudson River Railroad Company hereby approve and authorize the acquirement, by purchase, of a controlling interest in the stock and bonds of the New York & Northern Railway Company, and approve and authorize the making of a lease with the company, or a company which shall be organized in its stead, of its railroad and property, and approve and authorize the guaranty under such lease of the principal and interest of \$5,000,000 in 4 per cent 100-year gold bonds of the lessor company."

The report of the New York Central &

Hudson River Railroad Company to its stockholders, made June 4, 1898, was as follows:

At a special meeting held April 19, 1898, 640,878 shares of the capital stock of this company were voted in favor of a resolution approving and authorizing the acquirement, by purchase, of a controlling interest in the stock and bonds of the New York & Northern Railway Company, and approving and authorizing the making of a lease with that company (or a company which shall be organized in its stead) of its railroad property, and approving and authorizing the guaranty under such lease of the principal and interest of \$5,000,000 in 4 per cent 100-year gold bonds of the lessor company.

The following note was also introduced in evidence:

\$1,824,094.

August 1st, 1898.

On demand, upon ten days' notice after date, we promise to pay to the order of Drexel, Morgan, & Company one million eight hundred and twenty-four thousand and ninety-four dollars, with interest. Value received.

New York Central and Hudson River

Railroad Company,

Chauncey M. Depew, President.

E. V. W. Rossiter, Treasurer.

The indorsements upon this note showed payments in full, commencing August 2, 1898, and ending August 9.

A contract between Louis V. Bell and Henry K. McHarg was also introduced in evidence, which shows that on the 14th of July, 1898, the New York Central & Hudson River Railroad Company agreed to purchase from them, at the price or rate of 80 cents on the dollar, second mortgage bonds of the New York & Northern Railway Company of the par value of at least \$750,000, to be paid for at that rate in the bonds of the company which should, at the time of their issue, be the owner of the railroad covered by such mortgage, and a part of an issue of \$6,200,000, bearing interest at the rate of 4 per cent per annum, payable 100 years from the date of the new bonds, and secured by a mortgage upon said mortgaged property, principal and interest to be guaranteed by the New York Central & Hudson River Railroad Company; the purchase money to bear interest at 4 per cent from July 18, 1898, to be paid either by making the new bonds draw interest from that date, or by delivering to them bonds of the \$5,000,000 issue, the par value of which should be equal to the interest from July 18; the New York Central & Hudson River Railroad Company to have the option to pay the purchase price in cash. The contract also provided that the bonds purchased might be used by Messrs. Drexel, Morgan, & Co. for the purpose of reorganizing the New York & Northern Railway Company.

The president of the New York Central & Hudson River Railroad Company gave the following testimony: "I was aware of the notice sent by Drexel, Morgan, & Company to the Farmers' Loan & Trust Company, and I acquiesced in having it sent. It was sent in pursuance of the general purpose expressed in our circular of March 18, 1898, and our state-

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ment of June 30, 1898, to our stockholders, to acquire control, by lease or otherwise, of the New York & Northern Railroad property."

The evidence also disclosed that in October, 1898, the minority stockholders gave notice to the New York Central & Hudson River Railroad Company, Drexel, Morgan, & Co., and Charles T. Barney that they were willing to contribute their proportion of the money necessary to pay or purchase the interest coupons for the nonpayment of which such foreclosure was being had, and asked them to contribute their proportion for a like purpose. To this the New York Central & Hudson River Railroad Company made no reply. Barney replied that the stock standing in his name was owned by someone else, while Drexel, Morgan, & Co. declined to act upon that proposition. That the New York & Northern Railway Company and the New York Central & Hudson River Railroad Company were duly organized, and that the plaintiff was a domestic corporation, were found as facts by the court. It also in substance found that the New York Central & Hudson River Railroad Company owns and operates railroads which are parallel or competing lines with the New York & Northern Railway; that the appellant Pick owned 100 shares of the capital stock of the New York & Northern Railway Company, and represented about 18,000 other shares of such capital stock, and the defendant Holmes owned 1,200 shares; and that the purchase of the bonds by the New York Central & Hudson River Railroad Company was after default had been made in the payment of the interest thereon. The court also found that the plaintiff had received a written request, signed by the holders of more than \$2,000,000 in amount of such bonds, requesting it to bring an action for the foreclosure and sale of the premises covered by such mortgage; that it was for the best interests of all concerned that all the property should be sold in one parcel, and a sale in any other way would be greatly to the detriment and injury of the parties interested in the railroad and its affairs; and that the rights of all the parties interested could be fully protected only by a sale of the mortgaged premises, property, and appurtenances as an entirety. As conclusions of law, the court held that there was due under said mortgage, for principal and interest, the sum of \$3,453,511.11, and that the plaintiff was entitled to a judgment of foreclosure and sale.

Messrs. Simon Sterne and James C. Carter, with Messrs. Holmes & Adams, for appellants;

The Central company had no right to purchase the stock of the Northern company with a hostile intent toward that corporation. Such purchase entailed upon it active duties of protection and good faith; and its various acts, both of omission, in failing to call the stockholders together for the purpose of taking action to cure the default either by a voluntary assessment upon the stock or by any other of the numerous methods in which an insolvent railroad corporation can recover itself, and of commission in wilfully causing the continuance of the default by the repeated refusals of lucrative business offered and particularly in

the direct blow to the Northern company's life dealt by the act of the Central company in requesting the trustee to declare the principal sum due and to commence foreclosure,—all done in defiance of such duties owed by it,—should be disregarded by a court of equity, and no benefit should be allowed to result to the wrongdoer by reason thereof.

Perry, Tr. §§ 166 *et seq.*, 428-435.

The purchase of the bonds must be deemed to have been made on behalf of the Northern company at the price paid for the bonds, and the foreclosure must be set aside and the bondholders decreed to have an equitable lien on the property for the amount paid for the bonds,—a lien, however, which they cannot assert until they disengage themselves from the trust relation they have assumed.

Draper v. Gordon, 4 Sandf. Ch. 210; *Slade v. Van Vechten*, 11 Paige, 21, *Quackenbush v. Leonard*, 9 Paige 334; *Lewin*, Tr. 8th ed. 275.

When a person by the purchase of stock in a corporation becomes jointly interested with others in the property of such corporation he will not be permitted by any means to get the sole beneficial ownership of such property at the expense of other joint owners.

Jackson v. Ludeling, 88 U. S. 21 Wall. 616, 23 L. ed. 492; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527; *Wright v. Oroville Gold, S. & C. Min. Co.* 40 Cal. 20; *Ervin v. Oregon R. & Nav. Co.* 27 Fed. Rep. 625; *Taylor v. Chichester & M. R. Co.* L. R. 2 Exch. 379; *Meeker v. Winthrop Iron Co.* 17 Fed. Rep. 48; *Cook, Stock & Stockholders*, § 622; *Morawetz, Priv. Corp.* § 529; *Beach, Priv. Corp.* § 70; 2 *Bigelow, Fr.* 1858, 645; *Pearson v. Concord R. Co.* 59 N. H. 85.

Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys an outstanding encumbrance or an adverse title to dispossess and expel his cotenant. It cannot be tolerated when applied to a common subject in which the parties had an equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interests.

Van Horne v. Fonda, 5 Johns. Ch. 388; *Swinburne v. Swinburns*, 28 N. Y. 573; *Densmore Oil Co. v. Denamore*, 64 Pa. 48; *Raker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1065; *Carpenter v. Carpenter*, 131 N. Y. 101; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252.

The purchase of the majority of the Northern company's stock imposed a duty upon the Central company, and it was a violation of that duty of which just complaint is made and out of which a court of equity will not allow the party in fault to make a profit.

Menier v. Hooper's Teleg. Works, L. R. 9 Ch. 850; *Meeker v. Winthrop Iron Co.* *supra*; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 506, 28 L. ed. 496; *Pondir v. New York, L. E. & W. R. Co.* 72 Hun, 390; *Colles v. Troy City Directory Co.* 11 Hun, 397; *Barr v. New York, L. E. & W. R. Co.* 96 N. Y. 444; *Cook, Stock & Stockholders*, § 659; *Woodroff v. Howes*, 88 Cal. 184; *Gamble v. Queens County Water Co.* *supra*; *Hart v. Ogdensburg & L. C. R. Co.* 89 Hun, 816; *Sage v. Culver*, 147 N. Y. 241.

The majority stockholders will not be permitted to

mitted to inaugurate or sanction transactions resulting in injury to the interests of the minority stockholders or inconsistent with the original object of the formation of the corporation.

Ervin v. Oregon R. & Nav. Co. 20 Fed. Rep. 577, 27 Fed. Rep. 625; *Menier v. Hooper's Teleg. Works*, *supra*; *Meyer v. Staten Island R. Co.* 7 N. Y. S. R. 245; *Wheeler v. Pullman Iron & S. Co.* 143 Ill. 197, 17 L. R. A. 818; *Taylor, Corp.* 3d ed. § 558, and cases cited; *Gamble v. Queens County Water Co.* *supra*; *Aultman's Appeal*, 98 Pa. 505; *Thomp. Corp.* § 4484; *Waterman, Corp.* § 71; *Gregory v. Patchett*, 33 Beav. 595; *Mowrey v. Indianapolis & C. R. Co.* 4 Biss. 78.

The Northern company was during the period in which the things complained of occurred under the control of the Central company, and was so dominated by that company that all its acts and omissions during that period were dictated by the Central company, which must be held responsible for them.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499; *Porter v. Pittsburgh Bessemer Steel Co.* 120 U. S. 649, 30 L. ed. 880; *Morris v. Tuthill*, 72 N. Y. 575; *Hayden v. Official Hotel Red Book & D. Co.* 42 Fed. Rep. 875; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 68 L. ed. 55.

A party who by his own acts has prevented performance of a contract or brought about a forfeiture or default by another party cannot recover damages or compensation for the non-performance, nor can he complain of or in any way secure any advantage from the forfeiture or default which he has himself created.

Fleming v. Gilbert, 3 Johns. 528; *Kidd v. Reiden*, 19 Barb. 266; *Taylor v. Risley*, 23 Hun, 141; 3 *Addison, Cont.* 798; *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Higgins v. Solomon*, 2 Hall, 482; *Farnham v. Ros.* Id. 167; *Young v. Hunter*, 6 N. Y. 208; *McCreery v. Day*, 119 N. Y. 1, 6 L. R. A. 503; 1 *Pom. Eq. Jur.* § 426; 8 *Am. & Eng. Enc. Law*, p. 450; *Sanders v. Pope*, 13 Ves. Jr. 289; *Hill v. Barclay*, 18 Ves. Jr. 60; *Angle v. Chicago, St. P. M. & O. R. Co.* *supra*; *Meeker v. Winthrop Iron Co.* 17 Fed. Rep. 48.

The trustee of a railroad mortgage has no individual interest whatever, and only represents the holders of the bonds which such mortgage secures. He has therefore only such rights and equities with regard to the mortgaged property as have the bondholders themselves, and consequently any defense which would be available against the bondholders is equally available against the trustee when bringing an action to foreclose the mortgage for their benefit.

Kenicott v. Wayne County Supers. 88 U. S. 16 Wall. 452, 21 L. ed. 319; *Union College v. Wheeler*, 61 N. Y. 88; *Indiana & I. C. R. Co. v. Sprague*, 103 U. S. 756, 26 L. ed. 554; *Tillinghast v. Troy & B. R. Co.* 48 Hun, 420; 2 *Perry, Tr.* § 760; *Williamson v. New Albany etc. R. Co.* 1 Biss. 198.

A monopoly or anything savoring of or tending to promote a monopoly is against the policy of both law and equity.

People v. North River Sugar Ref. Co. 54 Hun, 370, 5 L. R. A. 886; *Leslie v. Lorrillard*, 110 N. Y. 519, 1 L. R. A. 456; *Pennycania*

R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83; *Pearson v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838.

The plaintiff had no authority or right to bring this foreclosure suit, it not having received a valid request so to do from a sufficient number of bondholders as contemplated by the mortgage.

While plaintiff had originally the right to bring this foreclosure proceeding without any request whatever, it not having exercised its option so to do, but having adopted the alternative course provided for by the mortgage, namely, to proceed upon the request of the holders of \$2,000,000 of such bonds, proof of such request becomes an essential requisite, and the plaintiff is put to the necessity of showing that the request received by it was a valid one and complied with the terms of the mortgage.

Chicago, D. & V. R. Co. v. Foodick, 106 U. S. 47, 27 L. ed. 47.

Messrs. Ashbel Green, David McClure, and Thomas Thatcher, for respondent:

The railroad corporation was the only owner of the property. The shareholder in a corporation has no legal title to its property or profits until a division is made. The property of the corporation is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein.

Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; *Burrall v. Bushwick R. Co.* 76 N. Y. 216; *Jermoin v. Lake Shore & M. S. R. Co.* 91 N. Y. 492; *Davenport v. Dows*, 85 U. S. 18 Wall. 626, 21 L. ed. 938; *Humphreys v. McKissack*, 140 U. S. 804, 35 L. ed. 478; *Porter v. Sabine*, 149 U. S. 473, 37 L. ed. 815; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499; *Morgan v. Railroad Co.* 1 Woods, 15; *Sala v. New Orleans*, 2 Woods, 196; *Porter v. Pittsburgh Bessemer Steel Co.* 120 U. S. 670, 30 L. ed. 838; *McMullen v. Ritchie*, 61 Fed. Rep. 253; *Forbes v. Memphis, E. P. & P. R. Co.* 2 Woods, 323.

It is questionable whether in any case where a suit is properly instituted against a corporation a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as a party to that suit and seek to defend or control the proceedings.

Forbes v. Memphis, E. P. & P. R. Co. supra; *Alexander v. Donohoe*, 143 N. Y. 210; *Little v. Bowers*, 184 U. S. 547, 33 L. ed. 1016; *Inglehart v. Stansbury*, 151 U. S. 68, 33 L. ed. 76.

There is no rule of law or of equity requiring sale of a railroad in parcels. The policy of the law is to treat them as an entirety.

Cook, Stock & Stockholders, 1892, chap. 688, § 5; *Muller v. Dows*, 94 U. S. 449, 24 L. ed. 209; *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 26 L. ed. 1111; *Columbia Finance & T. Co. v. Kentucky U. R. Co.* 60 Fed. Rep. 799, 22 U. S. App. 54; *Macon & W. R. Co. v. Parker*, 9 Ga. 877.

The trustee represents not only the requesting bondholders but all the bondholders, and when it is called to the attention of the trustees that a default has occurred entitling it to a foreclosure it must act then in behalf of all the bondholders in such a way as seems to it best.

34 L. R. A.

Hollister v. Stewart, 111 N. Y. 644; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 613, 25 L. ed. 759; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 187, 35 L. ed. 116.

The trustee was requested to foreclose by the holders of \$2,000,000 of bonds.

Bowling v. Harrison, 47 U. S. 6 How. 248, 12 L. ed. 425; *Smodes v. Bank of Utica*, 20 Johns. 872.

There is no fiduciary relation between the Central company as a stockholder and other stockholders preventing it from enforcing the bonds which it held or requiring it to give to other stockholders the benefit of the purchase of bonds or to account to them for the profits.

Bird Coal & I. Co. v. Humes, 157 Pa. 278; *Nickles v. Rochester City Bank*, 11 Paige, 118, 42 Am. Dec. 103; *Russell v. M'Lellan*, 14 Pick. 63; *Abbott v. Merriam*, 8 Cush. 591; *Gillett v. Bowen*, 28 Fed. Rep. 625; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527; *Harpending v. Munson*, 91 N. Y. 652; *Leavenworth County Comrs. v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 33 L. ed. 1064; *Central Trust Co. v. Bridges*, 57 Fed. Rep. 767, 16 U. S. App. 115; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 110, 34 L. ed. 613.

A director may buy a claim against the company and enforce it for the full amount.

Inglehart v. Thousand Island Hotel Co. 83 Hun, 377.

If he holds a bond secured by mortgage he may purchase at the sale.

Preston v. Loughran, 58 Hun, 210; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329.

If an officer or director to whom the doctrine as to the dealings by an agent with the property of his principal is said to apply may so act, *a fortiori* may a stockholder who is under no such relation to the corporation or costockholders.

A mortgagee may buy an adverse claim against the mortgaged property.

Cornell v. Woodruff, 77 N. Y. 203; *Porter v. Pittsburgh Bessemer Steel Co.* 120 U. S. 670, 30 L. ed. 838; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499.

Even a mortgagee cannot reform a mortgage which through mistake covers more property than was agreed to be covered. The money must be paid and thus the maxim be fulfilled that he who asks equity must first do equity.

Ames v. New Jersey Frankline Co., 12 N. J. Eq. 66, 72 Am. Dec. 385; *Williams v. Fitzhugh*, 37 N. Y. 451; *Lewis v. Mott*, 36 N. Y. 402; *Halstead v. Schwartz*, 1 Thomp. & C. 562; *Morris v. Tuthill*, 72 N. Y. 575.

A stockholder does not occupy a fiduciary relation so as to be accountable for profits of contracts made with the corporation.

Bird Coal & I. Co. v. Humes, 157 Pa. 278.

The purpose with which the bonds are held makes no difference as to the rights under the mortgage.

Morris v. Tuthill, supra.

A party is not debarred from the vindication of legal right because he is actuated by an improper motive.

Phelps v. Nowlen, 72 N. Y. 89, 28 Am. Rep.

33; *Chenango Bridge Co. v. Paigs*, 88 N. Y. 188, 38 Am. Rep. 407; *Ramsey v. Erie R. Co.* 8 Abb. Pr. N. S. 174; *Ervin v. Oregon R. & Nav. Co.* 20 Fed. Rep. 579.

That the suit may work hardship is of no consequence.

Clinton v. Myers, 46 N. Y. 515, 7 Am. Rep. 373; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186; *Simpson v. Dall*, 70 U. S. 3 Wall. 476, 18 L. ed. 267; *Adler v. Penton*, 65 U. S. 24 How. 407, 16 L. ed. 696.

The defendant Pick is a very recent holder of stock purchased presumably in order to defend this action and bound by the acquiescence of former holders of his shares.

Parsons v. Hayes, 18 Jones & S. 29; *Mann v. Currie*, 3 Barb. 294; *Re Syracuse, C. & N. Y. R. Co.* 91 N. Y. 1; *Dimpfel v. Ohio & M. R. Co.* 110 U. S. 210, 28 L. ed. 123.

The affairs of the Northern company were managed by its directors who were alone authorized to deal with the application of its earnings.

Beveridge v. New York Elev. R. Co. 112 N. Y. 1, 3 L. R. A. 648; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 20 L. ed. 499.

The law does not presume that the board of directors or a majority of them will be unfaithful because they were elected by a person owning a majority of the stock.

Allen v. Wilson, 23 Fed. Rep. 678.

If the purchase were *ultra vires* that would not prevent title to the bonds from passing.

Holmes & G. Mfg. Co. v. Holmes & W. Metal Co. 127 N. Y. 252.

This defense is that the alleged owner has not legal capacity to hold. This is no business of the defendant mortgagor or any of its stockholders and no defense to the foreclosure.

Silver Lake Bank v. North, 4 Johns. Ch. 370; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Humbert v. Trinity Church*, 24 Wend. 630; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 758.

The trial judge is only required to find upon material questions of fact submitted to him and involved in the evidence.

Callanan v. Gilman, 107 N. Y. 372; *Stewart v. Moras*, 79 N. Y. 629; *Baldwin v. Doying*, 114 N. Y. 455.

Mr. Sherman Evarts for respondents New York & Northern Railway Company *et al.*

Martin, J., delivered the opinion of the court:

That the New York Central & Hudson River Railroad Company purchased a majority of the second mortgage bonds and a majority of the stock of the New York & Northern Railway Company, for the sole purpose of obtaining control of the property of the latter, is clearly established by the proof contained in the record. Indeed, such was the avowed purpose of its purchase. The record renders it equally clear that the New York Central & Hudson River Railroad Company was the actual and beneficial owner of such bonds and stock for several months before the commencement of this action. They were retained in the hands of Drexel, Morgan, & Co., not as owners or holders in their own right, but as agents or naked trustees for the New York & Northern Railway Company.

Central & Hudson River Railroad, and were clearly subject to the order and control of the latter. Moreover, the request that Drexel, Morgan, & Co. made to the plaintiff to commence this action was not only based upon the bonds owned by the New York Central & Hudson River Railroad Company and others it had contracted to purchase, but the sole purpose of that request was to procure a foreclosure, and thus enable the New York Central & Hudson River Railroad Company to acquire control of the property and franchises of the New York & Northern Railway Company for its own benefit, as set forth in the circular letter sent to the stockholders of the New York Central & Hudson River Railroad Company. The president of the latter company himself testified that that was the object and purpose which induced the sending of the notice requesting the commencement of this action. The notice given by the New York Central & Hudson River Railroad Company to its stockholders states the fact that on March 18, 1893, agreements had already been made in respect to the purchase of a controlling interest in the New York & Northern Railway Company, subject to the approval therein asked for. The letter of Drexel, Morgan, & Co. to the treasurer of the New York Central & Hudson River Railroad Company, dated April 5, 1893, shows that the majority of the stock and bonds mentioned therein was held by them, subject to the order of the New York Central & Hudson River Railroad Company, and that they had received the note of that company in payment therefor. Thus, it is obvious that this action was procured to be commenced by the New York Central & Hudson River Railroad Company, while it owned a majority of the stock and bonds of the New York & Northern Railway Company, for the sole and avowed purpose of obtaining control of its property and business, regardless of the rights of the minority stockholders or the owners of the remainder of the bonds. The appellants contend that the New York Central & Hudson River Railroad Company, as such majority stockholder, also acquired the entire control of the affairs of the New York & Northern Railway Company through its board of directors, who were willing to serve the interests of those owning a majority of the stock, as was indicated by the resignation of three of the directors, the appointment of others in their places, by the resignation of two officers who occupied important positions in the affairs of that company, and by the appointment of two officers in their places, who were in the employ of the New York Central & Hudson River Railroad Company, to discharge the duties of such officers, and compensated for their services by the New York Central & Hudson River Railroad Company. While the proof upon that question was not perhaps conclusive, yet the circumstances developed by the evidence plainly indicate that, after it became the owner of a majority of the stock and bonds, the New York Central & Hudson River Railroad Company dictated and governed the action of the board of directors, and controlled the management of the affairs of the New York & Northern Railway Company.

The facts already referred to are strong proof that the New York Central & Hudson River Railroad Company was in the control of the affairs of the New York & Northern Railway Company. It is hardly to be supposed that a board of directors which was not under the control of another corporation would appoint three of the friends of the president of that corporation as directors of the company, and place the officers of that company in control of its financial affairs, especially when it was the owner of competing lines of railroad. The clear and legitimate inference to be drawn from the circumstances proved in this case is that, after the New York Central & Hudson River Railroad Company purchased a majority of the stock and bonds of the New York & Northern Railway Company, it controlled its officers and directors as fully and completely as though they had been elected by its votes. All the facts and circumstances, so far as the defendants were permitted to prove them, tend to show that such was the situation. Indeed, it is a matter of common knowledge that, where the ownership of a majority of the stock of such a corporation changes, the board usually changes, unless its members are already in harmony with the policy of the purchasers.

On the trial the appellants sought to prove that after the New York Central & Hudson River Railroad Company became the owner of such stock and bonds, and while its officers were in substantial control of the New York & Northern Railway Company, they declined to accept traffic from other roads that would have produced a fund with which to pay the interest due on the bonds in question; that the income of the road which should have been employed to pay such interest was used for other and improper purposes; and that such action caused the inability of the New York & Northern Railway Company to pay the interest, and thus cure its default. This evidence was rejected as immaterial, and the appellants duly excepted.

In determining the correctness of the rulings made by the trial court, it becomes necessary to determine incidentally whether a corporation, purchasing a majority of the stock of another competing corporation, may thus obtain control of its affairs, cause it to divert the income from its business, or to refuse business which would enable it to pay the interest for which it was in default, and then institute an action in equity to enforce its obligations, for the purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, and they have no remedy; or, in other words, whether a court of equity, with those facts established, would lend its aid to such a stockholder, by enforcing the mortgage and decreeing a foreclosure and sale of the mortgaged premises, at its request, in its behalf, and to accomplish such a purpose. If it would, then the rulings of the trial court were proper; if not, then the appellants were entitled to prove those facts, and it was error to reject the evidence.

In *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527, in discussing a similar question, Judge Peckham, in effect, said that, although it is not every question of mere ad-

ministration or of policy upon which there might be a difference of opinion that would justify the minority in coming into a court of equity to obtain relief, yet, where the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders, an action may be maintained by the latter, where the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is with an intent to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests. In *Pondir v. New York, L. E. & W. R. Co.* 72 Hun, 385, 389, where the Erie Railroad Company, through the action of the Buffalo, Bradford, & Pittsburgh Railroad Company, whose directors were elected and controlled by the Erie Company, without consideration, obtained the property of the latter corporation, and so arranged its affairs as to render all the shares of its stock, other than those held by the Erie Company, valueless, it was held that a stockholder of the Buffalo, Bradford, & Pittsburgh Railroad Company might maintain an action to redress the wrong done to his company. In that case Mr. Justice Follett said: "This was a fraud on the Buffalo, Bradford, & Pittsburgh Railroad Company and its shareholders. Such frauds are not uncommon in the management of corporations, and when they are exposed should be condemned by the courts and a heavy hand laid upon all who participate in them." In *Barr v. New York, L. E. & W. R. Co.* 96 N. Y. 444, where the officers of another corporation had leased the property of the first corporation, controlled a majority of its stock, and conspired to compel the minority to sell its stock by refusing to pay the rent due, it was held that a court of equity, on the application of the minority, would compel the payment of the rent; and that, where the majority of the stockholders of a corporation are illegally pursuing a course which is in violation of the rights of the other stockholders, an action to obtain equitable relief may be maintained by an aggrieved stockholder. *Sage v. Cutver*, 147 N. Y. 241, is to the effect that, when it can be fairly gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is a presumption against in equity. In *Meyer v. Staten Island R. Co.* 7 N. Y. S. R. 245, it was held that a majority of the stockholders of a corporation would not be permitted to sanction a transaction which is the outcome of a scheme, dishonest or fraudulent in its inception, and that the minority stockholders have rights which under such circumstances must be recognized; that the majority may legally control the company's business, but, in assuming such control, they take upon themselves the correlative duty of diligence and good faith; and that they cannot manipulate the company's business in their own interests, to the injury of the minority stockholders. In *Ervin v. Oregon R. & Nav. Co.* 27 Fed. Rep. 630, it was held that when a number of stockholders combine to constitute themselves a ma-

majority, to control the corporation as they see fit; they become, for all practical purposes, the corporation itself, and assume the trust relation of the corporation towards its stockholders; and if they seek to make profit out of it, at the expense of those whose rights are the same as their own, they are unfaithful to the relation they have assumed, and guilty, at least, of constructive fraud, which a court of equity will remedy. In *Wright v. Oroville Gold, S. & C. Min. Co.* 40 Cal. 20, it was, in substance, held that in dealing with the relations between a corporation and its officers, on one hand, and the stockholders, upon the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interests of the stockholders; and that a court of equity will, at the instance of a stockholder, control the corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred. In *Meeker v. Winthrop Iron Co.* 17 Fed. Rep. 48, it was held that a majority of the holders of the capital stock of a corporation could not, by their votes in a stockholders' meeting, lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose, and exclusively owned by them, unless such lease was made in good faith, and supported by an adequate consideration; and that in a suit, properly prosecuted, to set aside such a contract, the burden of proof, showing fairness and adequacy, is upon the party or parties claiming thereunder. In *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, a railroad company purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and then, with the assent of such board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property. Under those circumstances the court held that, although the stockholders and creditors of the canal company could not, after the road had been completed, reclaim the property, or enjoin its use, yet they were not concluded by such agreement as to the price of the property, but might compel the railroad company to account for its additional value. In *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 23 L. ed. 493, it was held that the managers and officers of a company where capital is contributed in shares are in a very legitimate sense trustees, alike for its stockholders and its creditors, though they may not be trustees technically and in form. They, accordingly, have no right to enter into or participate in any combination the object of which is to divest the company of its property, and obtain it for themselves at a sacrifice. They have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. In case of embarrassment to the company, and any necessity to sell the estates of the company, it is

their duty to the extent of their power, to secure for all those whose interests are in their charge the highest possible price for the property which can be obtained. In *Menier v. Hooper's Teleg. Works*, L. R. 9 Ch. 350, it was held that, where a majority of a company proposed to benefit themselves at the expense of the minority, the court might interfere to protect the minority, and that in such a case the bill is rightly filed by one shareholder on behalf of the others, and against the company. In *Gregory v. Patchett*, 33 Beav. 595, where the only available property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby practically put to end, and this was sanctioned by a majority of the shareholders at a general meeting, it was held that a majority could not bind the minority in such a transaction; that where measures were adopted which were plainly beyond the powers of the company, and inconsistent with the objects for which the company was constituted, the court, at the instance of the minority, would interpose to prevent the performance of such an act.

While the opinions in the cases cited are instructive, and have an important bearing upon the question under consideration, still, within the limits of this opinion, we have found it impracticable to quote from the language of the courts in those cases. "The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority, upon an application by the latter." 2 Cook, Stock & Stockholders, 8d ed. § 662, p. 945. The same principle is stated in 1 Morawetz, Priv. Corp. 2d ed. § 529; 1 Beach, Priv. Corp. § 70; 2 Bigelow, Fr. § 645, and Beach, Mod. Eq. Jur. §§ 182, 686. *Hackettstown Nat. Bank v. D. G. Yuengling Brewing Co.* 20 C. C. A. 827, 74 Fed. Rep. 110, is to the effect that every delegation of power implies that it will be honestly exercised, and in that case it was held that the evidence offered upon the trial presented a question of fact for the jury whether a consent, given in pursuance of a resolution passed by a majority of the bondholders of a corporation, extending the time of payment of the principal and interest of its bonds, was given in good faith, in the common interest of all, or amounted to an unwarranted exercise of the power of the majority, because given in the interest of one bondholder, with a view of enabling him to compel the minority bondholders to sell their bonds on such terms as he might dictate. While the question in some of the cases cited arose between stockholders and the directors and officers of a company who, as such, held a position of trust as to the former, still where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of an-

other company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes, it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders, and therefore, under such circumstances, the rule stated in the *Sage Case* and other similar cases applies to majority stockholders who control the affairs of the company, as well as to its directors or officers. It is a controlling maxim that a court of equity will not aid parties in the perpetration or consummation of a fraud, nor give any assistance whereby either of the parties connected with the betrayal of a trust can derive any advantage therefrom. *Farley v. St. Paul, M. & M. R. Co.* 4 McCrary, 188, 14 Fed. Rep. 114. "It is a sound principle that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned." *Fleming v. Gilbert*, 3 Johns. 528, 531; *United States v. Peck*, 102 U. S. 84, 26 L. ed. 46; *Dolen v. Rogers*, 149 N. Y. 491.

The principle of these authorities renders it quite obvious that a corporation, purchasing a majority of the stock of another competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property, to the injury of the minority stockholders. Such a course of action is clearly opposed to the true interests of the corporation itself, and plainly discloses that one thus acting was not influenced by any honest desire to secure such interests, but that its action was to serve an outside purpose, regardless of consequences to the debtor company, and in a manner inconsistent with its interest and the interest of its minority stockholders.

The respondents, however, contend that the doctrine of the authorities cited is not controlling in this case, but that the New York Central & Hudson River Railroad Company had a right to purchase a majority of the stock and bonds of the New York & Northern Railway Company, for the express purpose of obtaining control of the affairs of the latter for its own use and benefit, and to thus acquire its property at less than its actual value, to the injury of the minority stockholders; and that such stockholders had no remedy, in law or in equity, to protect themselves against such action of the majority stockholders, although it diverted the income which should have been applied to the payment of such interest to other and improper purposes, and refused business which would have enabled the defaulting company to pay its interest. In other words, the claim of the respondents is, and the general term in effect held, that the purpose for which the New York Central & Hudson River Railroad Company obtained a majority of the stock and bonds of the New York & Northern Railway Company is entirely immaterial, and that, notwithstanding the existence of such a purpose, a court of equity will aid them in enforcing the mortgage. To sustain this contention, they cite *Morris v. Tuthill*, 72 N. Y. 575; 34 L. R. A.

Phelps v. Nowlen, Id. 89, 28 Am. Rep. 93; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 88 Am. Rep. 407; *Ramsey v. Erie R. Co.* 8 Abb. Pr. N. S. 174; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Simpson v. Dall*, 70 U. S. 8 Wall. 476, 18 L. ed. 267; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186; *Adler v. Fenton*, 65 U. S. 24 How. 407, 16 L. ed. 696; and *Beveridge v. New York Elec. R. Co.* 112 N. Y. 1, 2 L. R. A. 648. In *Morris v. Tuthill* the action was to foreclose a mortgage brought by an assignee. There was no question or principle of trust involved in that case. The plaintiff owed the defendant no duty, and hence it was held that under such circumstances the plaintiff had a right to maintain an action for the foreclosure of the mortgage, although he took title to it from motives of malice, and the assignor assigned the mortgage to him from a like motive. That that case was correctly decided we have no doubt, but it is clearly distinguishable in principle from the case at bar, and has no bearing whatever upon the question under consideration. In the *Phelps Case* it was held that a party was not liable for the consequences of an act done upon his own land, lawful in itself, which did not infringe upon any lawful right of another, simply because he was influenced in doing it by wrong and malicious motives, and that courts would not inquire into the motives actuating a person in the enforcement of a legal right. How the doctrine of that case is applicable to the question involved in this it is difficult to perceive. In that case the party simply exercised a lawful right, and the court held that no liability arose from his having done so. There the plaintiff owed the defendant no duty, and sustained no relation of trust towards him, and hence it is clearly distinguishable from the case at bar. The same may be said of *Chenango Bridge Co. v. Paige*, *Ramsey v. Erie R. Co.*, *Clinton v. Myers*, *Simpson v. Dall*, *Oglesby v. Attrill*, and *Adler v. Fenton*. We do not think these cases in any way aid the respondents. In the *Beveridge Case* this court held that all the powers conferred upon a corporation, unless otherwise expressly prescribed, must be exercised by its directors, who are constituted by law the agency for that purpose; that the consent or ratification by its stockholders was unnecessary, unless required by statute or its by-laws, and therefore that contracts which a corporation may legitimately make may be made by its board of directors, and, in the absence of fraud or collusion on the part of the directors, they are binding upon the corporation; that an appeal to equity on the part of the stockholders to be relieved from the acts of the directors, where they were within their powers, and apparently uninfluenced by corrupt motives or personal interests adverse to those of the stockholders, should, at least, be justified by some showing that the acts were improper, within the belief of a fair proportion of the stockholders. The principle enunciated and the decision made in that case are undoubtedly correct; but the question as to the right of a majority of the stockholders of a corporation to enforce its obligations as against the minority stockholders to their injury, by reason of a default caused by the wrongful act or omission

of the majority, was not considered or in any way involved. It, however, seems to recognize the principle that, where there is fraud or collusion, corrupt motives, or personal interest adverse to the stockholders, another rule would apply. As we have already seen, there are circumstances under which the majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents, and hence, where there are corrupt motives, personal interest, or fraud, the case cited is an authority to sustain the conclusion which we have already reached.

That any person or corporation authorized to do so might have purchased the bonds of the New York & Northern Railway Company, and have rigorously enforced them by a sale of its property, there can be no doubt. They might also have purchased the stock of the company, and thus have become the owners of both, and, while such owners, might have enforced the liability of the company upon its bonds, so long as they acted in good faith and their purpose was proper. But when the New York Central & Hudson River Railroad Company purchased the stock and bonds in question, thus obtaining a controlling interest in the affairs of the New York & Northern Railway Company, for the avowed purpose of destroying it, to serve a purpose entirely outside of that for which it was organized, and in hostility to it, it becomes clear that, as such stockholder, it owed a duty to the minority stockholders; that the law implied a quasi trust upon its part; and that a court of equity will not aid it in the destruction of that corporation, and a confiscation of its property, although it held a majority of its stock and the required amount of its bonds. Hence we are of the opinion that the court erred in rejecting, as immaterial, evidence offered by the appellants to show that after the New York Central & Hudson River Railroad Company became the owner of a majority of the stock and bonds of the New York & Northern Railway Company, and while its officers were in control of the latter corporation and its affairs, it declined to accept traffic from other roads, which would have produced a fund with which to pay the interest that was due; that the income of the road, which should have been employed to pay such interest, was used for other and improper purposes; and that such action upon the part of the majority stockholder occasioned the inability of the company to pay the interest and cure the default. To the rejection of this evidence the defendants excepted. We think many of these rulings were erroneous, and that the appellants had the right to make the proof offered, so far as it related to the transaction of the business of the New York & Northern Railway Company during the time the New York Central & Hudson River Railroad Company owned a majority of its stock, and controlled its affairs; and for the error in those rulings the judgment should be reversed.

On the trial the learned trial judge refused to find various facts, upon the ground that they were immaterial. It is manifest from an examination of the appellants' requests to find, and the rulings of the court thereon, that it refused to find many facts that were material to

sustain the appellants' defense, and which were established by the undisputed evidence in the case. This, we think, constituted error, as it is the duty of a trial judge to find upon every material question submitted to him and involved in the evidence. *Callanan v. Gilman*, 107 N. Y. 860, 372.

The respondent claims that, by virtue of the provisions of § 40 of the stock corporation law, the New York Central & Hudson River Railroad Company had the right to acquire the stock of the New York & Northern Railway Company. We do not deem it necessary to either discuss or decide that question, for, if it be admitted that the New York Central & Hudson River Railroad Company was authorized to purchase such stock and bonds, still nothing will be found in the statute which authorizes it to employ them for the purpose of destroying the property of the New York & Northern Railway Company, to the injury of its minority stockholders. If we are correct in our conclusion that a corporation cannot acquire the majority of the stock of another corporation, obtain control of its affairs, divert the income of its business, refuse business which would have enabled the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations against such company, with the avowed purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, then it follows that this question is entirely immaterial. If the New York Central & Hudson River Railroad Company had a right to purchase the stock and bonds of the New York & Northern Railway Company, it obtained no better title and secured no greater right than any other stockholder would have acquired under a similar purchase. The right to purchase, even if given by statute, conferred upon the purchaser no authority to employ the stock and bonds for purposes condemned by the principles of equity.

The appellants also contend that the plaintiff had no authority or right to bring this action in the form in which it was brought, as it had not received a valid request to do so from a sufficient number of bondholders. The mortgage provides: "In the event of any of the defaults mentioned in the next preceding article, the party of the second part may, and, upon the written request of the holders of \$2,000,000 in amount of said bonds then outstanding and unpaid or unredeemed, the party of the second part shall apply to any court having proper jurisdiction in the premises for a foreclosure and sale of the mortgaged premises." The plaintiff, in its complaint, alleged that it had received a written request, signed by the holders of more than \$2,000,000 in amount of said bonds outstanding and unpaid or unredeemed, requesting it to bring proceedings for the foreclosure and sale of the property and premises covered by this mortgage. The only request which was made to the trustee was that made by Drexel, Morgan, & Co., who stated therein that they were the holders of \$1,700,000, and represented the owners of \$896,000 of such bonds. It was upon this request alone that the action was instituted. The proof tends to show that, although bonds to the amount of \$1,700,000

were in their hands, yet that they were not in fact the owners of such bonds, but they belonged to the New York Central & Hudson River Railroad Company. The proof also tends to show that the other bonds which they claimed to represent were not owned by Drexel, Morgan, & Co., but were bonds which the New York Central & Hudson River Railroad Company had made a contract to purchase. Thus, we have a request for foreclosure by a firm who, in fact, was not the owner of any portion of the bonds upon which the request was based. It is true that \$1,700,000 of the bonds were in their possession, but it clearly appears from the evidence they had been purchased and paid for by the New York Central & Hudson River Railroad Company, and were held by them subject to its order. It is also true that the contract with the New York Central & Hudson River Railroad Company for the purchase of the other bonds referred to in such request contained a provision that they might be used by Drexel, Morgan, & Co. for the purpose of reorganizing the New York & Northern Railway Company. Without any lengthy discussion of this question, it would seem that the purpose of this provision in the mortgage was to prevent the trustee from being compelled to foreclose the mortgage except upon the request of the owners of \$2,000,000 in amount of the bonds. If such was its purpose, and such is a proper construction of that provision of the mortgage, then, manifestly, the request was insufficient, as it was not thus made.

It is, however, contended that, inasmuch as the plaintiff had the right of its own motion or in its discretion to commence this action without any request whatever, it follows that the action, having been commenced, was properly begun, and the appellant's contention cannot be sustained. The mortgage provides for two cases in either of which the action might be properly commenced. The trustee might act upon its own motion, and exercise its own judgment and discretion upon the question whether it was for the interest of the bondholders and all concerned to have the mortgage foreclosed; and, if it so determined it might institute an action for its foreclosure, although no request whatever was made. On the other hand, it might be required to institute such an action upon the written request of the owners of \$2,000,000 of the bonds, notwithstanding the fact that it might be opposed to such a course, and it was contrary to its judgment. One provision is permissive only, while the other is mandatory. It does not necessarily follow, because the plaintiff might have instituted this action in the exercise of its discretion, but was induced to bring it, relying

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upon a request that was invalid, that it may now be upheld upon the ground that it possessed a discretion which it never exercised. The action was brought upon the theory that the holders of \$2,000,000 of the bonds had made a proper written request upon the plaintiff to commence it. Such having been the original character of the action, as indicated by the complaint, can it now be said that, although no proper request was made, yet the action may be maintained, because the plaintiff might, in its discretion, have determined to bring the action, although there had been no request. It would seem that under the provision of the mortgage permitting the plaintiff to bring this action, to some extent, at least, the question whether or not it would foreclose the mortgage, and declare the whole amount due, was one of judgment and discretion to be exercised by it before the commencement of the action. Not having voluntarily sought to thus enforce the obligations of the company, but having had served upon it a request which purported to be signed by the holders of \$2,000,000 of the bonds, and having commenced the action in pursuance of that request, we regard it as at least doubtful if it can now be maintained upon the ground that it was voluntarily commenced by the plaintiff if the request was invalid. But it is, perhaps, unnecessary to determine that question.

There are several other questions raised by the appellants, but, as the judgment must be reversed for the errors already pointed out, it is unnecessary to discuss or determine them.

The consideration of the questions involved in the case has led us to the conclusions that the learned trial judge erred (1) in refusing to find material facts upon the ground that they were immaterial; (2) in declining to find other facts which were material, and established by the uncontradicted evidence; (3) in rejecting as immaterial evidence offered by the appellants tending to show that the New York Central & Hudson River Railroad Company, while in control of the affairs of the New York & Northern Railway Company, declined to accept traffic from other roads, which would have produced a fund with which to pay the interest due upon the bonds in suit; and (4) in rejecting as immaterial evidence to show that the income of the road, which should have been employed to pay the interest on such bonds, was used for other and improper purposes.

We think *the judgment should be reversed*, and a new trial granted, with costs to abide the event.

All concur, except **Andrews, Ch. J.**, and **Gray, J.**, not voting.

FLORIDA SUPREME COURT.

Mathew PRINE, *Appt.*,

v.

Lucy PRINE.

(36 Fla. 576.)

*1. Our statute in reference to the allowance of alimony to a wife in cases where she is a party defendant refer exclusively to cases of divorce. Where the suit is brought by the putative husband to obtain a decree declaring the marriage void *ab initio*, a court of chancery has power to grant alimony to the putative wife, independent of the statute, and as incident of the jurisdiction of the court in such cases.

*2. In a suit brought by a husband against a putative wife to annul the marriage relation, where the fact of marriage is *prima facie* established, and the husband has means wherewith to live and to litigate, and the wife is destitute, the husband must furnish the wife the means of subsistence while the suit is pending, and to enable her to maintain her defense. The allowance in such a case upon a proper showing, of temporary alimony, counsel fees, and suit money to the wife while the suit is

*Headnotes by LIDDON, J.

NOTE.—Effect of intoxication on marriage.

The rule laid down in the principal case, that a marriage by one who at the time is so much intoxicated as to be *non compos mentis*, and does not know what he is doing, and is for the time deprived of reason, is invalid, but is valid if the intoxication is of a less degree, though perhaps more strict than the doctrine applicable to contracts in general as affected by intoxication, is not unsupported by authority, a number of cases requiring intoxication to amount to or be equivalent to actual insanity to invalidate a marriage.

Thus, the intoxication which will invalidate a marriage must have been such as to deprive the party of all sense of volition and to render him incapable of knowing what he is about. *Roblin v. Roblin*, 28 Grant, Ch. (U. C.) 490.

And insanity which does not render the party *non compos* does not disqualify him for marriage. *Leggett v. O'Brien*, Milw. Eccl. Rep. 323.

So, insanity from delirium tremens at the time is sufficient to avoid a contract of marriage. *Clement v. Mattison*, 3 Rich. L. 98.

And the question whether a party to a marriage was really insane from delirium tremens, or only intoxicated, in an action involving the validity of the marriage, is a question of fact for the jury. *Ibid.*

But a marriage is valid, though the husband was suffering from delirium tremens at the time, when it took place during a lucid interval and he was able to discuss and arrange the terms of the marriage settlement. *Scott v. Paquett*, 17 Low. Can. R. 238.

And the drunkenness of a party to a marriage, though induced by persons having an interest, by discreditable arts, and even though of such a degree as to render him unable to comprehend and understand the nature and obligation of the engagement and relation he was entering into, is not insanity within the meaning of the provision of the Delaware Revised Code, giving the superior court sole cognizance to decree marriages null and void when either of the parties was at the time insane. *Elzey v. Elzey*, 1 Houst. (Del.) 308.

So, a marriage is not rendered invalid by the fact

pending in the appellate court, is not an exercise of original jurisdiction, but is essential to the proper and impartial administration of justice in the exercise of appellate jurisdiction.

*3. In order for an appellate court to make an allowance of alimony, counsel fees, and suit money while the case is pending in such court, it should have some other proof than that taken in the court of original jurisdiction, when a similar application was made to and granted by such court. Such relief in an appellate court is not a matter of course, and can only be granted upon proof made in such appellate court showing the continuance of the necessities of the wife, and also the ability of the husband. (*Liddon, J.*, agreeing to this headnote so far as it relates to counsel fees and suit money, but not as to alimony.)

*4. This court will not reverse the decree of the circuit court as being against the evidence where the evidence is conflicting upon the subject of the mental capacity of one who enters into a marriage contract, where there is sufficient evidence, if believed, to show that the party was not deprived of the use of his reasoning faculties at such time, and where the uncontradicted evidence shows that the party has repeatedly since the marriage ratified the same by cohabitation with the other party thereto.

that the husband had been found an habitual drunkard by inquisition and a committee of his estate appointed, though a contract for the payment of money in consideration of the marriage would be thereby invalidated. *Imhoff v. Witmer*, 31 Pa. 243.

And an adjudication of the probate court that a person was incapable of taking care of himself or of his property by reason of intemperance or habitual drunkenness, appointing a guardian of his person and property, is *prima facie* only, and not conclusive, evidence of his want of capacity to contract marriage. *McCleary v. Barcalow*, 6 Ohio C. C. 481.

And one who relies upon insanity of a temporary nature, like intoxication which comes and goes with the exciting cause, to invalidate a marriage, must show its existence and operation at the very time the ceremony is pronounced. *Leggett v. O'Brien*, *supra*.

In *Johnston v. Brown*, 2 Shaw & D. 437, however, it was held that a marriage is invalid and will be set aside where it is proved that the woman married was in such a state of stupefaction, occasioned by intoxication, at the time as to be incapable of giving a rational consent, or of understanding what she did.

But a marriage entered into while the man was so intoxicated as to be incapable of understanding what he was about is voidable only and not void, and may be ratified and confirmed. *Roblin v. Roblin*, 28 Grant, Ch. (U. C.) 490.

And a memorandum indorsed on the record by the defendant, in an action brought for necessities furnished to a woman alleged to be his wife, for expenses incurred in the burial of her child, in which the validity of the marriage was put in issue, in which he admitted its existence and validity and consented to a verdict for the plaintiff, is a sufficient ratification and confirmation of the marriage claimed to have been invalid on the ground of his intoxication at the time. *Ibid.*

The effect of intoxication as a ground of divorce from a marriage which was valid when made is not here considered, but will be treated in a separate note.

F. H. B.

5. If a party at the time of entering into a marriage contract is so much intoxicated as to be *non compos mentis*, and does not know what he is doing, and is for the time deprived of reason, the marriage is invalid; but is not invalid if the intoxication is of a less degree than that stated.
6. A marriage invalid at the time for want of mental capacity of one of the parties thereto may be ratified and made valid afterwards by any acts or conduct which amount to a recognition of the same.

(December 19, 1893.)

A PPEAL by complainant from a decree of the Circuit Court for Duval County in favor of defendant in a proceeding to annul a marriage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henderson & Raney for appellant.

Mr. M. C. Jordan for appellee.

Liddon, J., delivered the opinion of the court:

The appellant filed his bill in chancery against the appellee in the circuit court to set aside a marriage between them. The grounds upon which the said marriage was sought to be nullified were, that on the 14th day of February, A. D. 1893, the day when the marriage ceremony was performed, and for some days previous thereto, the complainant was and had been in a state of intoxication from the use of ardent spirits; that he was deprived of his reason, and in such mental condition that he did not know what he was about, and was to all intents and purposes *non compos mentis*, and that the defendant took advantage of his condition and proceeded to have the marriage ceremony performed; that complainant repudiated the transaction as soon as he became sober enough to realize what had happened, and has ever since refused in any manner, shape, or form to recognize it, and has never since lived or in any manner cohabited with the defendant, and would never cohabit with her because she had for years previous to said marriage been a person of notorious bad character and reputation. The prayer of the bill was, that such marriage be declared null and void *ab initio*.

The answer of the defendant admitted the marriage, and emphatically and specifically denied all the allegations of the bill as to the intoxication of complainant and his mental condition at the time of the marriage ceremony, and that defendant took any fraudulent or unfair advantage of him, or that he was in any such condition that defendant could have taken any such advantage of him in having the marriage ceremony performed. The answer alleges that at the time of the marriage ceremony the complainant was perfectly sober and *compos mentis*; that she did not procure the performance of said marriage ceremony, but remained passive while the complainant procured the same. The answer alleges that the complainant knew before and at the time of the marriage that the defendant had not been of chaste character, and sets out in considerable detail the circumstances

of the courtship and marriage of the parties. The answer also emphatically denied that the complainant had refused to recognize the marriage, or had repudiated the same; but, on the contrary, expressly alleged that the defendant had in many ways ratified such marriage and consummated the same by cohabitation. The details of acts constituting such ratification and cohabitation were fully set out in the answer. Among other things upon these points it is alleged that after the marriage the complainant took the wedding party to a dwelling house owned by him, and asked defendant how she would like it for a home, and after her inspection of the house and expressing satisfaction, gave her the keys, and instructed her to move her household goods at once to the same, which should be their future home, and during the same day in company with defendant and the wedding party of four persons all told went to his bank where he drew \$25 and gave to the defendant to defray the expenses of such removal; that the wedding party rode around in a carriage and enjoyed themselves until it was too late to remove to the house agreed upon on the day of the marriage but complainant and defendant agreed that such removal should take place the next day. The answer alleges that the complainant cohabited with and spent the night succeeding the day of the marriage and the next afternoon with the defendant, and that on the night of the 16th of February, two days after the marriage, the parties cohabited and spent the night, or the greater part of the same, together in the house of one Carrie Williams. The answer also alleges that the defendant when she married "then and there resolved and determined to make the complainant a good and faithful wife, and turning her back to the past, to live a better life," and that she is in destitute circumstances, poor and without the means of subsistence, unable to obtain any employment or earn anything by her own labor, as all lawful avenues for a livelihood are barred against her, and that it seems to be the purpose of complainant to drive her into the paths of evil and vice by starvation, neglect, and cruelty; that complainant was possessed of considerable property, both real and personal, from which he derives an income of about \$500 per month; that defendant has no means of employing counsel or defraying the expenses of maintaining her defense; that she relies upon the court to award her temporary alimony and suit money, including counsel fees, to enable her to meet the complainant upon equal ground.

To this answer complainant filed a general replication. Further proceedings were had in which the case was referred to a master to take testimony and report as to the amount proper to be allowed the defendant as temporary alimony and counsel fees. The report was filed and exceptions thereto overruled, the master's recommendations adopted, and defendant allowed \$15 per week alimony *pendente lite*, and \$100 counsel fees. No argument is made upon this matter, and greater detail of statement of it need not be given. Voluminous evidence upon this subject, of reasonableness of attorney's fees, and the is-

sues in the case, appear in the record. The final decree of the court dismissed complainant's bill at his costs, and directed that the complainant pay the defendant \$300 for the services of her solicitor in defending said cause in her behalf. From this decree complainant appealed.

After the case was brought here upon appeal the appellee filed her petition and motion thereon for an order requiring appellant to pay her the sum of \$15 per week as temporary alimony, as was decreed in the lower court to be reasonable, and such other sum as the court should deem reasonable, and also to pay her costs of said motion and other costs and solicitor's fees. The petition for reasons why the relief prayed for should be granted, in substance, alleged that appellee was without means of support; that she had no property or resources by which she could maintain herself or employ counsel during the pendency of the cause in this court; that in the circuit court an order was made, after testimony taken on both sides by a special master, allowing her \$15 per week for alimony, and counsel fees; that by reason of the appeal to this court only a portion of said alimony and counsel fees had been paid; that the appellee, as will appear by the testimony taken in the cause, and in the record in this court, is a man possessed of large means and resources, and is amply able to support her, and to pay a reasonable solicitor's fee to enable her to maintain her defense in this case. The appellant filed an answer resisting the petition upon the ground alleged, that the appellee has ever since the rendition of the final decree by the circuit court on the 23d of February, 1893, and still continues to lead, a lewd life, and has supported and still continues to support herself through and by means of such lewdness. The answer also alleged that the allowance by the circuit court of alimony and counsel fees was excessive and should not be taken as a basis for allowances pending the appeal. To this answer the appellee filed a replication emphatically denying all the material allegations of the answer as to her lewdness. This replication also alleged the great want and destitution of appellee, and contained recriminatory allegations to the effect that the complainant had, ever since his appeal was taken to, this court, vigorously endeavored to prevent the appellee from living an honest and virtuous life, and constantly pursued her with designs of driving her into a life of prostitution. The details of such general allegations are set out in the replication, but are unnecessary to be stated here. At the time of filing the replication, appellee also filed an affidavit alleging her destitution, and denying that she leads, or has lead, a lewd life as alleged in the answer.

The petition for alimony, being preliminary and ancillary to the main suit, is pressed by appellee so that it in natural order would come on for disposition before the main suit is reached upon the docket. As it seemed to us necessary, in order to properly dispose of this branch of the case, to examine the whole record, we have determined to dispose of the whole case in one opinion—the

appeal as well as the petition for alimony and counsel fees. We are of opinion that the decree of the court below should be affirmed, but a majority of the court think that alimony *pendente lite* should not be granted in this court. Least there be some misapprehension of our position in the matter, we will state as briefly as the novelty and importance of the questions will admit those conclusions upon which the court is united, as well as those upon which it is divided. We are agreed upon all propositions announced except when otherwise expressly stated. We will first touch upon the power of the court to grant alimony in a nullity suit. Neither party to the record disputes such power. Yet, as the allowing of alimony in such cases cannot be justified under our statutes, which, in proceedings where the wife is a defendant, refers exclusively to cases of divorce, and as the question has never before arisen in this state, we think it best to refer to the principles of law controlling such cases, and cite some authorities in support of the same. In a number of cases it has been held that independent of statutory authority the courts have power to grant alimony and suit money in such cases brought by the putative husband. Where the form of relief prayed for in such cases is for a divorce on the ground of the nullity of the marriage, it has been held that statutory provisions in reference to alimony similar to ours applied only to divorces for causes arising after the marriage, but that in actions for divorce on the ground of nullity, the power exists independent of statute as an incident to the jurisdiction of the court in such cases. *O'Dea v. O'Dea*, 31 Hun, 441; *Griffin v. Griffin*, 47 N. Y. 184; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460. The case of *Griffin v. Griffin*, *supra*, in the relief sought, was very much like the present. The court said: "It is conceded that there is no statute in terms authorizing the order, and that, if sustained, it must rest upon the incidental powers formerly vested in the court of chancery, in cases of this description, and to which the supreme court has succeeded. . . . Yet it has been the constant practice of the court of chancery, both before and since the Revised Statutes, to make equitable provision for all these matters; and in so doing, it has been guided by the decisions of the ecclesiastical courts of England in similar cases," citing a number of English authorities. "This has not been done upon the theory that the court of chancery of this state was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, or that . . . it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our own statutes; but upon the ground of the general equitable jurisdiction of the court, and also that when our statutes did confer jurisdiction upon the court of chancery, in those actions for divorce which by the English law are solely cognizable in the ecclesiastical courts, the grant of that jurisdiction carried with it by implication the incidental powers which were indispensable to its proper exercise, and not in conflict with

our own statutory regulations on the same subject." To same effect is *Lee v. Lee*, 66 How. Pr. 207. 2 Bishop, Mar. Div. & Sep. § 725; note to *Methvin v. Methvin*, 60 Am. Dec. 676, citing various authorities.

The appellant has not disputed our power to grant the alimony and suit money pending proceedings here, yet, as this question is a new and novel one, this being the first application of the kind ever addressed to this court, and as there is conflict in the authorities, we have thought it best to give some expression of opinion and reference to the state of the law upon the subject. This court, under our Constitution, has only appellate jurisdiction in cases in equity originating in the circuit court. The question which caused us some difficulty was whether the allowance of alimony in this court would not be an exercise of original, instead of appellate, jurisdiction, and beyond our constitutional powers. In examining the question we ascertain that a number of appellate courts have granted alimony and suit money, while the case was pending in such courts on appeal. In many of these the question of the power to make the order was not discussed. The court assumed the power as a matter of course, and it seems no objection was made thereto. In other cases the relief has been refused upon the merits, the court assuming that it had jurisdiction and power to grant the relief if a proper case had been presented, and in some cases the power is expressly asserted. *Vanduser v. Vanduser*, 70 Iowa, 614; *Krause v. Krause*, 88 Wis. 354; *Wagner v. Wagner*, 86 Minn. 239; *Chaffee v. Chaffee*, 14 Mich. 463; *Van Voorhis v. Van Voorhis*, 90 Mich. 276; *Day v. Day*, 84 Iowa, 221; *Browne, Divorce & Alimony*, p. 248; *Zeigensfuss v. Zeigensfuss*, 21 Mich. 414; *Lake v. Lake*, 16 Nev. 363; *Weishaupt v. Weihaupt*, 27 Wis. 621; *Disborough v. Disborough*, 51 N. J. Eq. 806.

The question of the jurisdiction of an appellate court to grant the relief was expressly raised and decided in *Goldsmith v. Goldsmith*, 6 Mich. 285. The husband in that case objected to the allowance being made by the appellate court upon the ground that the jurisdiction of such court only authorized it to review and pass upon the decree and proceedings appealed from. The court overruled the objection and held that it had power to award the alimony pending appellate proceedings. The fullest discussion of the subject we have seen is in *Lake v. Lake*, 17 Nev. 280. In that state the constitutional grant of jurisdiction to the supreme court, in so far as it affects the point under consideration, is identical in terms with the section of our Constitution regulating the jurisdiction of this court. An application for suit money was made in the supreme court, and resisted on the ground that it would be an exercise of original jurisdiction. The court held otherwise and made an allowance for counsel fees and costs, and fortified its position by elaborate argument and citation of authorities. In that case the wife was defeated in the court below, and was the appellant. The gist of the conclusion of the court is stated as follows: "The law gives

appellant in this case the right to appeal from that part of the judgment disposing of the property, and accords to her every privilege granted to other litigants in this court. Upon her rests the burden of showing error in the court below. Among all the rights to which she is entitled, there is no one more important to her and the court than that of having the aid of counsel learned in the law and acquainted with her case. Without such aid the court must perform the double and inconsistent functions of court and counsel, or she with no knowledge of the principles, or experience in the practice of the law, must cope with counsel of ability in a profession which, most of all, requires a familiarity with all knowledge, and most of all offers success to him who knows best how to put in practical use the knowledge he possesses. Without counsel the statute of the state and the rules of the court cannot be complied with. Without them the good order and wellbeing of the court would be disturbed, and it would be deprived of one of the usual, proper, and necessary means of exercising its appellate jurisdiction."

In the case before us the merits of the application are much greater. Here the wife has won in the court of original jurisdiction, and prima facie the merits of the controversy are with her. To grant her alimony and suit money would certainly be in accordance with the principle universally prevalent, that where the fact of marriage is prima facie established, and a suit, especially a suit by the husband, is brought to annul the marriage or the marriage relation, and the husband has means wherewith to live and to litigate, and the wife is destitute, the husband must furnish the wife the means of subsistence while the suit is pending, and to enable her to maintain her defense. We do not believe it would be under such circumstances an exercise of original jurisdiction for us upon a proper showing to grant the wife the means of subsistence, while her case is pending in this court, but that such an allowance is essential to the proper and impartial administration of justice in the exercise of our appellate jurisdiction. If she has not the means to live and to employ counsel to present her case to the court, so that it may be fully advised as to the merits of her side of the controversy, how can it be said that there is a fair, even-handed, impartial administration of justice between her and the appellant, who has abundance of means of support, and to employ able and ingenious counsel to present his case in its most favorable aspects.

We have been able to find only two cases in which appellate courts have refused such applications for relief, without reference to the merits of the case. In one of these cases, *Hunter v. Hunter*, 100 Ill. 477, no reason was given for refusing to entertain the application, except that it had not been the practice of the court, "at least for many years," to entertain such applications, and that such applications were left to the court from which the appeal was taken. The case, however, of *Reilly v. Reilly*, 60 Cal. 624, emphatically determined that the appellate

court had no jurisdiction to make an order for alimony pending appeal; that the jurisdiction invoked by the application was original instead of appellate. This case also decided that the jurisdiction to grant such alimony, even pending appeal, was vested in the court from which the appeal was taken. As to the jurisdiction being vested in the court from which the appeal was taken, the contrary doctrine is established in this state in the case of *State, Shrader, v. Phillips*, 33 Fla. 408, where this court held that pending an appeal, with supersedeas, the circuit court was without power or jurisdiction to entertain proceedings for alimony and suit money. The reasons given for the action taken in *Hunter v. Hunter*, and *Reilly v. Reilly*, *supra*, have no application to this state, and we do not regard them as of great weight or value in determining the matter. Therefore if this court has not the power to entertain proceedings under such circumstances, no such power is vested in any court, and a great and humane principle of the law would, so far as it relates to cases pending on appeal, be practically abolished in this state.

Recurring, then, to the merits of the application for alimony, the majority of the court are of the opinion that no alimony and counsel fees and suit money can be allowed on this application, other than court costs, for the reason that the appellee has not furnished us with proof of her own necessities for support, as well as the means and ability of the appellant to contribute to such support during the pendency of the case here, the period for which alimony is asked. Neither has she offered any proof as to the value of services of her solicitor in the necessary proceedings here, or as to what would be reasonable suit money in this court. They are of the opinion that we cannot take judicial notice of the value of the services of her solicitor, nor of the amount necessary for suit money, and that in order to make an allowance for alimony here we should have other proof than that taken in the circuit court when a similar application was made to that court and granted; that such relief is not a matter of course, but can only be granted upon proof made here showing the continuance of the necessities of the wife and also the ability of the husband.

The member who prepares this opinion agrees with the other members in declining to allow counsel fees and suit money, but thinks the temporary alimony should have been allowed. The reasons impelling him to this view are that the necessary amount of such alimony was ascertained by a master and approved by the circuit court after the taking of testimony. The petition sets this matter up. The appellant does not allege that there has been any change whatever in the circumstances of either party since the circuit court made the order allowing \$15 per week temporary alimony. The allowance by the circuit court is alleged to be excessive, but no reasons are given upon which the allegation is predicated. He thinks that there is sufficient in the petition, answer, and record to show what would be a proper

amount for such temporary alimony, and that an allowance of same should be made.

In this case an issue was made upon the answer of appellant to the petition for alimony. No testimony has been taken or any affidavits or proofs whatever offered by either party except an affidavit of appellee referred to. No question as to the proper practice as to taking of testimony in such cases has been presented to us, and we therefore do not attempt to decide what practice should be pursued in obtaining and offering evidence in such cases in an appellate court.

We come now to the consideration of the merits of the appeal. Several assignments of error are filed, but the only one argued is, that the court erred in rendering the final decree in the case. We will not attempt to set out the testimony taken in the case. To do so would require much space, time, and labor, and not greatly subserve any very useful purpose. Upon the subject of the intoxication of the complainant at the time of the marriage ceremony, the evidence was extremely conflicting. There was certainly testimony which, if believed, proved that the complainant was so much under the influence of intoxicants as to be wholly incapable of entering into any contract. This evidence, however, was contradicted by other evidence which, if true, showed, if the complainant was intoxicated at all, it was to a very slight extent and not sufficient to deprive him of the use of his reasoning faculties. Upon this point we cannot say that the decree of the court was against the weight of evidence. Repeated acts of cohabitation when the complainant was sober, subsequent to and ratifying the marriage, were proved upon the part of the appellant, and he made no effort whatever to contradict the same. The amount of solicitor's fees allowed by the decree was less than was shown to be reasonable and proper by the undisputed testimony of members of the bar. The decree was in all respects in accordance with the evidence in the case. As to the law applicable to the facts, it cannot be doubted that if the party at the time of entering into the contract was so much intoxicated as to be *non compos mentis*, and does not know what he is doing, and is for the time deprived of reason, the marriage is invalid; but is not invalid if the intoxication is of a less degree than that stated. 1 Bishop, Mar. Div. & Sep. §§ 607 *et seq.*; Browne, Divorce & Alimony, p. 197. On the other hand, it is equally well established that a marriage invalid at the time for want of mental capacity, may be ratified and made valid afterwards by any acts or conduct which amount to a recognition of its validity. A lunatic on regaining his reason may affirm a marriage celebrated while he was insane, and this without any new solemnization. *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Sabatot v. Populus*, 31 La. Ann. 854; 1 Bishop, Mar. Div. & Sep. §§ 614, 624; Browne, Divorce & Alimony, pp. 206, 207.

The appellant, in view of what he calls his unfortunate situation, asks us to take the most favorable view which the law as applied to all the testimony shown by the record

will permit to be given his case. This we have been inclined to do, but have not been able to reach a different conclusion from that announced by us, without doing violence to the law and the testimony. The situation of the appellant is indeed a peculiar one. He is married to a woman who, the evidence clearly shows, before her marriage was a public prostitute. The appellant was fully acquainted with her and her character and reputation. The large allowance against him for alimony and suit money, and the costs decreed against him,

make him pay dearly for his folly. By his own rash and reckless conduct he has placed himself in a position from which we, upon this record, have no power to extricate him. The appellant is ordered to pay both the costs of the application for alimony and the costs of appeal.

The petition for alimony, counsel fees, and suit money, except as to court costs, is denied.

The decrees of the Circuit Court dismissing the bill of complaint and awarding counsel fees against appellant are affirmed.

PENNSYLVANIA SUPREME COURT

Borough of DU BOIS, *Appt.*,
v.
DU BOIS CITY WATERWORKS COM-
PANY *et al.*

(176 Pa. 430.)

1. **The cancelation of a contract by a municipality for a water supply** will not be made by a court of equity merely because of the inadequacy of the supply, for which the water company is not in fault but which is due to the inadequate capacity of the springs which the contract requires the supply to be obtained from.

2. **A reformation of a contract for a municipal water supply** because of a mutual mistake of the parties as to the adequacy of the stipulated source of supply is within the power of the court under act of April 29, 1874, § 84, cl. 3, giving power on a bill filed by any citizen to make such order as may seem just and equitable for the correction of the alleged impurity or deficiency of the water supply.

(July 15, 1896.)

A PPEAL by defendants from a decree of the Court of Common Pleas for Clearfield County canceling a contract for the furnishing of a water supply. *Reversed.*

The borough of Du Bois entered into a contract with the United States Waterworks Company, Limited, by which the company agreed to furnish the borough with the water supply as specified in the contract. This contract was assigned to defendant, the Du Bois City Waterworks Company. The borough filed a bill to have the contract annulled upon the ground that the company had failed to carry out the provisions of its contract.

Further facts appear in the opinion.

Mr. A. L. Cole for appellant.

Messrs. W. C. Pents and George A. Jenks, for appellee:

The contract in this case is executory.

So long as a contract continues executory, it may not only be impeached for fraud or mistake, but any invalidity which would be a defense at law would, in general, be ground for cancelation in equity.

Nace v. Boyer, 30 Pa. 99; *Simes v. Everson*, 46 Pa. 304.

A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific execution, but it cannot be a ground for altering its terms.

Schettiger v. Hopple, 3 Grant, Cas. 55; *Adams*, Eq. 411; 15 Am. & Eng. Enc. Law, p. 643.

The courts are not powerless to give relief in this case.

Wilson v. Getty, 57 Pa. 266.

"A defective, negligent, and worthless performance is the same as no performance at all."

Miller v. Phillips, 31 Pa. 218.

Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree, which justice or the rights of the parties may require.

Dull's Appeal, 118 Pa. 510; *Kay v. Seates*, 87 Pa. 31, 78 Am. Dec. 899; *Stewart's Appeal*, 78 Pa. 88; *Martin v. Graves*, 5 Allen, 601; 3 Dan. Ch. Pr. & Pl. p. 1961, note 1; *Pom. Eq. Jur.* 2d ed. vol. 1, § 221, p. 288, and note 1, also vol. 2, § 870, pp. 1218, 1214; 8 *Pom. Eq. Jur.* § 1309, pp. 2148, 2149.

Mitchell, J., delivered the opinion of the court:

The power of a court of equity to compel the cancelation of a contract, though well established, is very exceptional in its character. Its purpose is never to interfere with the freedom of contract, or with proper legal liability, even for bad bargains, but only to supplement the powers of courts of law where there is exceptional equity of a settled and recognized

NOTE.—As to the forfeiture of the charter of a water company for failure to make proper supply of water, see *Capitol City Water Co. v. State*, *MacDonald* (Ala.) 29 L. R. A. 743; and *State*, *Mylrea*, *v. Janesville Water Power Co.* (Wis.) 38 L. R. A. 891.

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As to the liability for loss of property by fire on account of deficient water supply, see *Howson v. Trenton Water Co.* (Mo.) 23 L. R. A. 146, and note; also *Springfield F. & M. Ins. Co. v. Keeseville* (N. Y.) 30 L. R. A. 660.

kind. Hence it is never to be exercised except in very clear cases and for definite cause. The causes which will justify it were stated as long ago as *Delamater's Estate*, 1 Whart. 362, and experience and the amplification of equity powers in sixty years have not furnished any instance of their enlargement. In that case Chief Justice Gibson said: "The grounds on which equity interferes for rescission, are distinctly marked, and every case proper for this branch of its jurisdiction is reducible to a particular head. They are principally fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of *quia timet*." In *Yard v. Patton*, 13 Pa. 278, this language was quoted as authoritative, and it was added that each of these causes should be established by positive and definite proof. In *Graham v. Pancoast*, 30 Pa. 89, it was said by Strong, J.: "Inadequacy of price, improvidence, surprise, and mere hardship, have each been held sufficient to stay the active interposition of a chancellor. Yet no one of these, nor all combined, furnishes an adequate reason for a judicial rescission of a contract. For such action something more is demanded, —such as fraud, mistake, or illegality." In *Rockafellow v. Baker*, 41 Pa. 319, 80 Am. Dec. 624, it was said: "Our interposition is invoked, not to carry out and accomplish what the parties have begun, but to undo what the parties have accomplished. How narrow the grounds are upon which a court of equity will interpose for such a purpose, and how cautious and reluctant its steps will be in that direction, were fully shown in *Graham v. Pancoast*, 30 Pa. 97, and *Nace v. Boyer*, Id. 109. Nothing but fraud or palpable mistake is ground for rescinding an executed contract." And in *Stephen's Appeal*, 87 Pa. 202, it was said: "No fraud or mistake, or turpitude of consideration and circumstances entitling her to relief on the principle of *quia timet*, are proved. Nothing less than one of these clearly established would justify the court in ordering the rescission of an executed contract." No case has gone beyond these; and while we do not say that a wilful and obstructive refusal to perform a contract, under circumstances which practically prevent the party aggrieved from entering into another, may not afford ground for equitable cancellation, yet some such special grounds must appear in order to take the case out of the general rule that remedy for mere breach must be sought at law.

Tested by these settled principles, there is no case here at all for the court's interference. Neither the bill nor the findings of fact under it charge any fault to the defendants. They show a want of strict performance, but they also show that strict performance was impossible, not from any lack of effort on the part of the defendants, but because the contract limits the source of supply to springs on the Du Bois land, and those springs are inadequate to furnish the needed quantity of water. The utmost that is made out by the bill and the evidence is that the contract calls for the performance of an impossibility by reason of a mistake of

fact as to the capacity of the stipulated source of supply. But this mistake was no more the fault of defendants than of plaintiff, and the parties cannot be put back *in statu quo*. If the defendants have, to their misfortune, made a contract whose full performance is impossible, they may be unable to recover the stipulated rental, either in whole or in part. But this is a matter of defense in an action at law, and affords no ground for the cancellation of the contract. Certainly there is no equity in putting the entire loss arising from a mutual mistake upon one party, with no consideration for the injury to its plant and franchise, and no allowance for the money already expended thereon without fault. The case is pre-eminently one for mutual concession and amicable adjustment on a fair basis, either by reduction of the rental or by enlargement of the permitted source of supply. But, failing this action by the parties themselves, equity will not help one of them to put the whole loss on the other, but will leave them to such remedies as they may have in a court of law.

Reference was made in the court below and here to the act of April 29, 1874, § 84, cl. 8 (Pub. Laws, 94; Brightly's *Purd. Dig.* [12th ed.] p. 955, pl. 4), relating to gas and water companies, by which the courts of common pleas are authorized, on bill filed by any citizen using the water, alleging impurity or deficiency, to compel the water company to correct the evil complained of, and to make "such order in the premises as may seem just and equitable." The learned judge below was of opinion that this remedy did not apply to cases of contract, but only to water rights acquired by eminent domain under the act of 1874, and it has been argued here by appellees, citing *Lehigh Water Co.'s Appeal*, 102 Pa. 515, and *Freeport Waterworks Co. v. Prager*, 129 Pa. 606, that this section applies only to private citizens and does not include municipal corporations. Both these views, however, are erroneous. What was decided in those cases was that the exclusive privilege of furnishing water, given by the act to the first company erecting works, does not prevail against a city or borough building waterworks in its municipal capacity and under its general powers. In the present case the borough is not the builder or owner of waterworks, but a mere consumer under contract, and stands upon the same basis as any private citizen in regard thereto. The remedy given by the act is intended to be adequate, and we see no reason why it may not be made so. The whole subject is put under the control of the court in the broadest terms, and, being one which concerns the public interests, may be treated with regard thereto, to the extent necessary, even to the reformation of the contract upon a basis just and equitable to both parties, where, as here, it was made in mutual mistake as to an essential fact, and a remedy for the difficulty may be found without violation of the main intent of both parties in the original instrument.

Decrees reversed, and bill dismissed, with costs.

William R. KLEIN, Appt.,

LIVINGSTON CLUB.

(177 Pa. 224.)

1. An injunction against the sale of intoxicating liquors by an incorporated club to its members in pursuance of a resolution of the club may be granted in favor of a member whose property rights would be damaged thereby, if the sale would be illegal, although it might be punishable by indictment.
2. The distribution of intoxicating liquors by an incorporated club to its members without any profit to the club, but on payment by each member for what he receives in the same way as he pays for any food or drink obtained there, does not constitute a sale within the meaning of the license act of May 13, 1887.

(Williams, J., dissents.)

(October 5, 1896.)

APPEAL by complainant from a decree of the Court of Common Pleas for Lehigh County refusing to enjoin defendant from proceeding to procure liquors for distribution among its members. *Affirmed.*

The facts are stated in the opinion.

Mr. James B. Dëshler, for appellant:

The furnishing of liquor by the steward of an unlicensed club to a member was a sale.

Com. v. Tierney, 1 Pa. Dist. R. 17; *Com. v. Steffner*, 2 Pa. Dist. R. 152.

The following authorities maintain that such a transaction is a sale by the club to its members:

State, Newark v. Essex Club, 53 N. J. L. 99; *People v. Sinell*, 84 N. Y. S. R. 898; *State v. Easton Social L. & M. Club*, 73 Md. 97, 10 L. R. A. 64; *People v. Bradley*, 33 N. Y. S. R. 562; *Kentucky Club v. Louisville*, 93 Ky. 309; *Nogales Club v. State*, 69 Miss. 218; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *State v. Neis*, 108 N. C. 787, 12 L. R. A. 412; *People v. Soule*, 74 Mich. 250, 2 L. R. A. 494; *Martin v. State*, 59 Ala. 84; *Hunter v. State*, 60 Ark. 812; 14 Crim. L. Mag. 541.

If such transactions are not sales they are gifts and come within the prohibition of § 18 of the act in question. If the club here in question, desiring to change its quarters, should sell the club building to one of its members, he would be surprised to find it suggested that the transaction was not a sale because the corporation was not one for profit, and because as a joint owner the purchaser was also one of the vendors.

Com. v. Tierney, 1 Pa. Dist. R. 17.

The act of May 13, 1887, has been construed strictly.

Com. v. Reyburg, 122 Pa. 299, 2 L. R. A. 415; *Com. v. Sellers*, 130 Pa. 82; *Re Carlson's License*, 127 Pa. 330; *Com. v. Zelt*, 138 Pa. 615, 11 L. R. A. 602.

The language of the act of May 13, 1887, indicates an intention to restrict and prohibit what earlier laws permitted.

NOTE.—For sale of intoxicating liquors by clubs, see also *People v. Adelphi Club* (N. Y.) 81 L. R. A. 510, and cases cited in footnote thereto. 84 L. R. A.

Messrs. Edward Harvey, R. E. Wright, and M. L. Kauffman, for appellee:

No legislation was ever passed forbidding the distribution of liquors among members of social clubs. Was it therefore the intent of the legislature to prohibit such a custom when the act of 1887 was enacted? The statute is penal and requires a strict construction.

Com. v. Carey, 151 Pa. 373; *Com. v. Fraim*, 16 Pa. 168; *Hart's Appeal*, 96 Pa. 355; *Big Black Creek Imp. Co. v. Com.* 94 Pa. 455.

It is the nature and intent of the act, not the place where it is done, that determines its character as lawful or otherwise.

Com. v. Heckler, 168 Pa. 578

The provisions of the act of 1887 are not directed against the use of liquors by the individual citizen, and they do not interfere with his right to supply his table with them or furnish them to his family or his guests.

Allenburg v. Com. 126 Pa. 603, 4 L. R. A. 543.

Graff v. Evans, L. R. 8 Q. B. Div. 373, is a leading authority on the question involved here.

If the liquors really belonged to the members of the club, and had been previously purchased by them or on their account of some person other than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted.

Com. v. Smith, 102 Mass. 144; *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *Com. v. Ewig*, 145 Mass. 119; *Barden v. Montana Club*, 10 Mont. 330, 11 L. R. A. 593; *Com. v. Geary*, 146 Mass. 139; *Tennessee Club v. Dwyer*, 11 Lea. 452; *Piedmont Club v. Com.* 87 Va. 540; *Koenig v. State*, 33 Tex. Crim. Rep. 387; *State, Bell v. St. Louis Club*, 125 Mo. 308, 26 L. R. A. 573.

The distribution of liquors by a bona fide club among its members is not a sale within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it, and the law prohibiting the sale of liquor on Sunday does not apply to such a club.

11 Am. & Eng. Enc. Law, p. 727.

People v. Andrews, 115 N. Y. 427, 6 L. R. A. 128, belongs to the class where the methods of the club are a device to evade the law.

Rickart v. People, 79 Ill. 85; *State v. Mercer*, 32 Iowa, 405; *State, Robinson v. Bacon Club*, 44 Mo. App. 86; *Martin v. State*, 59 Ala. 34.

State v. Easton Social L. & M. Club, 73 Md. 97, 10 L. R. A. 64, was ruled by the construction of the local option law in force in the place where the club was located.

DEAN, J., delivered the opinion of the court:

The plaintiff is a member in good standing of the Livingston Club of Allentown, Lehigh county. The club was duly incorporated April 7, 1890. Its purpose, as declared by its articles of association, is the social enjoyment of its members by friendly intercourse. It is the owner of a lot in the city, on which is erected a valuable brick building, containing

parlors, reception room, library room, banquet hall, dining rooms, kitchen, committee rooms, billiard rooms, and private rooms occupied by the club steward and servants. The cost of the buildings and grounds was \$23,000. The membership is limited to 100 residents of the city, or resident not exceeding 1 mile beyond, and all must be over twenty-one years of age. There are no sleeping rooms in the building for members or guests, but some of the members, not having families, make the club their home during club hours. No games of chance are permitted. The affairs of the club are controlled by a president, vice president, secretary, treasurer, and twelve governors, known as the "governing committee." Immediately before the filing of this bill, this committee adopted this resolution: "Resolved, that the steward be directed to purchase a stock of spirituous and malt liquors, etc., and furnish the same to the members of this club, and receive pay therefor from them, only, and turn over the moneys so received to the treasurer of said club, which money shall be again used to replenish the liquors, etc., so furnished to its members, and in the purchasing of eatables, cigars, etc., and also for the defraying of the expenses connected therewith." Plaintiff admits in his bill that the club receives no profit on liquors so furnished, but he avers that the steward is about to carry out the directions of the resolution; that the proposed action will be a violation of the license laws of the commonwealth, thus putting in peril the charter of the club, which may be forfeited, and, in consequence, he, as a member having an interest in the club property, will be thereby damaged. He therefore prays for an injunction restraining the steward and the governors from carrying out the resolution.

The purpose of the bill is to enjoin defendant from the commission of an alleged indictable misdemeanor, because the misdemeanor, if committed, will probably damage his property rights. A bill having for its sole purpose an injunction against crime or misdemeanor, it is well settled, does not lie; but it is just as well settled that equity will interfere if the alleged criminal acts go further, and operate to the destruction of or diminution of value of property. This case and that of *Manderson v. Commercial Bank*, 28 Pa. 379, are alike in their essential facts. In the bank case the law authorized the directors to discount paper at a rate not exceeding $\frac{1}{4}$ of 1 per cent a month. Manderson, a stockholder, averred that the president and cashier were in the habit of meeting after banking hours, and passing paper for discount at a rate exceeding the lawful rate; thus violating the usury laws, and subjecting the bank to the penalty therefor, and putting in peril the bank's charter. Therefore his property interest in the bank was endangered. It was decided that a stockholder had the right to prevent by injunction a practice which might produce such injury to him, and the writ was awarded. In *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401, the writ was refused by a majority of the court, because the sole purpose of the bill was to prevent an alleged violation of the act of 1794, in which question the complainant had no other interest than that of the public gener-

ally. If either the commission of the act here alleged or its criminality depended on the evidence of witnesses, we might well leave it to the proper criminal court for determination. The hand of a chancellor would not be put forth to restrain the commission of what might not be intended as, or what, if actually done, might not be, criminal, because of the absence of criminal intent. But here the declared purpose to commit the act complained of is admitted. Whether it be criminal if committed, is a pure question of law, for defendant's only plea is that the proposed act is not in violation of law.

Would the act, when committed, be a sale of liquor? That is the only question, for it is not alleged that it is the purpose of defendant to furnish liquor to persons of intemperate habits, to those visibly intoxicated, or to minors. The act of May 18, 1887, known as the "Brooks Law," is entitled "An Act to Restrict and Regulate the Sale of Vinous and Spirituous, Malt or Brewed Liquors, or Any Admixture thereof." This is a license act, and prohibits the keeping of any house, room, or place, inn, or tavern for sale of liquors, without a license first had and obtained. It further prescribes the mode of procedure, in all its details to obtain license to sell, and prohibits the sale or gift either by licensed dealers or unlicensed dealers on certain days and to certain classes. Our Brother Williams, in *Com. v. Carey*, 151 Pa. 371, referring to the title of the act and the body of it, has so clearly stated its purpose that his reasoning and conclusion are almost as demonstrative of the truth as the solution of a problem in geometry. He says: "There is no hint of a purpose to restrain and regulate the use of them by private citizens in their own dwellings. We look next into the body of the act, and there we find a comprehensive license system. We have, first, a restriction of the sale to persons holding licenses, and punishments prescribed for sales by unlicensed persons; next, the proceedings to obtain a license; third, provisions regulating the exercise of judicial discretion in granting or refusing licenses; fourth, penalties for violations of the law by licensed dealers; fifth, exceptions from the power to sell conferred by a license, as to certain days and certain classes of persons. The 17th section belongs to this class of provisions. To the excepted classes and upon the excepted days no man can lawfully sell or furnish for use as a beverage any intoxicating liquors. The unlicensed cannot, for the traffic is wholly forbidden to him. The licensed cannot, for an express exception as to these is made in the law under which the license is granted. If, notwithstanding the prohibition, any person does sell or furnish contrary to the 17th section, his conduct is a misdemeanor, and the house, room, or place kept or maintained by him for such unlawful sales or furnishings may be abated as a public nuisance, under the provisions of the 18th section. These provisions are not applicable to the table or the personal habits of citizens within the precincts of their own homes, and they cannot be extended by any known rule of interpretation so as to include them. The furnishing of liquors on Sunday, or to any of the excepted classes, that is made punishable, is

a furnishing in evasion of the law forbidding sales. It would be of little avail to close the bars on election days if candidates might open rooms near the polls, and furnish liquors free to voters. It would not help the cause of good morals if those who were forbidden to sell on Sunday could, under some specious pretext, profess to supply their customers without charge on that day. But if, for reasons of health or habit, one chooses to supply his own table with his own liquors, for use by himself, his family, or his guests, on Sunday, there is not now, and, so far as I am aware, there has never been, in this state, any statute forbidding him to do so."

The Brooks law only reduced to a comprehensive system all the features of all the license laws at its date on our statute books. There is not in it, nor in any of the statutes which it replaces, a prohibition of the use of liquors in clubs, any more than there is a prohibition of its use in a family. No indictment for furnishing liquors to members of a club could be sustained unless the evidence showed beyond reasonable doubt such furnishing constituted a sale. The statute being penal, it must be subject to a strict construction. We cannot extend it beyond its letter. If we, in construing the Brooks statute, adopted the settled rule of construction, considered the old law, the mischief and the remedy, then we have these questions: The old law regulating and restraining the sale of liquors was disjointed or fragmentary, because it was made up of separate statutes passed at intervals of years, not seldom presenting conflicting provisions, and often provisions in conflict with special local laws. At the same time, there was a settled conviction in the public mind that the license law did not produce the revenue that ought to have been exacted for the privilege of selling liquor. In view of the ineffectiveness of the old law, and the smallness of the revenue produced by it, the Brooks law was enacted. Its intention was to stop what, in the interests of good order, ought to be unlawful sales of liquor, and to exact a larger revenue from those sales made lawful by license. Probably, at the date of this act, club organizations wherein liquor was furnished, as here, had been in existence in large towns and cities for fifty years. The legislature was not ignorant of the fact. If such use tended to disorder or bad morals, the legislature knew it. If such use was not of immoral tendency, yet was a luxury or privilege that would bear taxation and yield revenue, they knew that fact. Yet there are no words in the act which, by any possible construction, can be stretched into a prohibition of the use of liquor in clubs, or that can be deemed as requiring they shall be licensed. There is, in fact, no express legislation concerning this distinctive, open, notorious, long existing use of liquor. The plain implication is that the consumption of liquor in clubs, as known to the legislature, was not deemed a sale. The general words of the law, however, make the sale of liquor without license illegal every where in the commonwealth; and whether this be a sale is now a judicial, and not a legislative, question.

The bill admits the club will receive no profit on the liquors bought and consumed by
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the members, so that, as concerns this usual incident of a sale, it is not present. The club buys the liquors, and distributes them to the members. Those who drink them pay in proportion to the quantity drank. The money for the purchase of the liquor in quantities from the liquor dealer comes out of the treasury of the club. Nothing in the shape of food or drink is distributed equally to the members. There is an equal distribution of light and heat. Members have like access to the reading rooms and library, but, when it comes to food and drink, each contributes to the common fund in proportion as he consumes. Some eat of terrapin and game, while others prefer less costly and plainer food. The member who is fond of terrapin contributes to the club the cost of it. It would be inequitable that the member who does not touch it should share in paying for it by an equal contribution. The same rule is enforced in regard to liquors. Some do not touch them. They pay nothing. Those who drink them pay. The purpose of the whole system is to distribute the advantages, comforts, and luxuries of the club among the members, so that there shall be no unequal contributions to the treasury which purchases them. They are all owners of the property when purchased in equal shares, and, if a division were then made, each would be entitled to an equal share of the liquor; but one consumes his share and that of others who do not drink liquor, and he puts back into the common treasury the value of the others' shares. Therefore, although by consumption the division is not equal, yet it is made equal by the contribution to the treasury. That has neither lost nor gained. Consequently, the distribution is equitable. Does this constitute a sale? We think not. There is no element of bargain, only a method of distribution of the common property. We are aware there is and has been much difference of opinion among courts on the question. In England the transaction has been held no sale. *Graff v. Evans*, L. R. 8 Q. B. Div. 373. In a recent case in Missouri (*State, Bell v. St. Louis Club*, 125 Mo. 308, 26 L. R. A. 578), the opinion contains a review of all the cases on the subject, and it is held to be no sale. In the still more recent case in New York court of appeals (*People v. Adelphe Club*, 149 N. Y. 5, 81 L. R. A. 510, decided 7th of April last, and not yet officially reported in the books), all the judges concurred in pronouncing it no sale. The act then in force, and under which the indictment was framed and conviction had, prohibited the sale of spirituous liquors to be drank upon the premises. There was no question as to the fact that, under substantially the same club rules as here, spirituous liquor was distributed to the members, and by them drank upon the club premises, those drinking returning to the treasury the cost of the liquor. Black on Intoxicating Liquors (§ 142), after citing the authorities from many states, comes to this conclusion: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a

pretense, so that any person, without discrimination, can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the buyer to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way, and to the same extent, that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law." As before noticed, there could have been no special intent on the part of the legislature to prohibit the act here complained of. There was a general intent to restrain the use of intoxicating liquor by prohibiting unlicensed sales thereof. If this were an unlicensed sale, under the guise of a club distribution, it would clearly be unlawful. The

law would look through all disguises, and so pronounce it. But as, on the undisputed facts, we are of the opinion the act apprehended by plaintiff is not a sale, there can be no violation of law which will imperil his property rights.

It has been argued that the effect of our decision, if against plaintiff, will be to deprive the licensed hotels of patronage to which they are impliedly entitled, by payment of heavy license fees under the Brooks law; that members of clubs will consume such liquors as they desire in their club rooms, instead of at licensed bars. This is not without force, but it should be addressed to the legislature, who seem for fifty years, in all the legislation on the liquor question, to have carefully refrained from prohibiting the furnishing of liquor to club members by their clubs, as well as neglected to impose on them license fees.

The decree is affirmed.

Williams, J., dissents.

NORTH DAKOTA SUPREME COURT.

STATE of North Dakota, *ex rel.* J. B. WINEMAN,

v.

O. M. DAHL.

(.....N. D.)

1. The recommendation of a constitutional convention, and the submission of a proposal therefor to popular vote, are properly made by the legislature in the form of a joint resolution, and not in that of an ordinary law.
2. The submission to popular vote of a proposal to hold a constitutional convention is properly made by the legislature, although the legislature has the power to take the initiative with respect to the calling of such convention.

(October 8, 1896.)

APPPLICATION for a writ of mandamus to compel defendant, as Secretary of State, to certify to the county auditors of the various counties for submission at a coming election of the question whether or not a constitutional convention should be held in accordance with a joint resolution of the legislature. *Granted.*

The facts are stated in the opinion.

Messrs. J. B. Wineman and Burke Corbett for plaintiff.

Mr. John F. Cowan, Attorney General, for defendant.

Corliss, J., delivered the opinion of the court:

An alternative writ of mandamus having been issued by this court in the exercise of its original jurisdiction, the defendant appeared

and answered the writ. A demurrer having been interposed to such answer, the case presents to us only questions of law. The object of this proceeding is to compel the defendant, as secretary of state, to certify to the county auditor of each county a certain joint resolution adopted at the last session of the legislature. It is in the following words:

"Concurrent Resolution. Be it resolved by the House of Representatives of the state of North Dakota, the Senate concurring therein, that, in the opinion of the legislative assembly, the best interests of the state require that a constitutional convention be called at some future date, for the purpose of revising the Constitution. Therefore, it is hereby recommended to the electors of the state of North Dakota that at the next general election, to be held on the 1st Tuesday after the 1st Monday in November, 1896, that they vote for or against a convention to revise the Constitution of the state."

Section 88 of the Constitution declares that the powers and duties of the secretary of state shall be as prescribed by law. One of these duties is to certify to the county auditors propositions or other questions to be submitted to the people. Rev. Code, §§ 491, 509. It is obvious that the body which is vested with power to designate the question to be submitted to the people is the legislature. This proposition is not controverted, nor is it disputed that that body has expressed its will that there should be submitted to the people the question whether a constitutional convention should be called to revise the Constitution. But it is insisted that this expression of sover-

NOTE.—For proceedings to amend Constitutions, see also *Seneca Min. Co. v. Secretary of State* (Mich.) 9 L. R. A. 770; *State, Torreyson, v. Grey* (Nev.) 19 L. R. A. 124; *Worman v. Hagan* (Md.) 21 34 L. R. A.

L. R. A. 716; *Livermore v. Waite* (Cal.) 25 L. R. A. 312; *State, Woods, v. Tooker* (Mont.) 25 L. R. A. 500; and *Edwards v. Lesueur* (Mo.) 31 L. R. A. 518.

elgn will is not in constitutional form, and is therefore without legal effect. That it did not take the form of an ordinary law is too clear for controversy. The joint resolution has no title. Its enacting clause is not couched in the language prescribed by the Constitution to be employed in the enactment of ordinary laws; nor was it ever submitted to the governor for approval. Whenever it is necessary that the expression of sovereign will should take the form of ordinary legislation, these requirements must be strictly observed. But, in declaring its purpose that a specific proposition should be submitted to the people for their approval or disapproval, the legislature is not discharging the ordinary function of enacting laws. In cases of this kind it has been the established usage to employ a joint resolution as the mode of expressing sovereign pleasure. There is nothing in our Constitution indicating a purpose to abrogate this settled practice. It is a simple and very satisfactory form in which to embody the will of sovereign power; and there is nothing in the nature of such an expression of legislative purpose which renders it necessary that the checks and safeguards which surround ordinary legislation should be applicable in cases of this character. No permanent general rule is thereby established. The whole force of the resolution is spent upon those officers whose duty it is to see that the proposition therein specified is submitted to the people. When they have performed their duty, there is nothing left but a mere recommendation to the people to express their views on the particular questions submitted, to the end that the verdict of the public upon that proposition may furnish a guide to future legislative action. It is not the resolution in this case which imposes any duty on the secretary of state. The duty he is required by this court to perform is imposed upon him by a law passed with all the formalities and solemnities essential to a valid enactment. That law declares that he must certify to the county auditors such question or proposition as is to be submitted to the people; and the body which has power to designate the proposition or question to be submitted is, as we have already asserted, the body in which inheres sovereignty. By the joint resolution, that body has designated the question to be submitted, and the law prescribes what the secretary of state shall do towards carrying out its legally expressed will.

There is eminent authority for the proposition that it is not necessary that the legislative will that the Constitution should be amended should assume the form of an ordinary law, and be submitted to the executive for approval. This was held by the Federal Supreme Court in *Hollingsworth v. Virginia*, 3 U. S. 8 Dall. 378. 1 L. ed. 644. The argument in support of the proposition that the President must approve a proposed amendment to the Federal Constitution is much stronger than the argument in this case that the governor must approve the action of the legislature in declaring that a particular question shall be submitted to the people. The Federal Constitution (art. 1, § 7) provides that "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be neces-

sary shall be presented to the president of the United States," etc. Yet, despite this provision of the Constitution, the court ruled that the 11th Amendment had been lawfully adopted, although the resolution embodying the amendment had not been submitted to the President for approval. This was in 1794. The amendments which were made in 1789, 1803, and 1865 were carried through without the action of the President. In 1865 the slavery amendments were inadvertently submitted to the Executive, and approved by him. On discovering this fact, Senator Trumbull, of Illinois, chairman of the judiciary committee, introduced a resolution declaring its submission to him to have been an inadvertent act, and that his approval was unnecessary and of no effect. The resolution also asserted that that case should not constitute a precedent for the future. It was adopted without division. But it is unnecessary to pursue this line of discussion any further. Under many state Constitutions containing provisions with regard to the enactment of statutes similar to those found in the organic law of this state, it has been, and is, customary to express by joint resolution the will of the legislature on matters not falling within the category of ordinary legislation. Such course has not, so far as we have been able to discover, ever been successfully challenged as being repugnant to the supreme law. Our Constitution plainly recognizes the legality of the expression of sovereign will by joint resolution. See § 66. This section declares that the presiding officer of each House shall sign all bills and joint resolutions. We do not think that it was the purpose of the people to interfere with this settled and convenient usage of expressing sovereign pleasure by joint resolution in all cases not falling within the domain of ordinary legislation. We cannot bring ourselves to believe that they intended to require all the forms and procedure essential to a valid law, in cases where the legislature merely desires to express its wish that the people would at the polls inform their servants of their sentiment touching some question of public interest. Whether aught will come of an affirmative vote on this question is immaterial. It is no concern of the secretary of state whether it is wise or unwise to submit to the people the proposition specified in the resolution,—whether it will lead to practical results or be only an idle form. The sovereignty of the people, speaking through its representatives, is the final judge whether the sense of the people on a grave issue shall be taken at the polls. The secretary of state has naught to do but obey the law, and certify such question to the proper officers, that it may be submitted to the people for their approval or disapproval.

Nor can it be said that it is an empty form to leave to popular vote the grave question whether the people shall assemble in convention, and revise their fundamental law. True it is that the power to take the initiative with respect to the calling of a constitutional convention resides in the legislature. In the absence of any provision in the Constitution on the subject, that body alone can give legality to such a convention. If its foundation is in the spontaneous action of the people, without permissive legislative authority, the movement

is revolutionary, although no blood be spilled or violence accompany the rising of the people to assert their reserve power of revolution. There was a time in the earlier history of this country when in certain quarters the view was entertained that the people could legally assemble in convention, and revise their Constitution, without the sanction of legislative action. See Jameson, Const. Conv. pp. 383-387, 663-666. But this opinion no longer prevails. Jameson, Const. Conv. §§ 219, 394-403, 570, 571, 574A. Judge Jameson says: "The making of provision for the assembling of conventions, and the hedging of them about with the restrictions needed, as well for their efficiency as for the safety of the commonwealth, is emphatically a matter of legislation. It is, moreover, a matter of legislation not fundamental in character, but of that species which our Constitutions apportion exclusively to the legislative departments created by them. The legislation necessary to initiate and to temper the operations of a convention no department of the government is competent to effect but the legislature. The sovereign itself could not do it, nor the electors,—bodies whose organization is such as to make deliberation upon the details of laws impossible. Nor is it true, as intimated by the judges in the opinion, that the giving to the legislature, in a Constitution, express power to recommend specific amendments to that instrument, involves, by implication, the denial to that body of power to call conventions for a general revision of it. We shall see in a subsequent part of this work that such a grant is applicable only to disconnected and unimportant amendments. It is obvious that a grant of power to propose such amendments in a summary manner, and without the formalities ordinarily attending the enactment of fundamental laws, cannot be considered as an implied prohibition to effect a general revision of a Constitution in the only appropriate and practical way,—by a convention. If it be not in the power of a legislature to call a convention, that fact is not to be inferred from the positive authority to effect a different object in a different way." But while the power resides in the legislature, and that body only, to call a constitutional convention, it is obvious that the agents of the people, who have not been selected on that particular issue, should not take upon themselves the responsibility of burdening the people with the expense of such a movement, without first submitting to them the question whether they desire such a convention to be called. The argument against

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the taking of the initiative by the legislature in such cases, without first ascertaining public sentiment on the question, is so strong, and lies so plainly on the surface, that in many states the Constitution, in terms, requires the submission of the proposition to popular vote, and a majority vote in its favor, before the legislature can legally summon the people to meet in convention to revise their organic law. See Jameson, Const. Conv. pp. 669-671. In 1820 the council of revision of New York returned to the assembly a bill calling a constitutional convention, with objections to its passage. The ground of these objections was the fact that the legislature had not taken the sense of the people on the subject. In those objections the conclusion of the council was stated in the following language: "The council therefore think it the most wise and safe course, and most accordant with the performance of the great trust committed to the representative powers under the Constitution, that the question of a general revision of it should be submitted to the people in the first instance, to determine whether a convention ought to be convened. The declared sense of the American people throughout the United States on this very point cannot but be received with great respect and reverence; and it appears to be the almost universal will, expressed in their constitutional charters, that conventions to alter the Constitution shall not be called at the instance of the legislature without the previous sanction of the people, by whom those Constitutions were ordained." It was therefore a very proper step for the legislature to take to declare that the people should be allowed to be heard on this question before final legislative action.

It is unnecessary for us to express any opinion on the question whether § 202 of the Constitution, prescribing the mode of amending the same, prevents the lawful assembling of a constitutional convention in this state to revise the fundamental law. The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended. See Jameson, Const. Conv. §§ 570-574d. But see *Re Constitutional Convention*, 14 R. I. 649; *Opinion of the Justices*, 6 Cush. 573.

The peremptory writ will issue as prayed for.

All concur.

VERMONT SUPREME COURT.

STATE of Vermont
v.
A. E. HARRINGTON.

(88 Vt. 623.)

1. A statute requiring itinerant vendors who go from place to place and temporarily occupy rooms for the exhibition and sale of goods to pay a state license of \$25 and deposit \$500 with the state treasurer as security, and then to pay in addition a local license fee in each place in which they sell goods, amounting to a tax on the value of their stock of goods according to the rate of the last preceding assessment of taxes in that place, is not unconstitutional, although it is oppressive.
2. The legislature must be the judge as to whether or not there is reason to apprehend fraud in the sale of goods by itinerant vendors when it enacts a stringent license law for the prevention of fraud in such sales.
3. The police power of the state is the power to govern men and things within the limits of its dominion, and is not limited to the protection of health, peace, morals, education and good order, but comprehends all those general laws or internal regulations necessary to secure peace, good order, the health and comfort of society, and the regulation and protection of all property in the state.
4. The state has authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property.
5. Requiring itinerant vendors to deposit \$500 with the state treasurer, to be returned on the surrender of the license, less the amount of any fines and costs that may have been imposed, does not deprive the licensee of property without due process of law.
6. A license tax cannot be deemed unequal because it reaches one occupation only, if it reaches all who follow that occupation.
7. An oppressive and unjust law is not void unless it contravenes some provision of the state or Federal Constitution.
8. The reasonableness of license fees in respect to their amount when imposed, not by municipal ordinance without legislative authority, but by the state through legislative enactment, is conclusively established by the statute, and cannot be reviewed by the courts.

(*Tuft, J., dissents.*)

(August 4, 1894.)

EXCEPTIONS by defendant to a ruling of the Orange County Court overruling a demurrer to an information charging defendant with a violation of the law requiring itinerant vendors to procure licenses. *Ruling affirmed.*
The facts are stated in the opinion.

NOTE.—For the numerous authorities on the limit of the amount of license fees, see *note* to *State, Tol. v. French* (Mont.) 80 L. R. A. 415.
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Messrs. Darling & Darling for respondent.

Messrs. D. C. Hyde, State's Attorney, and *John H. Weston* for the State.

Tyler, J., delivered the opinion of the court:

The information is based upon No. 59, Laws 1894, in which the words "itinerant vendors" are construed to mean and include all persons who engage in a temporary or transient business, either in one locality or in traveling from place to place selling goods, wares, and merchandise, and who, for the purposes of carrying on such business, hire, lease, or occupy any building or structure for the exhibition and sale of such goods, etc. The law excludes from its provisions sales made to dealers by commercial travelers and selling agents in the usual course of business, and bona fide sales of goods, etc., by sample, for future delivery; to hawkers on the streets and peddlers from vehicles. It requires that every itinerant vendor who proposes to do business in this state shall deposit \$500 with the state treasurer, after which deposit, upon application in prescribed form, and the payment of \$25 as a state license fee, he is entitled to an itinerant vendor's license from the state treasurer, authorizing him to do business in this state for one year. He may then apply to the clerk of the city or town where the goods are kept for sale for a local license. With his application to such clerk he must file a true statement, under oath, of the average quantity and value of his stock. The clerk submits the statement to the listers for their valuation. Their certificate of valuation is then submitted to the board of aldermen or selectmen, "who must forthwith act upon such application, and if, in the judgment of such board, such application should be granted, such city or town clerk may be authorized to issue a license to such applicant," who shall pay therefor a sum ascertained by the clerk by a computation based upon the valuation of the listers, in the ratio and at the rate of the last preceding assessment of taxes. It is provided that every itinerant vendor who sells, exposes, or advertises for sale, goods, wares, and merchandise, without a state and local license, shall be liable to fine or imprisonment, or both. The local license, in any event, expires on the last day of the next March. The deposit of \$500 is subject to the payment of all fines and penalties that may be incurred by the licensee through violations of the law. Upon the expiration of the state license the state treasurer returns to the licensee the remainder of the deposit, after deducting all fines and penalties. The case comes here upon the sole question of the constitutionality of the law.

The respondent's counsel contend that the law is in violation of both the state and Federal Constitution; that it is an encroachment upon the natural, inherent, and inalienable right of citizens to acquire and possess property through the agency of labor; that it discriminates between itinerant vendors and resident vendors, and between classes of itiner-

ant vendors, and thus violates that portion of chap. 1, art. 7, of the Constitution which declares that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are part of that community;" that it is in conflict with the inhibition of the Federal Constitution that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws;" that the requirement of a deposit of \$500 deprives an itinerant vendor of his property without due process of law; that it violates the 14th Amendment of the Federal Constitution, which commands that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States;" that the requirements of the law are unjust and oppressive, and violate the natural as well as the constitutional rights of the citizen.

The legislature had in view the class of persons who go from place to place, and temporarily occupy rooms for the exhibition and sale of goods, and enacted the law in the apprehension that there was fraud in such sales. Its title is, "An Act to Prevent and Punish Fraud in the Sales of Goods, Wares, and Merchandise at Public or Private Sale by Itinerant Vendors, and to Regulate Such Sales." It seems to have been passed as a police regulation, though the local license fee is equivalent to taxation upon the grand list in each town in which such license is taken. The police power of a state extends beyond the protection of health, peace, morals, education, and good order. It is the power to govern men and things within the limits of its dominion. It comprehends all those general laws of internal regulation necessary to secure peace, good order, the health and comfort of society, and the regulation and protection of all property in the state. Its power in these respects is supreme. *Desty, Taxn. 1877, and cases cited; Cooley, Const. Lim. 704.* "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 53. The law is clearly stated by Redfield, Ch. J., in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 63 Am. Dec. 625. "This police power of the state extends to the protection of the lives, limbs,

health, comfort, and quiet of all persons and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others." "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive." *Wilkerson v. Rahrer ("Re Rahrer")*, 140 U. S. 545, 35 L. ed. 572.

The question is whether this law is within the scope either of the police or taxing power of the state. If it is beyond such scope, and unconstitutional, it is in respect to the licenses, or the special deposit with the state treasurer, or the authority conferred upon the board of aldermen or selectmen to grant or refuse local licenses according to their judgment. Citizens have not an inherent and inalienable right to acquire and possess property, without the legislative restraint of taxation. It is also true that the property alone is not liable to taxation. A tax may be assessed on the privilege of carrying on a particular business, and, when it takes this form, convenience in collecting will commonly require payment of a license fee, as a condition to the right to carry on the business. *Cooley, Taxn. 384 et seq.; License Tax Cases*, 72 U. S. 5 Wall. 472, 18 L. ed. 501. "The mode of levying, as well as the right of imposing taxes, is completely and exclusively within the legislative power, which, it is to be presumed, will always be exercised with an equal regard to the security of the public, and individual rights and convenience." *Coulter v. Brittain*, 2 Hawks (N. C.) 204. Judge Cooley remarked in *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654, that while a statute might have revenue for one object, the exercise of the police power of the state might be another. So, if this law were to be considered as a mere revenue law, it must be in the light of the settled rule, as laid down by all writers upon taxation, that everything to which the legislative power extends may be the subject of taxation, whether it be person, property, franchise, privilege, occupation, or right; that not only is the power unlimited in its reach as to subjects, but, in its very nature, it acknowledges no limits, and may be carried to any extent which the government may find expedient. It may therefore be employed again and again upon the same subjects, even to the extent of exhaustion and destruction and thus become, in its exercise, a power to destroy. *Cooley, Taxn. 384, and cases cited in notes; Nathan v. Louisiana*, 49 U. S. 8 How. 78, 13 L. ed. 993; *License Tax Cases, supra; Union P. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 21 L. ed. 787; *New Orleans v. Great Southern Teleph. & Tele. Co.* 40 La. Ann. 41.

No employment is exempt from taxation. The state has an undoubted right to determine what employments shall be permitted, and to

forbid those which are deemed prejudicial to the public good. Rules for the conduct of the most necessary and common occupations are prescribed, when from their nature they afford peculiar opportunities for imposition and fraud. The state has authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property. *Cooley*, Const. Lim. 742 *et seq.* That all occupations may be taxed, when no restraints are imposed by the Constitution, is settled beyond controversy. It is no valid objection to a tax on business that its operation will not be uniform, but it must operate uniformly upon each class taxed. *Cooley*, Const. Lim. 609, note. A license tax cannot be deemed unequal because reaching one occupation only, if it reaches all who follow that occupation. It would be only when individuals of the class were singled out for exemption that the inequality would be manifest. *Cooley*, Taxn. 128. It was said by Judge Cooley in *Youngblood v. Sexton*, *supra*, that occupation taxes are no violation of the rule of uniformity. *Worth v. Petersburg E. Co.* 89 N. C. 301. *Desty*, Taxn. p. 1883, says: "Municipal corporations may tax a business or occupation of one class and omit to tax that of another class, and may classify merchants, and tax each class in its discretion; but a tax on any occupation must reach all who follow it,—all of a class of persons or things." The court said in *Picklen v. Shelby County Tax. Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79: "No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state Constitution in that regard. . . ." Quoting again from *Youngblood v. Sexton*: "A particular business may be taxed while others are spared, not only because for any reason it can best bear the burden, but also because such surroundings attach themselves to the business taxed as to render the discouragement and discipline of heavy taxation wise and politic." He instanced the taxing of state banks out of existence, which was sanctioned in *Veazie Bank v. Fenno*, 75 U. S. 8 Wall. 583, 19 L. ed. 482. It is laid down in 2 Dill. Mun. Corp. § 793, that the usual provisions in the Constitutions of the different states concerning taxation do not prohibit the legislatures from imposing, or authorizing municipal corporations to impose taxes upon trades, special professions, and occupations, and that authority to tax all persons exercising any profession may be executed, to the extent of taxing each member of a firm separately. The right of the legislature to impose a license tax upon peddlers was recognized in *State v. Hodgdon*, 41 Vt. 189, and *State v. Pratt*, 59 Vt. 590, 1 Inters. Com. Rep. 299. In the latter case that part of § 8951, Rev. Laws, which required a license of a person peddling tea of foreign growth, was held in conflict with the Federal Constitution, as attempting to regulate commerce between the states. "The legislature, if it does not make discriminations in violation of the state Constitution, may authorize municipal corporations to tax transient

traders or itinerant dealers and peddlers; and such tax is not in violation of the Constitution of the United States, although the property be brought from another state, provided, it must be added, it does not unlawfully discriminate in favor of the resident, and against the non-resident, citizen." 2 Dill. Mun. Corp. § 744; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Webber v. Virginia*, 108 U. S. 344, 26 L. ed. 565, and numerous other cases cited in note. It was held in *Wilmington Comrs. v. Roby*, 8 Ired. L. 250, that a license may be imposed on all transient persons keeping "stores" in the town, imposing it as a police regulation, though called a tax in the statute. *State, Toi, v. French* (Mont.) 80 L. R. A. 415, and *State v. Wheelock* (Iowa) 80 L. R. A. 429, have exhaustive and valuable notes upon this subject. In the former case the question was whether imposing the payment of license fees upon laundrymen violated the uniformity clause in the state Constitution in respect to taxation. It was held that a license fee was not a tax, within the constitutional restrictions. In the latter case a license fee of \$100 per annum, charged itinerant vendors of drugs who professed to cure or treat all diseases, was held reasonable, and not an unconstitutional interference with interstate commerce, though the drugs were in original packages, brought from other states. In the annotations to these cases these general rules are deduced: That "the power of a sovereign state to fix license fees at such figures as it may see fit would appear to be unlimited, except in cases in which its exercise would conflict with some constitutional provision. . . ." That "statutory and charter restrictions upon the power to tax, like constitutional ones, do not apply to license fees required for the purpose of regulation." Among the notes of cited cases are the following: The legislature of a state may impose such license taxes upon privileges as it may choose. *Columbia v. Beasley*, 1 Humph. 282. And it may, in regulating any matter which is a proper subject for the police power, impose such sums for licenses as will operate as a partial restraint on the business, or on the keeping of a particular kind of property. *Tenney v. Lenz*, 16 Wis. 566. And a requirement of a license fee from peddlers, classifying them as foot peddlers, peddlers with one-horse cart or wagon, and peddlers with two-horse cart or wagon, charging a different rate for each, is a police requirement, and a valid exercise of a power to regulate, and not in conflict with a constitutional requirement of uniformity of taxation upon all of a class. *Kneeland v. Pittsburgh* (Pa.) 10 Cent. Rep. 421. The constitutional requirement as to uniformity of taxation does not prevent a municipality from discriminating in fixing rates for licenses for the transaction of different classes of business, and imposing a higher rate upon one class than upon another. *Ex parte Hurl*, 49 Cal. 557. A license tax upon different industries, varying in amount upon each, but being the same upon the subjects of the same class, is not unconstitutional for want of uniformity. *Hadtner v. Williamsport*, 15 W. N. C. 188. And a license tax imposed by a municipality endowed with

discretion on the subject will not be declared unreasonable by the courts merely because they deem it unwisely large. *Cooper v. District of Columbia*, 4 MacArth. 250. And when the legislature confers upon a municipal corporation the power to pass ordinances of a special and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed in pursuance thereof cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. *Ex parte Chin Yan*, 60 Cal. 78. So, a license fee of \$200, imposed upon the business of vending butcher's meats, is not unauthorized, oppressive, or in restraint of trade, when required under a statute empowering municipal ties to fix the fee for licenses at from \$5 to \$500. *St. Paul v. Colter*, 13 Minn. 41 (Gil. 16), 90 Am. Dec. 278. Cases are cited in these notes where municipal ordinances have been held unconstitutional and void on account of the excessive amount of license fees imposed, but few, if any, cases are cited where statutes have been declared unconstitutional for this reason. The imposition of license taxes is, upon abundant authority, within the constitutional authority of the legislature, though it may interfere, as the payment of all taxes directly does, with the acquisition of property. The law is not a "class" law, for all persons of the class of itinerant vendors, whether resident or nonresident, are subject alike to its requirements. Peddlers, hawkers, and drummers are not of this class. The occupation of itinerant vendors, from the manner in which it is conducted, is as distinct from that of resident vendors as is that of peddlers and auctioneers. It imposes no burden upon interstate commerce, as the occupation licensed is not directly concerned therein. It makes no discrimination between our own citizens and citizens of other states, and therefore does not violate the command of the Federal Constitution that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States." The law could not be deemed oppressive in respect to licenses if only the state and one local license fee were required for the year, but it must be remembered that each local license fee is for the privilege of doing business in the town in which it is payable.

The money deposited with the state treasurer is returnable to the licensee, upon his surrender of the license, less the amount of fines that may have been imposed and costs, so it cannot be held that he is deprived of property without the process of law. The requirement of this deposit is not more oppressive than a requirement of a statute of Illinois that operators of butter and cheese factories on the co-operative plan shall file with the circuit clerk a bond in the sum of \$8,000, with two sureties, conditioned that the company shall make monthly statements of the amount of the product and sales, prices received, and dividends earned. This was held to be a proper exercise of police power; that the fact that the law regulates trade, or in some degree operates as a restraint upon trade, does not render it obnoxious to any constitutional provision; that a statute is not subject to the objection that it is not general, because it applies to a class of persons, if it applies to all persons similarly engaged. An ordinance of the city of Chicago which requires auctioneers to pay an annual license fee of \$200 and to give a bond in the penal sum of \$1,000, with two sureties, to be approved by the mayor, conditioned for the due observance of the ordinance, was held reasonable and valid as a police regulation. *Wiggins v. Chicago*, 68 Ill. 372. The statute of a state relating to oleomargarine, its manufacture and sale, was held to belong to the police power of the state for the prevention of fraud, in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253. See notes to *State v. Goodwill* (W. Va.) 25 Am. St. Rep. 870.

Our statute is nearly an exact transcript of the Massachusetts act of 1890. The only material difference is that under the latter the city or town clerk, on application, after ascertaining the value of the stock of goods, and the amount to be paid for the license according to the rate of the last preceding tax levy in his city or town, "shall issue" a license upon payment to him of the amount so ascertained. The supreme court, in *Com. v. Crowell*, 156 Mass. 215, upheld the law as a proper police regulation. Connecticut has a statute providing that city and town authorities may issue licenses to such persons as they find proper to engage in a temporary or transient business, for the sale of goods, wares, and merchandise, for a term not exceeding a year, on the applicant paying a fee not less than \$1, nor more than \$100, as the authorities may direct, except in the sale of farm and sea products, making it a misdemeanor to engage in such business without a license. The supreme court, in *State v. Conlon*, 65 Conn. 478, 81 L. R. A. 55, declared the act void because, as it said, "it permits the local authority to grant a license to one, and to refuse it to another, in pursuance of a discretion unguided and unrestrained by law," and "the absolute power to fix the license fee at \$1 for one year, or \$100 for one day, . . . thus making it nominal or prohibitive at pleasure. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, is authority for this holding, though it is not cited in the opinion. In that case an ordinance conferred upon supervisors arbitrary power, at their own will, and without the exercise of discretion, in the legal sense of the term, to give or withhold consent to the carrying on of laundry business within the limits of the city and county of San Francisco, and make it unlawful to carry on such business without such consent. This was held unconstitutional. The court said that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails. . . ." The Connecticut court states the general rule that "the legislature has power to require a license for the transaction of any business, either for the purpose of raising a revenue, or for the purpose of regulating the conduct of such business, as public interests may demand." It admits the power in the legislature—"First, to regulate the conduct of

all business, or of any particular business, harmless in its nature and which every citizen has the right to carry on; and second to regulate, even to the extent of prohibition, any business in its nature injurious to the public." But the court says that "... the exercise of that power in the two cases is governed by different principles. In the latter case the controlling object is giving to the public that protection from danger which the state is bound to give, and ordinarily the legislature must be the judge of the degree of danger, and of the required protection. It may restrict the business by requiring large license fees, or by other protective regulations." The court makes the point that the act draws no line of distinction, except between a business that is temporary, and a business that is not temporary, without defining the former or showing that it is more dangerous to the public than the latter. The information was for the sale of boots and shoes without license, and the court construed the act to deal with temporary or transient business, for the purpose of regulating an ordinary and lawful business, in which all citizens have a right to engage, and held the act to be in violation of Bill of Rights, § 1, declaring all men equal in rights, and that no man or set of men is entitled to exclusive privileges, which is substantially like the constitutional provision of Massachusetts and of this state. The court conceded the full legislative power to license and regulate a lawful business, as well as a business which in its nature is dangerous to the public, though its regulations must be governed by different principles in the two cases. Therefore, had the Connecticut statute, like ours, defined "temporary or transient business," granted no exclusive privileges to any persons of the class of transient dealers, and referred the granting of licenses to the legal discretion, instead of the mere caprice, of the local authorities, possibly it might have been held constitutional. At all events, that statute differs from ours in important particulars. Section 6 provides that, upon such vendor's filing his sworn application, depositing \$500, and paying \$25, the state treasurer shall issue a license to him; and § 9 provides that the city or town clerk, when authorized by said board, and upon payment of the license fee, shall issue a license. But it provides that, though such vendor has complied with every requirement of the law down to the time the aldermen or selectmen "act upon such application," they may then refuse the license, if in their judgment it should not be granted. The act does not confer upon this board authority to grant or refuse licenses at their mere option, as in *Yick Wo v. Hopkins*, and in *State v. Conlon*, *supra*. Here the board are required to act forthwith upon the application, and to exercise their judgment whether a license should or should not be granted. If they should refuse to act in any case, they could doubtless be moved by mandamus. When they have acted, and passed their judgment upon the application, resort to mandamus cannot be had, because they are invested with quasi judicial power, and the legal presumption is that they have acted judiciously. No point is made in the respondent's brief that it is not

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competent to leave the granting of licenses to the judgment of the board of aldermen or selectmen. Discretion should be reposed in some person, otherwise books, pictures, and other merchandise of an immoral character might be offered for sale. Whether there is reason to apprehend that vendors who go about from place to place, disposing of goods by auction and private sale, will deceive and defraud the public as to the quality of the goods sold the legislature, as was said by the court in *State v. Conlon*, must be the judge.

It must be conceded that the requirements of this law are oppressive upon the class of persons known as "itinerant vendors," in respect to the deposit of \$500, and in the payment of a license fee in each town where business is transacted. But the question is not whether the law is oppressive or unjust, but whether it contravenes any provision of the state or Federal Constitution. If it does not, the court has no right to declare the act void, for the Constitution alone is the boundary of the power of the legislature. Cooley, Const. Lim. 10, says: "The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the Constitutions of the several states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess." It is not sufficient to say that the law violates the spirit of the Constitution. "Courts are not at liberty to declare a statute unconstitutional because in their opinion it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the Constitution; or because it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 684. It was said in *Youngblood v. Sexton* that courts cannot annul tax laws because of their operating unequally and unjustly; that, if they could, they might defeat all taxation. See Cooley, Const. Lim. 200, 587, 706, and notes.

We are unable to find that the law in question, as a police regulation, is in contravention of any constitutional provision. We have incidentally considered the authority of the legislature in respect to taxation, but it will be borne in mind that this law imposes a license fee, and not a tax. The distinction will also be observed between the cases where license fees have been imposed by municipal ordinances without charter or other legislative authority, and those where such fees are imposed by the state through legislative enactment. In the latter case the reasonableness of the fees, in respect to their amount, must be left with the sovereign state.

The judgment overruling the demurrer and adjudging the information sufficient is affirmed. The judgment that the respondent is guilty is pro forma reversed, and cause remanded.

Taft, J., dissents.

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN RAILROAD
COMPANY, *Ptff. in Err.*,

COMMONWEALTH of Virginia.

(.....Va.....)

1. A train composed of empty coal cars, although destined for a point in another state to procure a load, is not engaged in transporting articles of interstate commerce so as to be beyond the control of state laws.

2. State laws prohibiting the running of railway trains on Sunday, if enacted in good faith for the preservation and protection of the health and morals of the people, and without discrimination against interstate or foreign commerce, are not in conflict with the Constitution of the United States.

(June 11, 1904.)

ERROR to the Circuit Court for Appomattox County to review a judgment convicting defendant of running trains on Sunday in violation of a statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas J. Kirkpatrick, William H. Mann, and F. S. Kirkpatrick, for plaintiff in error:

It has been held by this court that just such a train on its way to Lambert's Point, loaded with coal, was engaged in interstate commerce.

Norfolk & W. R. Co. v. Com. 88 Va. 95, 13 L. R. A. 107.

To forbid the return of these empty cars on any given day in the week will impose a burden which will not simply diminish defendant's capacity to do its business by one seventh, but it will cause a disarrangement and congestion of the whole system which will cripple defendant in its coal trade to a much larger extent. This coal trade as a whole and complete transaction is an interstate matter.

Commerce in the sense employed in the Constitution of the United States certainly includes the transportation and all the instrumentalities of shipment or carriage between states.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *United States v. E. O. Knight Co.* 156 U. S. 1, 39 L. ed. 325.

The Virginia statute prohibiting the running of Sunday trains cannot be defended upon the ground that it is within the police power reserved by the state.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; *Leisy v. Hardin*, 185 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86; *Brimmer v. Reiman*, 188 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485; *Voight v. Wright*, 141 U. S. 63, 35 L. ed. 688; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Minnesota v. Barber*, 186 U. S. 818, 34 L. ed. 455, 3 Inters.

Com. Rep. 185; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 29 L. ed. 158; *Coolington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962; *Norfolk & W. R. Co. v. Pennsylvania*, 186 U. S. 114, 34 L. ed. 894, 3 Inters. Com. Rep. 178; *The Daniel Ball v. United States* ("The Daniel Ball"), 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547.

Mr. R. Taylor Scott, Attorney General, for defendant in error:

The statute, belonging to the class called by the courts and text-writers "Sunday laws," was enacted by the legislature in the exercise of its police power. This power is unaffected by the Federal courts over and above it, and cannot be taken from the state or exercised in whole or in part by Congress.

United States v. De Witt, 76 U. S. 9 Wall. 41, 19 L. ed. 598; *Cooley, Const. Lim.* 725; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795.

There is no doubt that the state may control the operation of railroads running only within its limits; but whether a statute prohibiting the running of all trains within the state on Sunday can be upheld is a question on which courts have taken opposing views.

24 Am. & Eng. Enc. Law, p. 581; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, 141 U. S. 40, 35 L. ed. 628; *State v. Baltimore & O. R. Co.* 24 W. Va. 788.

Laws enacted to prevent desecration of the Sabbath are not unconstitutional as a restraint upon trade and commerce.

Such laws may be supported as regulations of police.

Cooley, Const. Lim. 725; *Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518; *Bloom v. Richards*, 2 Ohio St. 387. *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Cal. 180.

The states of the Union may tax common carriers engaged in interstate commerce, and although the law incidentally may and does affect commerce and its agencies the law is valid.

Picklen v. Shelby County Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79; *Pullman's Palace Car Co. v. Pennsylvania*, and *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, *supra*; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311.

Buchanan, J., delivered the opinion of the court:

The plaintiff in error was indicted in the county court of Appomattox county for violating § 3801 of the Code, which is as follows:

"No railroad company, receiver, or trustee controlling or operating a railroad, shall, by any agent or employee, load, unload, run, or transport upon such road on a Sunday, any car, train of cars, or locomotive, nor permit the

NOTE.—This case overrules the case of the same name in 13 L. R. A. 107. The present decision accords with that of the United States Supreme Court in *Henington v. Georgia*, 163 U. S. 229, 41 L. 34 L. R. A.

ed. 103. Since the question involved arises under the Constitution of the United States, the decision of the Federal Supreme Court is, of course, controlling.

same to be done by any such agent or employee, except where such cars, trains, or locomotives are used exclusively for the relief of wrecked trains, or trains so disabled as to obstruct the main track of the railroad; or for the transportation of United States mail; or for the transportation of passengers and their baggage; or for the transportation of live stock; or for the transportation of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage; provided, however, that if it should be necessary to transport live stock or perishable articles on a Sunday to an extent not sufficient to make a whole train-load, such train-load may be made up with cars loaded with ordinary freight."

Sec. 3802: "The word 'Sunday' in the preceding section shall be construed to embrace only that portion of the day between sunrise and sunset; and trains *in transitu* having started prior to 12 o'clock on Saturday night, may, in order to reach the terminus or shops of the railroad, run until 9 o'clock the following Sunday morning, but not later."

The case was tried upon the following agreed state of facts: "That the train composed of empty coal cars, which are used exclusively in the coal business, as described below, passed through Appomattox county, and by Appomattox station, between 9 o'clock A. M. and 8 o'clock P. M. of Sunday, April 2, 1893, going from Crewe to Roanoke; said points being divisional terminal points on the Norfolk & Western Railroad. That when the train arrived at Roanoke it would be broken up in the company's yard, and, as soon as practicable, would be put into another train, with another engine and crew, and sent by way of Bluefield, in West Virginia, to the coal mines at Pocahontas, in Virginia, and to others in West Virginia. At these mines the cars would be loaded, and sent by way of Bluefield, in West Virginia, to Lambert's Point, in Virginia. The coal so shipped would be coal sold to parties out of the state of Virginia before it leaves Bluefield, and to be conveyed to the purchasers outside of Virginia by way of Bluefield, West Virginia, and Lambert's Point, Virginia."

"That said train was not one of those included in the exemptions in § 3801, Va. Code 1887."

The plaintiff company was found guilty and fined, and the judgment of the county court was affirmed by the circuit court. The action of the circuit court in affirming the judgment is complained of, and is before us for review in this case.

In the case of *Norfolk & W. R. Co. v. Com.*, reported in 88 Va. 95, 13 L. R. A. 107, this court held that the statute under which the indictment in this case was made was inconsistent with the commerce clause of the Constitution of the United States, in so far as it applied to trains running between different states, or engaged in transporting interstate commerce, and therefore void.

The counsel for the plaintiff company insists that the principle decided in that case is the same that is involved in this, and conclusive of it. On the other hand, the attorney general, for the commonwealth, contends that the ques-

tions involved in the two cases are different, and, if they were the same, that the decision relied on as controlling this is erroneous, and ought not to be followed.

The train which the plaintiff company was indicted for running in violation of § 3801 of the Code was made up entirely of empty cars, which, it is agreed, were used exclusively in carrying articles of interstate commerce.

The fact that they had been so used in the past, and were intended to be so used in the future, does not show that they were, at the time when the act was done for which the plaintiff company was indicted, engaged in interstate commerce.

It was held by the Supreme Court of the United States in *Coe v. Errol*, 116 U. S. 517, 525, 29 L. ed. 715, 718, that "when the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepôt* for that particular region, whether on a river or line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state."

If this be the true rule by which to determine when the products of the mine become articles of interstate commerce, and cease to be controlled entirely by the laws of the state, why is it not the correct rule to determine when the carrier of such products becomes engaged in transporting interstate commerce, and is protected and governed by the laws of the United States? In the one case the miner may intend to ship a particular product to another state, and may be preparing the article for shipment, yet it is not an article of interstate commerce until it starts upon its final destination to that state, and until that time is subject to the laws of the state alone, and has none of the rights of an article of interstate commerce. In the other case the carrier may be preparing certain cars upon which to transport the products of the mine to the foreign state, and they may be on their journey to the place from which they are to be shipped, yet why should those cars be considered as engaged in interstate commerce until they are loaded with articles committed to the carrier to be transported to another state?

The reason given for the rule that goods do not become an article of interstate commerce until actually put in motion for some place out of the state, or committed to the carrier for such transportation, is that until that time the article, though intended for exportation, may never be exported, as the owner has the perfect right to change his mind at any time.

The common carrier has the same right to change his mind, and ship on other cars than those which he may have provided for that

purpose, and the cars which were intended for that purpose may never be used.

The rule fixed by the supreme court in the one case seems equally applicable to the other. Applying that rule to the facts of this case, it would seem that the train which the plaintiff company was indicted for running was not when so running engaged in transporting articles of interstate commerce, and was therefore controlled exclusively by the laws of the state.

But if this be not the correct view, and it be held that the plaintiff, in running the train, was engaged in the business of interstate commerce, was the legislation in question within the powers reserved to the state, and not in conflict with the Constitution of the United States?

The right of the state to enact laws to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, is a matter of so much consequence, and so far-reaching in its effects, that its courts ought not to hold that the statutes made for that purpose are inconsistent with the Constitution of the United States, unless they are plainly and clearly so.

"Questions of this nature," as was said by Mr. Justice Story in *Houston v. Moore*, 18 U. S. 5 Wheat. 1, 5 L. ed. 19, at an early day in our judicial history, "are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought much less to be adjudged in favor of the United States, unless it be clearly within the reach of its constitutional charter."

And in the very recent case of *Plumley v. Massachusetts*, decided at the last term of the same court, and reported in 155 U. S. 461, 39 L. ed. 238, the court, speaking through Mr. Justice Harlan (at pages 479, 480, 155 U. S., and pages 229, 230, 39 L. ed.), said: "We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the states to protect the morals, the health, and safety of their people, by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers, and of enumerated state governments which retain and exercise all powers not delegated to the Union,' the judiciary of the United States should not strike down a legislative enactment of a state,—especially if it has direct connection with the social order, the health and morals of its people,—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority dele-

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gated to the United States for the attainment of objects of national concern."

As the Supreme Court of the United States is the final arbiter of questions of this nature, we must look to its decisions for guidance in determining the question. Neither the counsel nor the court have been able to find any decision of that court upon the particular question involved in this case; in fact, counsel admit that there is no such decision.

Numerous decisions have been made by that court, however, in which the powers delegated to the United States by the commerce clause of the Constitution, and the police powers reserved by the states, have been considered; and, while these decisions are not altogether consistent and harmonious, yet from them are to be gathered the principles which must govern us in the decision of this case.

Chief Justice Marshall, in the leading case of *Gibbons v. Ogden*, 23 U. S. 9 Wheat. 203, 6 L. ed. 71, which involved the inspection laws of one of the states said: "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and consequently they remain subject to state legislation."

Mr. Justice Grier, in the *Passenger Cases*, 48 U. S. 7 How., at page 457, 13 L. ed. 775, in discussing the police power of the state of Massachusetts, said: "This right of the states has its foundation in the sacred law of self-defense, which no power granted to Congress can restrain or annul. It is admitted by all that those powers which relate to merely municipal legislation, or what may be more properly called 'internal police,' are not surrendered or restrained; and that it is as competent and necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and convicts as it is to guard against physical pestilence which may arise from unsound and infectious articles imported."

In the *Slaughter-House Cases*, 83 U. S. 16 Wall., at page 62; 21 L. ed. 404, Mr. Justice Miller, speaking for the court, said:

"The power [police] here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may now be questioned in some of its details." Again he says: "This power is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." He then quotes with approval the language of Chief Justice Redfield in the case of *Thorpe v.*

Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625, as follows: "It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. Of the perfect right of the legislature to do this, no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned."

It was said by Mr. Justice Davis in *Pests v. Morgan*, 86 U. S. 19 Wall. 581, 582, 22 L. ed. 201, 202: "That the power to establish quarantine laws rests with the states, and has not been surrendered to the general government, is settled in *Gibbons v. Ogden*. The source of this power is in the acknowledged right of a state to provide for the health of its people, and although this power, when set in motion, may, in a greater or less degree, affect commerce, yet the laws passed in the exercise of this power are not enacted for such an object. They are enacted for the sole purpose of preserving the public health, and, if they injuriously affect commerce, Congress, under the power to regulate it, may control them. Of necessity, they operate on vessels engaged in commerce, and may produce delay or inconvenience; but they are still lawful, when not opposed to any constitutional provision, or any act of Congress on the subject."

In *Sherlock v. Ailing*, 98 U. S. 99, 103, 23 L. ed. 819, 820, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "In conferring, upon Congress the regulation of commerce it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways, may affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." Approved in *Kidd v. Pearson*, 128 U. S., at page 23, 32 L. ed. 351, and *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S., at page 101, 32 L. ed. 354, 2 Inters. Com. Rep. 288.

It was said in *Hall v. De Guir*, 95 U. S., at page 488, 24 L. ed. 548, as quoted with approval by that court in 128 U. S., at page 23, 32 L. ed. 351: "As has been often said, 'legislation [by a state] may in a great variety of ways affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution,'" unless, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or interferes directly with its function.

In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 471, 24 L. ed. 527, 529, 530, it was said by Mr. Justice Strong, that "we admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."

84 L. R. A.

In the same case (p. 472, L. ed. p. 531), it is said: "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious disorders, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

In the case of *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 99, 32 L. ed. 352, 2 Inters. Com. Rep. 288, it was held that "a state statute which requires locomotive engineers, and other persons employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined in this respect from time to time by a tribunal established for the purpose, and which exacts a fee from the company for the service of examination, does not deprive the company of its property without due process of law, and, so far as it affects interstate commerce, is within the competency of the state to enact, until Congress legislates on the subject."

And in that case the court cites (page 101, 128 U. S., and page 354, 32 L. ed.) with approval *Sherlock v. Ailing*, 98 U. S. 99, 104, 23 L. ed. 819, 820, in which it was held that state legislation of that character, "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In *Kimminsh v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, the court held that a statute of the state of Iowa which provided that any person having in his possession "Texas cattle," under certain circumstances, should be liable for damages which might accrue from allowing them to run at large and thereby spread the disease known as "Texas fever," was not in conflict with the commerce clause of the Constitution of the United States, although the necessary effect would be to interfere with the introduction into that state of the class of cattle to which the statute applied.

And the court in referring to the case of *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, in which the statute of Missouri, in a somewhat similar though a much broader statute, was held to be in violation of the interstate commerce clause of the Constitution, said that, while that was true, yet that the court in that case said: "At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it."

In *Wilkerson v. Rahrer* ("Re Rahrer"), 140 U. S. 545, 554, 35 L. ed. 572, 574, Chief Justice Fuller said, in delivering the opinion of the court, that "the power of the state to impose restraints and burdens upon persons and

property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

"And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been conferred expressly or by implication to the national government."

In *Pumley v. Massachusetts*, 155 U. S. 461, 471, 39 L. ed. 223, 226, after discussing former decisions of the court, Mr. Justice Harlan, speaking for the court, said: "While in each of those cases it was held the reserved police powers of the states could not control the prohibitions of the Federal Constitution, nor the powers of the government (*New Orleans Gaslight Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516), it was distinctly stated that the grant to Congress of authority to regulate foreign and interstate commerce did not involve a surrender by the states of their police powers."

"In none of the above cases is there to be found a suggestion or intimation that the Constitution of the United States took from the states the power of preventing deception and fraud in the sale, within their respective limits, of articles, in whatever state manufactured, or that that instrument secured to anyone the privilege of committing a wrong against society."

In *United States v. E. O. Knight Co.* 156 U. S. 1, 11, 39 L. ed. 825, 828, Chief Justice Fuller said: "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern man and things within the limits of its dominion,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive." Again, at page 18, 156 U. S., and page 329, 39 L. ed. in the same opinion, he says: "It is vital that the independence, of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government."

I think from the decisions of the Supreme Court of the United States in the cases referred to above, and others not cited, this conclusion may be drawn: that the state may, in order to secure and protect the lives or health of its citizens, or to preserve good order and the public morals, legislate for such purposes, in good faith, and without discrimination against interstate or foreign commerce, without violating the commerce clause of the Constitution of the United States, although such legislation may sometimes touch, in its exercise, the line separating the respective domains of national and state authority, and to some extent affect foreign and interstate commerce.

Was the statute which we are considering

passed, in good faith, for the purpose of protecting the health and of preserving the morals of the people of the state?

The experience of mankind has shown the wisdom and necessity of having, at stated intervals, a day of rest for man and beast from their customary labors. It is necessary both for the physical and moral nature of man. The government of the United States, as well as the government of the states of the Union, recognize this requirement for rest in man's nature, and provide for it in their respective jurisdictions.

In *Ex parte Newman*, reported in 9 Cal., at page 519, Judge Field, now of the Supreme Court of the United States, in his dissenting opinion, which afterwards became the law of that state (*Ex parte Andrews*, 18 Cal. 676), discussing the necessity and propriety of such a law with much force and learning, says, among other things, that the legislature, in the enactment of such a statute, "has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion among philosophers, moralists, and statesmen of all nations, as of the necessity of periodical cessations from labor. One day in seven is the rule founded in experience, and sustained by science. There is no nation possessing any degree of civilization where the rule is not observed, either from the sanctions of the law, or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule founded upon the law of our race. . . . Its aim is to prevent the physical and moral debility which springs from uninterrupted labor, and in this aspect it is a beneficent and merciful law. It gives one day to the poor and dependent from the enjoyment of which no capital or power is permitted to deprive them. It is theirs for repose, for social intercourse, for moral culture, and, if they choose, for divine worship."

Judge Thurman, in *Bloom v. Richards*, 2 Ohio St., at page 891, says that "wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked."

The Supreme Court of the United States said in *Soon Hing v. Crowley*, 118 U. S. 708, 710, 28 L. ed. 1145, 1147, that "laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the states."

"There can no longer be any question," says Mr. Cooley, "if any there ever was, that such [Sunday] laws may be supported as regulations of police." Cooley, Const. Lim. 6th ed. 725 note 8, and cases cited.

It cannot be doubted that such laws are police regulations of the greatest utility for the physical and moral well-being of society. Neither is there any question that the statute under discussion was enacted in good faith for the preservation and protection of the health and morals of the people of this state, and without any discrimination whatever against interstate or foreign commerce, and that its only effect upon such commerce would be to delay it a few hours in its journey from the point of shipment to its destination. The statute provides for the uninterrupted shipment of articles of commerce of such a perishable character that one day's delay in their shipment would impair their value. There is nothing in the character of coal, and other articles of commerce which are not injured by short delays, or in fact of any article of commerce, that requires that the laws of the state enacted and necessary for the preservation and promotion of the health and morals of its people should be struck down in order that they may have a more rapid shipment.

I am of opinion that the statute which the plaintiff company was indicted for violating is not in conflict with the commerce clause of the Constitution of the United States, and that *the judgment of the Circuit Court was right, and should be affirmed.* And the case between the same parties, hereinbefore referred to, and reported in 88 Va. and 18 L. R. A., in which a different conclusion was reached, was not correctly decided, and should be overruled.

Harrison, J., who sat in the argument of this case, but was absent when the opinion was delivered, expressed his concurrence by letter.

Since this opinion was written the Supreme Court of the United States has decided that a statute of the state of Georgia, similar to the one under consideration, was not in conflict with the commerce clause of the Constitution of the United States, but was a valid exercise of the police power of the state. *Hennington v. Georgia* (decided May 18, 1896) 168 U. S. 299, 41 L. ed. 166.

NEBRASKA SUPREME COURT.

Rachel B. GREENE, *Appt.*,

v.

Charles GREENE.

(.....Neb.....)

*1. Alimony may be defined to be such sum as is ordered by the court to be paid to the

*Headnotes by HARRISON, J.

NOTE.—Allowance to husband from property held by the wife in divorce cases.

- I. Permanent allowance.
- II. Statutes.
- III. *Alimony pendente lite*.
- IV. English cases.

I. Permanent allowance.

Where the title to property derived through the husband has been placed in the wife's name, courts in granting a divorce have allowed the husband's claim to a part of the same, and this on the ground of equity, and some on the construction of statutes authorizing such relief; and some have denied such relief where the equity was not established. The conduct of the parties in the procurement of the title and treatment of each other, as well as statutes which are mandatory or permissive, enters largely into the propriety of such a decree.

The claim of the husband against property held in the name of his wife should properly be called an equity, though it has been denominated by some courts a division of property, and by some alimony or a divorce of property. Alimony, technically so called, as a support in favor of a husband out of the wife's property without regard to its source, is generally denied; but the tendency seems to be to place the husband and wife on an equality on this question, as the rights and powers of a wife expand, and the respective rights and powers of the husband contract; and alimony has been given to the husband in some cases. See *alimony pendente lite*, *infra*, III.

wife by the husband for her support during the time she lives separate from him, or to be paid by her late husband for her maintenance after divorce from the marriage tie. This latter is a creation of modern law, and is what is known as "permanent alimony."

2. A husband cannot, in this state, whether he or the wife be granted the divorce, recover alimony, to be paid out of the divorced wife's separate estate.

band contract; and alimony has been given to the husband in some cases. See *alimony pendente lite*, *infra*, III.

Most of the cases in this note, like the case of *GREENE v. GREENE*, are attempts by the husband to obtain property held in the name of the wife on the granting of the divorce.

The case of *GREENE v. GREENE* holds that Neb. Comp. Stat. 1895, chap. 25, § 10, providing that a petition or bill for divorce, alimony, and maintenance may be exhibited by a wife in her own name as well as by the husband, does not authorize a decree for alimony and maintenance in favor of a husband in an action of divorce, but was intended to allow the wife to sue in her own name instead of by "next friend."

The husband claimed alimony, but the court held that there was no authority under the statute for any allowance of alimony. This was a *dictum*, as it was not allowed in the decree and the appeal by the wife was on another question.

The lower court allowed his claim for property the title of which was in his wife, and this was affirmed because the record did not contain all of the evidence.

A decree of divorce for fault of the wife gave to the husband land held in her name but the title to which was "derived through him," under Wis. Rev. Stat. § 2364, providing for a division of the husband's property, and so much of the estate of the wife as shall have been derived from the hus-

3. Section 10, chap. 25, Comp. Stat., which reads as follows: "A petition or bill of divorce, alimony, and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as is provided by law in other civil cases under the Code of Civil Procedure."—*Held*, to confer upon the wife the right to commence an action of divorce in her own name, and without the intervention in the suit of a "next friend," as was formerly required, and not to authorize the granting of alimony or maintenance to the husband, to be paid from the estate of the former wife.

4. When it appears from statements in the bill of exceptions that it does not contain all the evidence introduced at the trial of the case, such must be taken to be the fact, in the absence of any other or further proof on the subject than the certificate to the bill to the effect that it contains all the evidence.

5. Where a bill of exceptions does not contain all the evidence adduced at the trial, the evidence will not be examined by this court to ascertain whether it was sufficient to support the finding and decree of the trial court.

6. The record presented to this court did not disclose that any objections were made in the district court to its trial and adjudication in this, an action for divorce, of the alleged rights of a husband in real estate, the title to which rested in the wife. *Held*, that the questions will not be considered in this court.

(November 5, 1896.)

A PPEAL by defendant from a decree of the District Court for York County granting plaintiff a portion of the property standing in his wife's name in an action by him for divorce. *Affirmed*.

The facts are stated in the opinion.

Messrs. Harwood, Ames, & Pettis and Sedgwick & Power for appellant.

band, and §2372 providing that no judgment of divorce shall affect the right of the wife in her separate property, "except as provided in this chapter." It was said that the wife's separate property cannot be touched unless the property in her name can be properly said to have been derived from her husband. *Gallagher v. Gallagher*, 59 Wis. 461.

And a decree of divorce in favor of a wife directed her to convey to her husband land which she entered with the proceeds of property which she had sold belonging to him, and she was allowed to retain land which he had entered in her name with money which she had brought to him on her marriage. *Stewartson v. Stewartson*, 15 Ill. 148.

So, on a divorce for fault of the husband he was decreed one half of the real estate the title of which was held by her. And Wash. Code, §2007, providing for an equitable division of property on a divorce, applies to her separate property. *Webster v. Webster*, 2 Wash. 417.

And a husband was decreed an equitable share in the property, where he obtained a divorce on account of the wife's misconduct, and she had obtained the title to all his personal and real estate, and drove him from the premises an old man, houseless, homeless, moneyless, without property and among strangers. *Snodgrass v. Snodgrass*, 40 Kan. 494.

And the husband, on a divorce for the fault of his wife, was awarded the rents and profits as well as the possession of certain property part of the wife's general estate, and the costs of the case. *Milliken & V.* (Tenn.) Code, § 3829, provided that where a marriage was dissolved at the suit of the husband, and the husband was the owner of lands, his interest to the land should not be taken away by the dissolution, but should remain as though the marriage had continued. This statute did not create a technical separate estate in the wife, and did not prevent the decree that was made in this case. *Brasfield v. Brasfield* (Tenn.) 96 S. W. 384.

So, on a divorce for the fault of the husband, he was awarded one fifth of the income of slaves during his life, and a share in the land, which slaves and land had been conveyed to a trustee for the wife by the husband subsequent to the marriage, although Tex. Stat. Art. 849, authorizing a division of property on a divorce, provided that nothing shall be construed to compel either party to divest him or her self of the title to real estate or slaves. The court said this case is an exception to the general rule. The wife derived her property from her husband. By law he was entitled to the management of the separate property of the wife, and to the support out of its proceeds. The husband in this case had stripped himself of everything, and this decree does not infringe the title to the slaves. *Fitts v. Fitts*, 14 Tex. 443.

In *Meldrum v. Meldrum*, 15 Colo. 478, 11 L. R. A. 65, where the wife had by protestations of love and affection obtained a large amount of property by gift from her husband, through fraud and deceit, and thereafter procured a divorce from him, in a subsequent suit by him to set aside the deed the conveyance was set aside and he was not precluded by the divorce proceedings in the county court, the court saying, there is no question of alimony here, the wife alone can maintain such an action, and the husband was not required to set up in his cross-complaint in divorce this cause of action.

In *Oliver v. Oliver*, 5 Ala. 75, where a husband asked on appeal for an allowance out of the estate of the wife for having paid off her debts before marriage to him, and a divorce was granted to her for this fault, it was held he could not have such affirmative relief without a cross bill; but it was said that a court of chancery could properly refuse relief unless the complainant should do equity. In this case after the divorce she released all her interest in a fund settled by the husband on her as separate estate, and the decree of the chancellor was then affirmed.

And on a divorce a *vinculo matrimonii*, thereafter, "by the agreement of the parties," it was further decreed that C. should have the custody of the three elder children, and that for the support and education of the children C. should receive one third of the rents and profits to which Mrs. C. was entitled. *Cheever v. Wilson*, 78 U. S. 108, 19 L. ed. 604.

In *Wetmore v. Wetmore*, 5 Or. 469, it was said that Or. Civil Code, § 495, provides that whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made, shall in all cases be entitled to the undivided one-third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in § 497.

In *Small v. Small*, 42 Iowa, 111, it was said that under Iowa Code, § 2223, the court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

But where a husband asked for a decree of land as alimony, it was held that an action for alimony

Messrs. George B. France and N. V. Harlan, for appellee:

The court has jurisdiction to decree and make a finding upon the dissolution of the marriage contract adjusting the property rights and protecting the husband's equitable interests in the real property and his curtesy in the homestead.

Cochran v. Cochran, 42 Neb. 612.

It is not unusual for the courts to grant alimony to the wife when the husband is granted the divorce.

Brandon v. Brandon, 14 Kan. 842; *Graves v. Graves*, 108 Mass. 814.

If the husband is entitled to alimony the fact that the divorce is granted to the wife would not govern the court's action in adjusting the same.

A petition or bill of divorce, alimony, and maintenance may be exhibited by the wife in her own name as well as the husband.

Neb. Comp. Stat. 1895, § 2865.

The foregoing statute is sufficient authority for sustaining the action of the court without any other precedent.

Where lands are held by the wife, who applies for a divorce, the court may, upon decreeing alimony, direct that such lands be divided between the parties, and that they execute to each other conveyances to perfect such decree.

Stewartson v. Stewartson, 15 Ill. 146; *Wheeler v. Wheeler*, 18 Ill. 89; 2 Bishop, Mar. & Div. § 469; *Small v. Small*, 28 Neb. 843; *Brandon v. Brandon*, *supra*; *Cole v. Cole*, 23 Iowa, 433; *Smith v. Smith*, 19 Neb. 715; *Shafer v. Shafer*, 10 Neb. 472; *Gallagher v. Gallagher*, 89 Wis. 461; *Johnston v. Johnston*, 54 Kan. 726; *Loveren v. Loveren*, 106 Cal. 509; *Alexander v. Alexander*, 140 Ind. 560; *Ferry v. Ferry*, 9 Wash. 239; *Van Brunt v. Van Brunt*, 53 Kan. 380; *Snodgrass v. Snodgrass*, 40 Kan. 494.

cannot be maintained by the husband against the wife. *Somers v. Somers*, 39 Kan. 122.

And a husband on a divorce for cruel treatment by him, was refused all claim against land bought by him and conveyed to his wife to prevent confiscation by the government during the last rebellion. *Goodrich v. Goodrich*, 44 Ala. 670.

So, on a divorce for the fault of the husband, property conveyed to the wife by the husband during marriage, to defraud his creditors, where he claimed that she held it on trust and that the conveyance was to be void on a divorce, was decreed to the wife as her separate property, and a decree giving the same to her husband was reversed. *Stafford v. Stafford*, 41 Tex. 111.

So, a husband was refused a revocation of a settlement of property made by him upon his wife, where a divorce was decreed to her on account of his misconduct, although Ind. Rev. Stat. 1881, § 1045, provided that in considering "alimony" for the wife a settlement made by the husband might be considered to determine what would be a fair award; but in this case the wife abandoned all claim to alimony. In this case the husband claimed that his wife had artfully secured possession of his property by protestations of reconciliation, and then abandoned him and sued for a divorce. This decree was on the ground that a husband should not be awarded a premium for his misconduct. *Stults v. Stults*, 107 Ind. 400.

A husband on a divorce was refused a decree for a conveyance of property held by the wife, where the investment was made with her money, although the common law in force vested such money in the husband. The investment in her name was regarded as a settlement upon her, and he was guilty of cruel treatment which was the ground of the divorce. *Jackson v. Jackson*, 91 U. S. 122, 23 L. ed. 258, Reversing *Jackson v. Jackson*, 1 MacArth. 84, where the husband was allowed a division of property held as separate estate by the wife, procured by joint earnings, and where the divorce was granted on original bill by the wife, and cross bill for divorce was refused, but the cross bill prayed for the restoration of title. Although alimony was not asked, it was germane to the subject-matter of the petition and presented by the cross bill, and D. C. Stat. regulating divorces, § 9, provided that the court allowing a divorce may award alimony to the wife, and dower and reasonable property. When the statute directed an allowance of property to the wife the power was given to divorce the property as well as the parties.

A husband was refused a claim against property settled on his wife bought with joint means, where

a divorce was granted the wife for his fault. The District of Columbia statute relating to married woman's estate was changed and now takes away the power claimed in *Jackson v. Jackson*, *supra*. A husband cannot rescind a settlement and take back property by procuring a divorce for his fault. *Hinds v. Hinds*, 7 Mackey, 85.

And a husband was refused a decree setting aside a deed of trust to his wife which was confirmed by a decree of court on a divorce from bed and board, where there was a subsequent decree of divorce *a vinculo matrimonii* and the husband brought suit to set aside the first decree and to have the property restored. 2 Stant. (Ky.) Rev. Stat. 21, providing that all property remaining in kind obtained by one party through the other during marriage by reason thereof, shall be restored on granting a divorce, did not apply because the property came to her on account of the separation and because she could not live with him and it was in place of alimony. *Flood v. Flood*, 5 Bush, 160.

And a husband was refused the restoration of title of land, conveyed in trust for the sole and separate use of his wife after they were married, where a divorce *a vinculo matrimonii* was granted to him. Ky. Rev. Stat. chap. 47, art. 2, § 6, providing that upon final decree of divorce from the bond of matrimony, the party shall be restored to such property, not disposed of, obtained from or through the other before or during marriage, "in consideration or by reason thereof," did not authorize the restoration of this property. The mere existence of the marital relation did not constitute the consideration for the conveyance in the sense in which that term was used in the statute. *Phillips v. Phillips*, 9 Bush, 183.

Where a trustee holding land for the husband after conviction and sentence of the husband to the penitentiary, conveyed the land to a third party, who reconveyed a part to the wife for her support and that of a child, and she obtained a decree of divorce which directed that she should enjoy for her support the land conveyed to her, the husband could not set aside this conveyance and this decree, after he was pardoned, as the decree only gave her what the statute gave her, and the breach of trust of the trustee in conveying lands to her could not be tried in a motion to set aside the divorce decree. *Johnson v. Johnson*, Walk. Ch. (Mich.) 309.

In a suit by the wife for divorce from bed and board, where the husband on cross petition asked to be restored to real estate which he had given to her in consideration that she should deport herself as an affectionate and dutiful wife, and which she

Harrison, J., delivered the opinion of the court:

This action was instituted in the district court of York county by the appellee against the appellant; the objects sought being to obtain a divorce from her, and other relief in regard to certain property rights. Appellant's desertion of him was alleged by appellee as the ground for the claim of divorce. It was pleaded in the petition that the parties were married at Johnsonburg, New Jersey, October 13, 1869, and that on or about November 1, 1888, the appellant deserted appellee, and for more than two years had been wilfully absent from him, without just cause or reason. The petition also contained a somewhat extended account of the beginning and course of their married life, and more particularly the business and financial transactions engaged in by the appellee, and reverses therein, and the consequent changes in loca-

tion, etc. And it is of the statements that appellee purchased a certain tract of 40 acres of land in York county, and near York, and also a lot in York, upon which he claims to have erected a store building; that this property belonged to appellee, but had been placed in the name of Robert Blair, contrary to the wishes, and against or in fraud of the rights, of appellee; that Robert Blair, deceased at the time of this action, made a will in which he devised the aforementioned land and lot to his three daughters,—the undivided one-half interest therein to appellant, and the undivided one-half to the other two. It is pleaded in the answer and shown by the evidence that the two sisters of appellant afterwards conveyed to her the title which they acquired to the aforesaid property. It was further set forth in the petition that there were four children, issue of the marriage, with the care, custody, and education of whom, it was alleged, the

had failed to do, a decree in conformity with the petition was reversed, as he could not claim that the consideration had failed, because the promise of the wife was no legal obligation, and Ky. Rev. Stat. chap. 47, § 6, providing for the restoration of property on a decree from the bonds of matrimony, did not apply to a decree of divorce from bed and board. A decree was made giving her a divorce from bed and board and that she should be protected in the use of the property. *Orr v. Orr*, 8 Bush, 155.

Kentucky Code, § 435, providing that every judgment of divorce shall contain an order of restoration of property, obtained by one party from or through the other, in consideration of and during marriage, did not authorize the enforcement of an order of restoration to the husband, where the decree for the restoration was made after an order was entered discontinuing his claim to the property in the divorce suit. *Bennett v. Bennett*, 95 Ky. 545.

And a wife was allowed a recovery of her land which the husband had sold after he had obtained a divorce from her. It was held that his title resulting from the marriage ceased with the legal dissolution of that union, the same as though he was dead. *Hayes v. Sanderson*, 7 Bush, 489.

So, where a wife obtained a divorce *a mensa et thoro*, and the husband denied her right to recover and enjoy possession of her land, except on condition that she return, she was entitled to recover from him the possession and use of her land. *Taylor v. Taylor*, 112 N. C. 134.

Massachusetts Gen. Stat. chap. 104, § 44, authorizing the court to grant a share of the wife's estate in the nature of alimony to the husband, only applies to a decree of divorce from the bond of matrimony absolutely and finally severing the marriage tie, and does not apply to a divorce *in solido* in his favor. *Garnett v. Garnett*, 114 Mass. 347.

In *Highley v. Allen*, 5 Mo. App. 521, it was said that the court in its decree could not give to the husband any portion of the property of the wife.

In *Abel v. Abel*, 89 Iowa, 300, it was held that "the answer of the defendant asks, in case of a decree of divorce, that a part of the property be granted to him. The district court correctly denied such relief. It is not a case where the party in fault is entitled to alimony." This was because the merits of the case did not justify such a decree, as the Iowa Code authorizes alimony to the husband. See *Small v. Small*, 43 Iowa, 111.

A decree of divorce giving the wife all the husband's property, and "directing her to pay his debts," was unwarranted. There was no precedent for such a decree. *Ross v. Ross*, 73 Ill. 402.

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In *Ex parte Spencer*, 88 Cal. 400, it was said that it is true that "alimony" in its strict technical sense proceeds only from husband to wife.

II. Statutes.

The following additional statutes give to the husband certain rights in the wife's property, and some of them allow him alimony and maintenance.

New Hampshire Pub. Stat. 1891, chap. 175, § 17, provides that upon a decree of nullity or divorce the court may decree that the husband shall have a part of the estate of the wife in the nature of alimony, as justice may require.

Batt. (N. C.) Rev. chap. 37, § 8, provides that on a divorce from bed and board the court may decree to the party on whose application it was granted alimony not to exceed one third of the net annual income of the other party. Section 14 provides that on a divorce for adultery or impotency the guilty party shall lose all right to courtesy or dower, or to share in the personal property of the other. Section 15 provides that a wife eloping with an adulterer shall forfeit all right to property of her husband settled upon her on the sole consideration of marriage, before or after marriage, if the husband shall have commenced an action for divorce during his lifetime.

Rhode Island Pub. Stat. 1883, chap. 167, § 12, provides that in a case of divorce the court may assign to the petitioner a separate maintenance of the estate or property of the husband or wife, as may be necessary or proper.

Rhode Island Pub. Stat. 1883, chap. 167, § 4, provides that on a divorce for affinity, consanguinity, impotency, idioy, lunacy, or crime, the wife shall have restored to her all her lands, tenements, and hereditaments, and may have restoration of her personal property. Section 5 provides that on a divorce for adultery by the wife, the husband shall hold her personal property forever, and her real estate not secured to her by law during her natural life, if issue is born alive of her body during marriage, otherwise during her natural life only, if he survives her.

Vermont Gen. Stat. 1870, chap. 70, § 83, provides that on a divorce for adultery by the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they both shall live, and shall have tenancy by courtesy if he survives her.

Tennessee Code, § 3329, provides that when a marriage is dissolved at the suit of the husband, and the defendant is the owner in her own right of lands, his rights to the rents and profits of the same shall not be impaired by the dissolution. And he

appellant was wholly unqualified to be trusted; that by the will of appellant's father the sum of \$125,000 was bequeathed in such manner that she was entitled to receive the income therefrom, amounting to \$6,000 per annum; that appellant "is the owner of a large amount of property, as hereinbefore alleged, and the plaintiff is possessed of but little means and has but little annual income, and he is unable to perform manual labor, as he is afflicted with what is commonly known as 'hip-joint disease,' and is unable to support himself by reason thereof, and the defendant absolutely refuses to convey that which is justly due him, or to contribute anything to his support." The prayer of the petition was as follows: "The plaintiff therefore prays that he may be divorced from the defendant, and that he may be given the custody of the said minor children, and that the defendant be decreed to pay him reasonable alimony, and to convey to him each and every part of the lands hereinbefore described, and for such other and further relief as equity may require." In her answer the appellant set forth the purchase of the properties in and near York as having been made with money furnished by her father; that they were so purchased for her, but that

the title was taken in the name of her father; that after his death it was discovered that in his will she had been given the one-half interest in them, and her two sisters one-half interest; that the two sisters afterwards conveyed to her all title or interest they had in the properties in York county. And the answer continued: "That prior to the beginning of this action . . . the said plaintiff, by a certain indenture, duly executed, signed, witnessed, acknowledged, and delivered with and to one Thomas Kays as the trustee and agent of this defendant, for a good and valuable consideration, released, relinquished, and conveyed to and for the use of this defendant all his claim, right, title, or interest, or pretended claim, right, title, or interest, in or to several tracts of land, and every of them, and thereby, upon consideration as aforesaid, expressly admitted and acknowledged that this defendant was the true and only owner of all the same, as her own separate estate and property, free from all interest, title, or control of said plaintiff, whereby this defendant avers that this plaintiff is estopped to assert or maintain that he has, or has had since the 24th day of July, 1883, any right, title, claim, lien, or interest in or to said lands, or any of them. All of which matters were

shall also be entitled to her personal estate in possession or in action. Section 5531 provides that on divorce for adultery of the wife she cannot alienate any of her lands, and at her death they shall be distributed as though she had died intestate.

New York Rev. Stat. (1896, Birdseye) p. 803, § 18, subs. 3, provides that where an action for divorce is brought by the wife, and the plaintiff is the owner of any real or personal property, or has in her possession any personal property left with her by the defendant or acquired by her own industry, or given to her, or if she may become entitled to any property by the decease of a relative intestate, the defendant shall not have any interest therein. Section 19, subs. 2, provides that when an action is brought by the husband the judgment dissolving the marriage does not affect the plaintiff's interest in and to any real or personal property which the defendant owns or possesses when the judgment is rendered.

Maine Rev. Stat. 1888, chap. 60, § 10, provides that when a divorce is decreed to the husband for adultery of the wife, he may hold her personal estate of which she was seized during marriage, during his life, if they had children born alive during marriage, otherwise during her life only if he survives her; but the court may make an allowance out of her property as is necessary for her subsistence. This does not apply to the wife's property held under chap. 61, which chapter provides for the rights of married women to obtain, acquire, and dispose of property in their own name.

Sayles's Tex. Civ. Stat. art. 2864, provides that on a decree of divorce the court shall order a division of the estate of the parties as shall seem just, but nothing herein contained shall be construed to compel either party "to divest him or her self of the title to real estate."

Arizona Rev. Stat. § 2114, provides that the court in a decree of divorce from the bonds of matrimony, shall order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any, provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to separate property.

The following statutes provide for restoration of

property, and also fix the status of the wife's property, thus impliedly denying that any claim may be made by the husband against the wife's estate.

Starr & C. Illinois Statutes, chap. 40, § 17, provides that when a decree of divorce is granted, and it shall appear that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same.

Arkansas Dig. Rev. Stat. 1884, § 2503, provides that in every final judgment for divorce from the bond of matrimony an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which the other party obtained from or through the other during the marriage and in consideration or reason thereof.

Maine Rev. Stat. 1888, chap. 60, § 9, provides that when a divorce is decreed for impotence, or is decreed to the wife for the fault of the husband, the wife's real estate shall be restored to her, and the court may enter judgment for her for so much of her personal property as came to her husband by marriage, as is reasonable.

Maryland Pub. Laws, art. 16, § 37, provides that in all cases where a divorce is decreed, the court shall have full power to award to the wife such property or estates as she had when married, or the value of the same, or of such as may have been sold or converted by the husband, having regard to the circumstances of the husband.

Howell's Mich. Stat. 1882, § 6240, provides that on a divorce from the bonds of matrimony, except that of adultery by the wife, and when the husband shall be sentenced to imprisonment for life, and on a decree from bed and board, the wife shall be entitled to the immediate possession of all her real estate, as if her husband were dead. Section 6237 provides that upon a divorce from bed and board the wife shall have the same rights in respect to her real and personal property as an unmarried woman.

Minnesota Stat. 1894 provides whenever a decree is made of a nullity of marriage or a divorce from the bond of matrimony, for any cause except adultery by the wife, and when the husband is sentenced to imprisonment for life, and upon every divorce from bed and board, the wife shall be en-

and are at issue between these same parties in an action pending in the district court of York county, Nebraska, between the same parties as in this action, which other action was pending at the time this action was commenced, and has ever since been and is now so pending, as hereinbefore set forth." One portion of the answer was in the nature of a cross-petition, and contained, among others, allegations of appellee's cruelty toward appellant and his family, and his unfitness to have the custody and control of the children. Appellant asked that she be granted a divorce, that she be awarded the custody of the children, and that the title to the properties in controversy be quieted and confirmed in her, and some other relief, which need not be particularly noticed. To this answer and cross-petition the appellee filed a denial of each and every allegation of new matter therein contained. The appellant filed a supplemental answer, in which it was pleaded that of the action to which reference was made in the former answer as pending in the district court of York county between the parties hereto, and in regard to the title of the lands and property herein involved, there had been a trial, and a judgment therein favorable to appellant, by which she had been awarded the

ownership and title of the real estate drawn into controversy, and that the cause of action in that case was the same as in the case at bar. To this supplemental pleading the appellee replied, admitting the other action, and that it had run its course to judgment, but alleged that the sole issue in that case was whether a contract upon which it was predicated had been made by appellant under duress. This reply was further a general denial of the allegations of the supplemental answer, except such as were specifically admitted. Of the issues joined there was a trial. Appellant was granted a divorce and the custody of the children. There were further findings and decree as follows: "The court further finds that the plaintiff has an equitable interest in the following described real estate, which real estate appears on the records as the property of the defendant, to wit, has an interest in lot 11, block 58, in the city of York, York county, Nebraska, according to the original plat of the town of York, and that said interest is of the value of \$1,400. The plaintiff has also an equitable interest in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 31, T. 11 N, of R. 2 W., 6th P. M., in York county, the title to which also appears of record in the name of defendant,

titled to the immediate possession of all her real estate and personal property as if her husband was dead.

Indiana Code Civ. Proc. 1043, provides that a divorce decreed on account of the misconduct of the husband shall entitle the wife to the same rights, so far as her real estate is concerned, as she would have been entitled to by his death.

Wyoming Rev. Stat. 1887, § 1585, provides that on a divorce, except for the wife's adultery, the wife shall be entitled to the whole or a reasonable part of her personal estate that shall have come to the husband by marriage, or the value thereof.

1 Mo. Rev. Stat. 1889, § 4509, provides that when the wife shall obtain a divorce from the bonds of matrimony all property which came to the husband by means of the marriage, that is undisposed of at the time of filing the petition, shall revert to the wife and children.

Ohio Rev. Stat. (Glaucque), 7th ed. §§ 5099, 5700, provide that when a divorce is granted for fault of the husband or wife the effect of the judgment shall be to restore to her the whole of her lands, tenements, or hereditaments not previously disposed of. Okla. Code, § 4550, is to the same effect.

Taylor's Kan. Stat. § 4756, provides that on a divorce for fault of the wife the court shall order restoration to her of the whole of her property owned by her before marriage, or separately acquired by her after marriage, and not previously disposed of; and the court may set apart such portion of the wife's property as is necessary for the support of the children. Section 4757 provides that a divorce shall bar the party for whose fault it was granted against any claim in or to the property of the other, except for fraud.

Alabama Civ. Code, § 2837, provides that a divorce deprives the husband of all control over the separate estate of his wife.

Clay's Alabama Dig. 170, § 8, providing that on a decree of divorce the court shall order a division of the estate of the parties, providing that nothing shall be construed to compel either party to divest him or her self of the title to real estate, evidently was repealed, as the same does not appear in the present Code.

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III. *Alimony pendente lite*.

There are but few decisions directly on the question of alimony *pendente lite* to the husband, although in some of the cases *supra* alimony generally was claimed. Under some of the statutes *supra* it seems that on a proper showing, alimony *pendente lite* would be granted to the husband. In an Illinois lower court case, and in an Iowa case, alimony *pendente lite* was allowed, although there was no statute to that effect in Illinois, but there was in Iowa.

An order was made directing the wife to pay into court for the use of the plaintiff, to pay his attorney, \$25. This was affirmed although the court upon final hearing found against the plaintiff, and in favor of the defendant on her cross-petition, and that she was entitled to a divorce from the plaintiff. The lower court allowed him \$300, which included \$50 in attorney fees altogether, but this was set aside on appeal except as to the allowance of \$25. *Barnes v. Barnes*, 50 Iowa, 454. (The Iowa Code authorizes such an allowance. See *Small v. Small*, 42 Iowa, 111.)

In the circuit court of Cook county, Illinois, in the absence of any statute, and admitting there was no precedent, an allowance of alimony *pendente lite* was made to the husband where he was old and a confirmed invalid, unable to support himself, and his wife had an estate from which she derived an income, and she had brought suit for a divorce for his misconduct, the court holding that since the status of married women has been changed, the same rule should be applicable to the wife as to the husband, and both should be placed upon an equality. *Groth v. Groth*, 28 Chicago Leg. News, 348.

IV. *English cases*.

Under the various English statutes the court has power to alter settlements on granting divorce, and, where the wife has been guilty of adultery, to give such part of the wife's income to the husband as the court shall see proper.

On a decree *nisi* dissolving the marriage on account of the wife's adultery, where the wife's income was £1,140 a year from property under the will of her father, and the husband's income was

and that the interest of said plaintiff in said premises is of the value of \$3,000, and the said sum of \$1,400 is a valid lien on said lot, and the said sum of \$3,000 is a valid lien on said S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 31, T. 11, R. 2 W.

It is further ordered and adjudged by the court that the plaintiff have and recover of the defendant, Rachel B. Greene, the sum of \$4,400, the value of his equitable interest in the property hereinbefore described, and that said sum be a lien on said premises in the order named." From this latter portion of the decree this appeal has been prosecuted.

One of the questions presented is, Can alimony be allowed to the husband? "Alimony" is defined in § 351, vol. 2. Bishop, Mar. & Div. 6th ed. as follows: "Alimony, in divorce law, is the allowance which a husband pays, by order of court, to his wife, while living separate from him, for her maintenance; or it may be a like provision ordered for the sustenance of a woman divorced from the bond of matrimony, out of her late husband's estate—the latter branch

of the definition denoting a form of alimony known only to the modern law, not to the ancient. It may be for the wife's use during the pendency of a suit, called alimony *pendente lite*, or after its termination, known as permanent alimony." See also further definition in note 1 on same page. In § 489, in the same volume, the author observes: "If a husband is obliged to seek divorce from his wife, and the property of the two is mainly or entirely vested for her separate use, it will, under special circumstances, be impossible to do justice without transferring to him some of this property. And perhaps there may be statutes in some of our states under which something approximating this can be done. But it cannot generally. Nor, where the common-law rules of property prevail, are the circumstances numerous in which it ought to be; because these rules put what justly belongs to the wife as well as to the husband into his hands, to be used by him for the family support as well as his own. Yet legislation in some of

£350 derived from his business, the court ordered her to settle £250 for life on her husband, and £50 on each child, and refused to make the allowance variable according to the possible valuation of the wife's property. 20 & 21 Vict. § 45, provided that on divorce for adultery of the wife, where she had property, the court could order such settlement of such property for the benefit of the innocent party and their children. *Midwinter v. Midwinter* [1898] P. 93.

And under this statute, where the wife was guilty of adultery, the court allowed to the husband on divorce such a portion of her settled property as would place him somewhat in the status in which he would have been had the union continued. *Maroh v. Maroh*, L. R. 1 Prob. & Div. 489.

So, a husband who had accepted an allowance under a deed of separation, and subsequently had grounds for dissolution of marriage, was allowed an increased provision out of his wife's income under 22 & 23 Vict. chap. 61, § 5, providing that the court after a final decree of nullity of marriage may inquire into settlements and make such orders as to the court shall seem fit. *Benyon v. Benyon*, L. R. 1 Prob. & Div. 447, 45 L. J. P. 93, 24 Week. Rep. 950.

On a motion subsequently made in this case to reduce the allowance on account of the depreciation of the securities and estate of the respondent, the court refused to make any change. An order made is not liable to change on account of subsequent circumstances. *Benyon v. Benyon*, L. R. 15 Prob. Div. 29, 54.

Under 22 & 23 Vict. chap. 61, § 5, the court had power to order a variation of the settlement, where a decree of dissolution of marriage was granted on the husband's petition and there had been a settlement in contemplation of marriage under the Scotch law. *Nunneley v. Nunneley*, L. R. 15 Prob. Div. 138.

And where a wife refused to obey a decree of restitution of conjugal rights the court ordered her to settle a permanent maintenance on her husband under Mat. Causes Act 1884, § 3, providing that where the application for restitution of conjugal rights is by the husband, and the wife is entitled to property or earnings, the court may order a settlement for the benefit of the petitioner and their children. *Swift v. Swift*, L. R. 15 Prob. Div. 118.

A marriage settlement was varied allowing the husband £300 a year during the joint lives of the husband and wife, where the wife's income under 34 L. R. A.

a settlement amounted to £1,050 a year. *Farrington v. Farrington*, L. R. 11 Prob. Div. 84.

And a husband was awarded a settlement out of the wife's income to be held for him and his children, where she was guilty of adultery, but the court held that it could only deal with property to which she was entitled in possession or reversion. *Milne v. Milne*, L. R. 2 Prob. Div. 295.

And a husband was awarded half the wife's present and reversionary income, for himself and his children, where the marriage was dissolved for adultery of the wife. *Noel v. Noel*, L. R. 10 Prob. Div. 179.

But the court refused to award the husband the money due to a wife on a settlement out of her father's estate, and gave the property to their children on account of her adultery. After a final decree the court could not make a retrospective order under 22 & 23 Vict. chap. 61, § 5, as to dividends due and payable before the date of the order. *Paul v. Paul*, L. R. 2 Prob. Div. 93.

And the court refused to change an order of settlement so as to give the husband use of the property settled on the wife, until she should produce their child, which she had abducted, having been permitted access to the child by an order of the court. 22 & 23 Vict. chap. 61, § 5, was not intended to be used for a collateral purpose. *Symonds v. Symonds*, L. R. 2 Prob. Div. 447.

As to varying marriage settlements where there are no children, 22 & 23 Vict. chap. 61, § 5, was amended (41 Vict. chap. 19, § 3), and under the amendment they may be varied. *Yglesias v. Yglesias*, L. R. 4 Prob. Div. 71, 40 L. T. N. S. 37, 27 Week. Rep. 423.

The court refused to vary a settlement by amending the clause giving to the wife an income of the settled property, and adding, should be received by the petitioner *dum sola et eiusa vixerit*. *Gladstone v. Gladstone*, L. R. 1 Prob. Div. 442, 45 L. J. Prob. 82, 35 L. T. N. S. 330, 24 Week. Rep. 739.

And under 22 & 23 Vict. chap. 61, § 5, providing that after a final decree of dissolution of marriage the court may make such orders in regard to the property settled, either for the benefit of the children of the marriage or their respective parents, as to the court shall seem fit, the court cannot make an order favorable to the husband as to such settlement, where the children are all dead, as when there are no children there can be no parents. *Corrance v. Corrance*, L. R. 1 Prob. Div. 495.

the states is setting strongly in a direction ultimately to exhibit the spectacle of rich wives supporting poor husbands; and of husbands defrauding their creditors while wealth embraces them in the arms of their wives. This condition of things is for the legislatures, not the courts; but the courts, seeing these things, may also see a reason why they should not feel compunction when, in a proper case, they withhold all allowance of alimony to the wife." "Alimony is allowed the wife in recognition of the husband's common-law liability to support her. Therefore, in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the wife's part to support her husband, alimony cannot be granted to him. In several of the states, however, alimony, or an allowance from the wife's estate in the nature of alimony, is allowed the husband by statute." 1 Am. & Eng. Enc. Law, 2d ed. p. 92. "An action for alimony cannot be maintained by the husband against the wife." *Somers v. Somers*, 39 Kan. 132; Nelson, Div. & Sep. § 904.

Unless allowed by our statute, the husband could recover no alimony. It is argued that by virtue of the provisions of § 10, chap. 25, Comp. Stat. 1895, entitled *Divorce and Alimony*, the right to recover alimony was conferred upon the husband. The section reads as follows: "A petition or bill of divorce, alimony, and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as is provided by law in other civil cases under the Code of Civil Procedure." Before the enactment of this section a wife was obliged to commence the action by a representative, by her next friend, and the evident intent of the enactment was to allow her to commence the suit in her own name, without the interposition of a "next friend," and the addition of the words "as well as a husband" was meant to and does convey no other meaning than that the wife may commence an action in the same manner as a husband; and they do not reach back and connect with the words "alimony and maintenance," and confer upon the husband the right to alimony and maintenance in an action of divorce, either of which, unless given by this section, he could not obtain in the action. The words were but used as a part of the description of the action which the lawmakers gave the wife the right to institute in her own name. It would be a strained construction which would give them the force of raising in the husband the new right to obtain alimony and maintenance in an action of divorce. *Wood v. Wood*, 8 Wend. 857. The rights of the appellee to receive any of the property, then, could not be predicated upon his claim for alimony and maintenance, but must be derived from such equities as accrued in his favor from the manner of the original purchase of the property and the subsequent improvement thereof, and his participation therein and contributions thereto. In relation to this branch of the case, it is asserted by appellant that there is no evidence, or at least not sufficient evidence, to

support the findings and decree of the court. To this attorneys for appellee answer that there was testimony offered and received at the trial in the district court which was not made a part of the bill of exceptions, and is not presented in this court, and that it is the established rule, when such is the extant condition of the record, that the question of the sufficiency of the evidence to sustain the findings and judgment will not be examined. The record in this case discloses that the bill of exceptions was prepared and presented to the attorneys for appellee for examination and amendment, and was returned to the attorney for appellant indorsed, "I herewith return this draft of a bill of exceptions in the case of *Charles Greene v. Rachel B. Greene*, submitted to me on the— day of—, 1893, and propose no amendments thereto." It was said by this court in deciding the case of *Cattle v. Haddow*, reported in 14 Neb. 59: "Where a bill of exceptions purporting to contain all the testimony is submitted to the adverse party for amendment, and such party certifies that he has no amendments to propose to the same, the court will presume that such bill contains all the evidence, notwithstanding the certificate may not fully so certify." But in *Missouri P. R. Co. v. Hays*, 15 Neb. 281, it was stated: "Where all of the evidence used on a trial is not before us we cannot say that the finding was unsupported. It is true that the certificate to the bill of exceptions is to the effect that it is complete and contains all the evidence produced on the trial. But we find within the bill itself, in the questions and answers especially, incontestable proof that it does not. Where such is the case the certificate will not be taken as conclusive on that point." In the bill of exceptions we find the following statement: "Plaintiff now reads in evidence depositions of Aaron Kisselbach, Euphremia Cramer, Fanny C. Widenor, Nicholas Harris, Howard Barrow . . ." The depositions which the record refers to are not in the bill of exceptions, and where the fact that evidence was used which is not incorporated in the record appears, as it does here, it must be noticed, notwithstanding the certificate to the bill and the presumption arising from the indorsement of counsel hereinbefore quoted, and, where the bill does not contain all the evidence used on the trial, the objection that the finding and decree of the trial court are not supported by the evidence cannot be considered. That it would not be fair or right to do so is too apparent to need argument in its support. *Chamberlain v. Brown*, 25 Neb. 484; *Aspinwall v. Sabin*, 22 Neb. 78; *Nelson v. Jenkins*, 42 Neb. 188. The record before us does not disclose any objection made to the litigation of the question of the appellee's rights, if any, in the property, in this, an action of divorce. The question was presented by the pleadings, and, as shown in the record, was fully submitted to the trial court; hence we need express no opinion on it at present. *Somers v. Somers*, 39 Kan. 132; *Sherwin v. Gaghagen*, 39 Neb. 288, and cases cited.

It is urged by counsel for the appellee that the appeal from the branch of the case in respect to the property by the appellant presents the whole decree here, and that the action of

the trial court, in any and all particulars, is open to examination and reversal or modification at the instance of either party to the cause; and he further contends that there was not sufficient evidence to sustain the findings made, on which is based the decree of divorce in favor of appellant. Without discussion or decision of the presentation of this subject at this time, in an appeal which in terms was limited to one branch of the case by the party

successful in the portion of the decree sought to be attacked by the opposing party, it will suffice to say that it has developed that the evidence is not all contained in the bill of exceptions, and hence the question of the sufficiency of the evidence to support the findings of the trial court is not open to consideration.

It follows from the views hereinbefore expressed, and the conclusions reached, that the decree of the District Court will be affirmed.

MISSOURI SUPREME COURT (In Banc).

Agnes FUCHS, *Appl.*,

City of ST. LOUIS *et al.*, *Respts.*

(188 Mo. 168.)

1. The fact that gases form from crude petroleum oil upon its subjection to heat will be judicially noticed by the courts.
2. The fact that a sewer blow up is entitled to consideration upon the question of care on the part of a municipality in respect to its management.
3. The jury must be permitted to pass upon the question of due care by a municipal corporation which in midsummer turns a large quantity of crude petroleum into a public sewer the natural outlet of which is obstructed, and leaves it four days without taking any precautions to avoid a resulting explosion.
4. An oil company from whose premises crude petroleum escapes during a conflagration not shown to be due to its negligence is not liable for injuries caused by an explosion of a public sewer into which the oil was turned by the municipal authorities after it had left the premises of the oil company and without its knowledge, for the purpose of checking the spread of the conflagration.

(*Sherwood, Burgess, and Robinson, JJ., dissent.*)

(May 28, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendants in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendant's negligence. *Reversed as to the city. Affirmed as to the other defendant.*

The facts are stated in the opinion.

Messrs. Lubke & Muench, for appellant:

The state has recognized the business of handling petroleum and its products to be dangerous to human life, and has put it under regulation by providing for the appointment of inspectors commonly known as coal oil inspectors.

Rev. Stat. 1889, chap. 8, § 1823; *St. Louis County Ct., Jenks v. Fassett*, 65 Mo. 418.

When the safety of human life is in question a high degree of care is required in conducting a business in itself lawful. And when in that business pipes are used to carry oil there is a

NOTE.—As to negligence in the manufacture or storage of explosives, see *Judson v. Giant Powder Co.* (Cal.) 29 L. R. A. 718, and *note*.

34 L. R. A.

constant duty of inspection so that the pipes may be kept in proper condition.

Lee v. Vacuum Oil Co. 54 Hun, 157.

The chief of the fire department is an officer of the city designated by the charter, and is the agent of the city in all matters connected with his department, including the inspection of all buildings which are in the course of construction.

Scheme and Charter, Rev. Stat. 1889, art. 4, §§ 11, 2184.

There is also a sewer commissioner of the city.

Id. Rev. Stat. 1889, art. 4, §§ 36, 2109.

Both of these officers were required by the charter to devote their entire time to the duties of their respective positions.

Id. Rev. Stat. art. 4, §§ 11, 2184.

The municipality is liable like any individual for the negligent use of its property.

Flori v. St. Louis, 8 Mo. App. 231, 69 Mo. 341, 33 Am. Rep. 504; *Carrington v. St. Louis*, 89 Mo. 212, 53 Am. Rep. 108.

The duty of a city to keep its sewers in proper condition is a ministerial one, and for its breach an action will lie at the instance of the injured party.

2 Dill. Mun. Corp. 3d ed. § 1049, and cases cited: *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Fink v. St. Louis*, 71 Mo. 52; *Smith v. New York*, 66 N. Y. 295; *Gilluly v. Madison*, 68 Wis. 518, 52 Am. Rep. 299; *Krans v. Baltimore*, 64 Md. 491; *Hitchins Bros. v. Frostburg*, 68 Md. 100.

A sewer having been constructed, the duty of maintaining it and keeping it in proper condition and repair is ministerial, and any violation or negligent performance of this duty will render the city liable for damages resulting therefrom.

6 Am. & Eng. Enc. Law, p. 28, and cases cited in note 1.

There was sufficient evidence to connect the Waters-Pierce Oil Company as a principal with the wrong here complained of. That company owned the dangerous article and knew it was being carried off into the sewer for the better protection and preservation of the company's other property. It received directly the benefit of the wrong done and is a joint tortfeasor with the city.

Cooley, Torts, 1st ed. 127, 186; *Canifaz v. Chapman*, 7 Mo. 175; *Page v. Freeman*, 19 Mo. 421; *Alred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *McMannus v. Lee*, 43 Mo. 206, 97 Am. Dec. 886; *Murphy v. Wilson*, 44 Mo. 318, 100 Am. Dec. 290.

Mrs. C. P. Johnson and J. D. Johnson, for respondent, Waters-Pierce Oil Company:

The instruction for a nonsuit in favor of the Waters-Pierce Oil Company was correct, because:

1. There was no evidence that it was guilty of the negligence charged in the petition.

Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; *Sira v. Wabash R. Co.* 115 Mo. 127; *Wabash, St. L. & P. R. Co. v. Locks*, 112 Ind. 404; *Cooley*, Torts, 2d ed. 78.

2. It does not appear that the oil which was run into the sewer occasioned the explosion.

Mr. W. C. Marshall for respondent, city of St. Louis.

Barclay, J., delivered the following opinion:

This action was brought under the damage act (Rev. Stat. 1889, chap. 49, §§ 4426, 4427) to recover for the death of Mr. Carl E. Fuchs. Plaintiff is his widow, and charges that his death was occasioned by the wrongful act or neglect of the defendants, which charge the defendants deny. The defendants are the city of St. Louis and the Waters-Pierce Oil Company. The case came to trial in the circuit court in St. Louis. At the close of the testimony instructions were given to the effect that plaintiff could not recover against either defendant. Plaintiff took a nonsuit, with leave, etc., and having, without result, duly moved to set it aside, brought the case here by appeal, after the customary exceptions preserving her case for review. The plaintiff's husband was killed by the explosion of a public sewer which was in the possession and control of the city. The question presented by this appeal is whether the facts tend to show a liability for that misfortune, as to either one of the defendants. Mr. Fuchs had for many years owned a building on the east side of Fourth street, between Chouteau avenue and Convent street. In July, 1892, he occupied the lower floor and cellar of this building as a place of business, where he conducted a saloon. The house stood over a public sewer, built there by the city before he acquired the property in 1884. The house was built in that year. The sewer was called the "Mill Creek Sewer." It was a large one, constructed and maintained by the city. It was used to drain an extensive territory, as well as to carry off the surface water and sewage from the public buildings in the central part of the city, including the city hall, the "Four Courts," and the jail. The sewer extended from the west beneath and across Broadway (or Fifth street) and Fourth street, underneath and across Mr. Fuchs' lot; and thence eastwardly, a distance of about four blocks, to the Mississippi river, its outlet. The sewer was provided with several closely covered openings or manholes, which were available for ventilating it. Several of these manholes were located along the line of the sewer near the saloon property, one of them a short distance west of it. The sewer was about 14 feet in diameter, had an arched top and was built chiefly of masonry. July 22, 1892, about noon, a fire broke out on the premises of the Waters-Pierce Oil Company, located some ten blocks west, and two or three blocks north, of the saloon. While the fire was in progress, and the city fire

engines were throwing streams of water on the burning buildings, large quantities of oil and water ran from the premises of the oil company, and spread out among the railroad tracks adjoining. Then a gang of laborers under direction of the chief of the St. Louis fire department, dug a trench among the railroad tracks, and by that means conducted the oil and water into a drain leading to the Mill Creek sewer. This oil was not burning at the time. The men who did this were not on the premises of the oil company, and no officer of that company present was seen or heard to give them any directions concerning the prosecution of the work, nor was it shown that the workmen were in the employ of the oil company. Nor was the sewer inlet into which this oil was conducted on the premises of the oil company. How much oil ran into the sewer does not clearly appear. But the amount was, at least, 800 or 400 gallons. Four days after the fire the explosion occurred, shortly after 4 p. m. The immediate cause was the act of an employee of a shop on the opposite side of the street from the saloon, who went into the cellar in the course of his business, taking a lighted candle. As he approached the drain or sewer inlet, there was a puff of flame, and an explosion, which knocked him off his feet, stunned him, and set fire to his clothes. He remembered nothing more for some time thereafter, but another man near him took up the story at that point, and testified that the big explosion (which demolished part of the saloon) occurred before you could count ten, after the mishap to the man with the candle. The final explosion made a noise like a cannon, as one witness described it. It tore open the top of the sewer for a long distance, and, among other damage, blew out part of the saloon building, and killed the plaintiff's husband. The drain opening into the cellar where the explosion originated connected with the Mill Creek sewer. The presence of a large body of oil in the sewer at the time and place of the catastrophe was established by the testimony of a witness who was sitting at a table in the saloon with Mr. Fuchs when the explosion took place. This witness was thrown into the sewer, and swept down in it a distance of several hundred feet, but was fortunate enough to escape alive. His evidence showed the presence also of much coal-oil gas in the sewer while he was in it. There was evidence that the conflagration at the oil works was large, and attracted general public attention. A gas engineer, of many years' experience in manufacturing gases from petroleum and its products, testified for plaintiff that crude petroleum, exposed to a temperature of 60 degrees Fahrenheit, in a confined space, gives off inflammable vapors or gases, which will explode when brought into contact with flame; that naphtha is one of the first products of the distillation of the crude petroleum, and is lighter, and the like vapors will form from it speedier than from the crude oil in the same temperature; that these vapors or gases are lighter than the air, and rise, and, although not combustible spontaneously, will explode so soon as a flame comes in contact at any point with the gas. The evidence also indicated that the outlet of the sewer at the river was stopped up by reason of the high stage of water.

There was evidence to show that some of the large manholes or inlets to this sewer in the vicinity of the saloon were not opened after the oil ran into the sewer, and that the cover of a manhole in the street west of the saloon was thrown into the air by the explosion, and broken in pieces. The death of the plaintiff's husband occurred July 26, 1892, the day of the disaster, and this suit was instituted on September 16th following.

1. The first question is whether the case should have gone to the jury on the issue of negligence on the part of the city. Irrespective of any inquiry as to the capacity or construction of the sewer, it is settled law in Missouri that a city is liable for any omission of reasonable or ordinary care in the management of such a property. What is ordinary care depends very greatly on the facts and circumstances of each particular case. In determining what care of property is reasonable, its situation and the objects of its use should be considered. Here was a large sewer, which ran under business buildings in a populous part of the city, and the sewer exploded in the circumstances described. There is not, by the way, the slightest claim or suggestion of any negligence on the part of the deceased. That a large body of inflammable oil had entered the sewer, because of the fire at the oil works, was a fact which the jury might naturally have inferred the city had notice of, after a lapse of four days, as also of the high water in the Mississippi river prevailing at that time, preventing a free discharge of the contents of the sewer in that direction. The fact that gases form from such oils upon subjection of the latter to heat is a matter of ordinary scientific knowledge, of which courts will take judicial notice. It was, moreover, testified to as a fact in the case before us. In view of the conditions existing at the time of the disaster, what was the duty of the city, or rather, what fair inferences may be drawn (from the fact of the explosion and its circumstances) as to the performance or non-performance by the city of the duty of ordinary care towards its citizens living along the line of the sewer? It is in evidence that the large vent or manhole in the street, just west of the saloon, was tightly covered during the four days from the fire to the explosion, and that, when the latter occurred the iron cover of that opening, about 8 feet in diameter, was thrown a great distance by the force of the shock. The time was summer,—the latter part of July; yet nothing whatever appears to have been done by the city authorities, so far as this evidence indicates, towards averting the effects likely to follow the escape of such a large body of volatile oils into a sewer whose natural outlet was obstructed by the high water in the river, as stated. All the facts which made the sewer dangerous might fairly have been found to be within the knowledge of the city officials after the lapse of time following the fire. *Vanderstice v. Philadelphia* (1888) 103 Pa. 102. Carefully managed sewers do not, according to the common experience of men, usually blow up and scatter destruction and death. Such a performance is of itself entitled to consideration, on the issue of care in respect of such property; or, as some jurists have said, "the

thing itself speaks." *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759, 25 Atl. 522. Had the cover of the large opening west of the saloon been removed, so as to allow the direct escape of the gas at that point, it may be that the disaster would have been avoided. It was not removed; nor do any other steps appear to have been taken in regard to the care of the sewer by the city authorities after the flow of the oil into it on the 22d of July. It is not always consistent with common prudence to await a catastrophe before taking precautions against it. Nor is it conclusive of careful management that a particular disaster has never before occurred. It is often an essential part of reasonable care to guard against those performances which men of ordinary prudence would naturally and reasonably anticipate in dealing with such dangerous agencies as science has contributed to our highly complex civilization. To what extent such foresight is demanded by the duty to use ordinary care it would be very difficult to say. We shall not attempt to generalize on that topic now; and, as the cause at bar should be brought to another trial, we do not propose to go into any further comment on the facts than seems needful to indicate our general view as to their probative force and tendency. It appears to us, on the testimony submitted, that it cannot be declared as a conclusion of law that the city fully performed the full measure of its duty in respect of the sewer property; and hence that the learned trial judge erred in giving the instruction which denied plaintiff the right to go to the jury for a finding of fact as to the alleged negligence of the city.

2. Touching the charge against the oil company, there is no evidence as to the origin of the fire at the works, nor any evidence of any want of care on the part of the company in regard to the flow of oil into the sewer. That flow was caused by the direction of the chief of the city fire department for the purpose of averting the danger of spreading the conflagration. The oil company was not responsible for that action on the facts shown, nor was it responsible for the care of the public sewer which exploded four days later.

We conclude that *the ruling and finding as to the oil company should be affirmed; but as to the city the judgment is reversed and the cause remanded for a new trial.*

Brace, Ch. J., and Robinson, J., concur. Macfarlane, J., concurs in the result.

The cause having been transferred to the court in banc on March 3, 1896, the following opinion was handed down:

Per Curiam:

The foregoing opinion of Barclay, J., handed down in division No. 1, is adopted as the opinion of the court in banc, **Brace, Ch. J., and Gantt and Macfarlane, JJ., concurring therein with him; Sherwood, Burgess, and Robinson, JJ., dissenting. Accordingly the judgment of the circuit court is affirmed as to the Waters-Pierce Oil Company, and is reversed and remanded for new trial as to the city of St. Louis.**

Sherwood, J., dissenting:

Action by plaintiff, the widow of Carl E.

Fuchs, deceased, to recover damages for the death of her husband, caused by the explosion of Mill Creek sewer. The petition, after formal and preliminary statements, alleges that the defendant city had built the sewer, and then proceeds to state that a fire broke out on the premises of defendant the Waters-Pierce Oil Company on the 22d of July, 1892, where a large stock of oils was stored by that company; and that such company did cause and permit said oils to escape and run into the above-mentioned sewer, fill the same with oil, and generate gases therein, etc. Having made these allegations, the petition then avers that "under a license from the then owners of said lot [referring to the lot afterwards bought by Carl E. Fuchs in May, 1884] the said sewer was by said city constructed and carried underneath said lot eastwardly towards the said river, and that said sewer was located below the cellar afterwards caused to be built upon said lot by said deceased, Carl E. Fuchs; that when defendant the city of St. Louis obtained said license from said owners it assumed and agreed with the then owners of said lot and their assigns, and became bound, to keep and maintain said sewer in good order, and to care for the said sewer, so that said lot and any improvements which might be put thereon would be free from danger of injury on account of said sewer and the use thereof." The petition then concludes thus: "Plaintiff further alleges that said sewer was provided with openings especially designed to carry off any gases which might arise in said sewer and be liable to combustion and explosion, and that said sewer and the openings thereof aforesaid, on and prior to the said 26th day of July, 1892, were in the sole care and control of defendant the city of St. Louis, its agents and servants, yet the said city, its agents and servants, knowing that said defendant the Waters-Pierce Oil Company had flooded said sewer with oil, neglected to open said vents, and carelessly and negligently failed to take measures and precautions to prevent gases arising and accumulating in said sewer so as to endanger the same; and that between the said 22d and 26th days of July, 1892, gases did arise and accumulate in said sewer in great and very dangerous quantities, and on the date last named, and within six months next before the commencement of this suit, ignited and exploded with great force, throwing open said sewer underneath the property of said Carl E. Fuchs, shattering his said building, and also then and there causing the death of said Carl E. Fuchs," etc. The answer was a general denial by defendant city as well as by defendant company.

The evidence, in substance, so far as necessary to state it, was to this effect: Carl E. Fuchs, deceased, owned the building on the east side of Fourth street, seven or eight doors south of Chouteau avenue, and about four blocks from the river. This section of the city is a valley, and the sewer in question is known as "Mill Creek Sewer." This sewer was formerly a creek, and constituted the natural drainage of a large portion of the city, into which very numerous smaller sewers emptied, and it drained the property in Mill Creek valley from Grand avenue eastwardly,

and also drained the City Hall and Four Courts. Fuchs' building was located over this sewer, which was built in 1858 or 1859, in the most solid and substantial manner, the stones composing it being very massive, and it ran through the lot on which the store building of Fuchs was situate in a north westerly and south-easterly direction and crossed Fourth street and Broadway, which converged at that point, and were, in consequence of such convergence, some 200 to 300 feet wide at that point. On July 26, 1892, the sewer exploded about 4:25 P. M., and in consequence of which Carl E. Fuchs died on that day. The explosion tore out the front of the store, except the iron pillars; also the rear wall of the entire building, and the floor of the store; and opened the sewer through the whole length of the building, and extended eastwardly between Second and Main streets, where the entire top arch of the sewer was thrown out for a distance of about 400 or 500 feet. The street west of the store was not disturbed, but the sidewalk on the west side of Broadway was torn up, and also the property next to it. There were covers for the sewer in the middle of the street (where Broadway and Fourth street join) opposite the store, and another on the west side of Broadway, about 150 feet from the store. This cover was blown off,—the one in the street west of the store,—an ordinary-sized man-hole, 3 feet in diameter, with a solid cast-iron lid, about $\frac{1}{4}$ of an inch thick. After the explosion this lid was found broken in pieces, and the contents of the store, barrels, boxes, bottles, shelving, and woodwork, wood floors, joists, plaster, and wainscoting were in the sewer, through which the water was rushing. There was a substance in the cellar which looked like an oily mass, and had a gaseous smell. The Waters-Pierce Oil Company's place of business was between Gratiot street on the south, Twelfth street on the east, the railroad tracks on the north, and Fourteenth street on the west, and was ten blocks west and two or three blocks north of the Fuchs store, and was close to the Mill Creek sewer, where the company had large iron tanks for storing oils, from which they filled sheet-iron wagons for distributing oils to retail dealers in the city, etc. The floor of the cellar of the Fuchs house was composed of a layer of 2 or 3 inches of cinders with a cement top, constructed on the arch of the sewer. The sewer was 14 feet wide, 12 feet high, and with walls 30 to 24 inches thick. At the time of the explosion the river was very high, and filled the cellars and first floors of the buildings on the levee. A fire occurred at the defendant company's works on July 23d, four days prior to the explosion. The witness giving the foregoing testimony was Dr. Fuchs, a son of the deceased. On his cross-examination this witness stated: Generally ordinary sewage is dark and greasy-looking. That he could not tell whether any petroleum oil was mixed with the water in the sewer, but that it had an odor like gas; not like ordinary lighting gas, but a greasy smell like petroleum or gasoline; something like that; though he was not sufficiently versed in chemistry to tell what kind it was. That the smell was not like that emanating from the black liquid which he had seen taken from sewers.

That the smell was different from the ordinary gases from the gas works. That the manhole at the intersection of Broadway and Fourth street was about 100 to 150 feet west of the store. That he knew of no manholes in the sewer east of Fourth street. That after the explosion he saw flat cars, which had fallen into the opening of the sewer which was constructed under the property before his father bought it or built on it, and since that time no repairs on the sewer east of Broadway had been necessary. That there was a slight current to the water in the sewer the day of the accident, but the mouth of the sewer was blocked up by the river. That there was only one sewer inlet at the north end of Market at the junction of Fourth and Fifth streets, and one at the southwest corner of Broadway and Chouteau avenue. That the one at the north end of the Market was reconstructed, and it was made of clay pipe, with a goose neck to it, to prevent the escape of gases into the open air. This was done at the instance of the people in the neighborhood, who complained of the gases and odors thus escaping. That the inlet at the corner of Chouteau avenue and Broadway is intended to drain the surface water from the streets.

Follenius, whose marble works were located at 506 and 510 Chouteau avenue, and who had occupied those premises for about twenty-two years, and who had been familiar with the locality for some twenty-eight years, testified that he remembered the fire which occurred at the oil company's works on Thursday, the 22d of July. There was a manhole at the corner of Broadway and Chouteau avenue, on the west side of the latter. That on Sunday (next before the Monday, the 26th of July, on which the explosion occurred), his place having connection with the sewer he observed a peculiar smell from the sewer. That it seemed as though mixed with sewer gas and coal oil, which was different from the sewer gas smells which were there most all the time. That he was seated at his desk when the explosion occurred, and after that went out into his yard, which looked as if it had been plowed up with a large plow. That large holes were blown in the top of the sewer 3 or 4 feet over, from which issued an odor like he had noticed the day before. That the shock threw the lid off the manhole at the corner, and on going eastward he noticed the same kind of odor issuing at the southeast corner of Broadway and Chouteau avenue; also east of the Fuchs building; and that the smell was unlike coal gas, and different from any smell that had come from the sewer before. That the odors that came from the manhole at the southeast corner of Broadway and Chouteau were there before the sewer was built, but since its building could only be detected on a cloudy, rainy day. He further testified that he saw a colored mass mixed with the dirty water that was flowing down the sewer, of a kind of violet color, but could not say whether it was oil.

Tunstal, another witness, was in the back room of the building when the explosion took place, and Fuchs and Kriebaum were in there with him, and by that explosion he was cast into the sewer, and from which he got out after struggling in the stream a distance of 84 L. R. A.

about 800 feet. There he encountered water from 5 to 6 or 7 or 8 feet deep. That in the sewer were "sawdust and muck and petroleum and coal oil, and everything else that you could think of that was nasty." That there was a little current, enough to carry him along, but none right where the *débris* from the house dammed up the sewer. That there was a large amount of sawdust in solution, and general muck, more like molasses or tar or something of that kind. That petroleum is a thick fluid, like tar; and that there was coal oil on top of the water. This he recognized in the darkness of the sewer. That there was "gas, either from petroleum or whatever it was that blew up the sewer." "That the explosion didn't ignite all the gas in the sewer. That there were other odors there besides that of gas. That witness was compelled to hold his nose, and get under the water, to keep from being asphyxiated with the gas, which was just like needles going up into his nose." That the defendant oil company's works were located alongside of the Mill Creek sewer, between Twelfth and Fourteenth streets, on the Pacific Railroad; and that this was the only oil mill on that sewer.

Two hours after the occurrence of the explosion, another witness, Dr. Bowler, who was in the second story of the Fuchs building when it occurred, states that a characteristic pungent smell was noticeable arising from the opening in the sewer, such as usually arises from sewers; that after the explosion there was smoke or vapor arising from the sewer, indicating that there had been fire or combustion in the sewer, and that the gas had been consumed; that the ordinary gas which accumulates in sewers from decaying vegetable or animal matter is explosive when ignited under certain conditions; that the density of the gas would have to be sufficient, and also sufficient heat to produce the explosion; that, if all the conditions were favorable, you would get spontaneous combustion or explosion by ignition,—that is, applying a light to the accumulated gas; that sewer gas may explode, under certain conditions, without the presence of petroleum; that he understood the process of manufacturing gas from crude petroleum, which, and coal oil, are explosive when subject to a certain degree of heat; and that under favorable conditions either of the gases mentioned might explode spontaneously.

Schneider, who lived in the next door south of Fuchs, testified: That there were two manholes in the Mill Creek sewer at the junction of Fourth and Fifth streets (the latter of which is usually called Broadway),—one in the middle of the street and the other on the sidewalk on the west side of the street,—and they were kept closed with solid covers. That there were two other openings to the sewer,—one on the corner, and one right in front of the Market,—which were made for water to flow into; and two openings of usual size to the sewer, also open, covered with gratings, in the alley, 144 feet east of the Fuchs property, right behind the property of witness. These openings in the alley are to a sewer connected with the main sewer. That on the evening of the day of the fire (which occurred just a little after noon) the smell from the sewer of

coal oil was so strong in his house that they had to close the windows. That his sewer connects with the Mill Creek sewer. That each succeeding night it was the same way, and they could not stand it in the rear of the house, and had to go to the front, because of this smell of coal oil. There was always some odor coming from the sewer, but not so strong as at the time mentioned. That the odor was much stronger after the fire than before. That since the manholes on Fourth and Fifth streets had covered tops they did not suffer so much from the odor. That the branch sewers affording connection from his house with the Mill Creek sewer had no self-acting safety cocks to shut off odors from the sewer in the yard.

Kuntz, a plumber, testified that seven or eight years ago he connected the premises of the Waters-Pierce Oil Company with the Mill Creek sewer at a point on Gratiot street opposite Thirteenth, to drain their yard; that there was a grating at the junction of Fourth and Fifth streets over the main sewer, to let the water flow in.

Hartung, reporter, testified: That he was present at the time the fire of the oil company's works occurred, and was there some three hours. That he saw men who wore overalls, and were laborers, who were acting under the command of Lindsay, chief of the fire department, digging trenches in among the railroad tracks, and thus conducting the oil and water (which was in large quantities in the ground, from 5 to 12 inches deep) to the public sewers. That these men at work were about 15 feet north of the oil company's plant. That it was impossible to tell the proportions of the flowing water and oil. That the men were not firemen. That while the works of the oil company were furiously burning, the oil from the works ran out on the ground and among the railroad tracks on which the cars were standing. That he asked Chief Lindsay "whether there was any danger from that oil that was scattered among the tracks catching fire and damaging the railroad property, and he said, 'No,' he thought not; that the men were leading it into those inlets; and I heard him say, 'Move along,' 'Is it hot?' and questions of that sort." That there was no way to prevent the oil, etc., from escaping and going northward into the Union Depot yards, where there were cars standing, except by turning it into the sewers. That the fire department was playing on the fire at the time the works were burning. That one of the officers of defendant company stated to him that there was naphtha in some of the company's tanks. This witness also testified that there were 800 or 400 gallons of oil flowed into the sewers, and then, after that, 3,000 or 4,000 gallons; and then said he could not estimate the quantity, as he could not tell how thick the oil was on the surface of the water.

Wilson, a policeman, testified that just as he passed the Fuchs place the explosion occurred; that a dense smoke came out of the building; which resembled the scent which arises after the extinguishment of a gasoline stove.

Enger, a gas engineer, who had twenty-one years' experience in making gas from petroleum and its products, had not studied the

matter of how gases originate that are formed in a sewer. That gases arise by evaporation. They are not made that way, but are produced that way by simple evaporation. That some of the constituents of the oil would evaporate. That this was the case with all kinds of oil from crude petroleum down to naphtha,—gasoline. That illuminating oil that is sold as kerosene would not give off any vapor under ordinary temperature, nor would it produce any gas. I have tried that many times." That if you poured such oil on the floor, with a lighted candle in the room, the oil would not take fire. That it only explodes or burns by contact. That crude petroleum gives off a vapor under ordinary temperature; that is, any temperature over 60° Fahrenheit, which is inflammable by coming in contact with fire. That it cannot be called a gas, but is a vapor. That if you filled a large vessel with crude petroleum, and put it in a closed room, after a time, depending on the atmosphere, there would be gas enough in the room to make it dangerous to go in there with a light. That there would have to be a great deal of ventilation in a room to prevent it being dangerous. "I would be afraid of it even in any case." That he had given the question of the construction of sewers in a city no attention. That naphtha is one of the first products of distillation of petroleum, and is a very light oil, and vapors form from it much quicker than they would from petroleum alone. That gasoline is the same as naphtha only a little lighter grade. Asked whether sewer gas or marsh gas would not ignite or burn spontaneously, witness said that the former would not, and that ordinary gas would not, to his knowledge. That it would take a very large quantity of crude petroleum to generate enough vapor to cause Mill Creek sewer to explode. That when he spoke of oil evaporating at a temperature of 60°, he referred to oil in an open vessel; such a one as would admit of air. That from his general reading he knew that there was a constant generation of gases from animal and vegetable matter, and was called "sewer gas," which is a mixture of gases. That there is a mixture of sulphureted hydrogen, and maybe some marsh gas. That marsh gas emanates from decaying vegetable matter. That witness believed that it was common in sewers. That the conditions were favorable to it, and that the conditions were more favorable to sulphureted hydrogen being in sewer gas, and more so than ordinary marsh gas. That gas is generated in sewers from human excrements, rotting vegetables, and animal matter. That explosions from sulphureted hydrogen or marsh gas would be about the same in their violence as gas from petroleum vapors. That in the opinion of witness, if the explosion had resulted from crude petroleum or other cause, such sudden ignition would have raised the temperature to about 2,200°, and the heat would have ignited and burned any petroleum in the sewer at the time, and would have ignited the petroleum more readily on the surface of the water than if lying on a dry surface. This witness could not state what the temperature of the sewer was. That tank cars containing hundreds of barrels of oil are constantly being transported all over the country

without any protection from the sun, and having on the top of each a cupola top with a manhole in it, and by means of such holes the cars are filled.

Humpert, who did business for Peters at French Market, across the street from Fuchs' place, testified: That on the 28th of July he went down in the afternoon, with a lighted candle, to put some watermelons away in an ice chest in the cellar, when a cloud of fire came right in his face and knocked him on his knees, etc. His place is about 150 feet from Fuchs' place. And that there was a sewer in the cellar which connected with that one in the alley. That there was a manhole in the alley, over the sewer, which is covered by a grate. This was just back of Peters' building.

Kern next testified that he was in front of Peters' place when the explosion happened; that he saw Humpert, who had just come from the cellar with his clothing on fire; that witness took Humpert's shirt off, the fire from his clothes; and in about the time a person could count ten, a loud report was heard, and the front of Fuchs' building came out.

At the conclusion of the testimony the court, at the instance of defendants, gave instructions in the nature of demurrers to the evidence, whereupon plaintiff took a nonsuit, etc.

1. It will have been inferred from the foregoing quotations from the pleadings and the evidence that this cause requires consideration from two points of view; one relative to the pleadings, the other to the evidence.

In the first place there is no evidence to show that the city contracted with the grantors and their assigns or Fuchs to "keep and maintain said sewer in good order, and to care for the said sewer, so that said lot and any improvements which might be put thereon would be free from danger of injury from or on account of said sewer and the use thereof." This being the case, there is no right arising out of contract which could hold the city liable in the premises.

2. And it is patent of record that the other portions of the petition do not state that it was the duty of the city to keep Mill Creek sewer free from noxious or dangerous gases, or free from fluids and substances which would generate such gases. Unless the duty of the city to do this is alleged in the petition, it states no negligence; for duty unperformed is the sole predicate of negligence, and without it the latter cannot exist. *Oooley, Torts*, 2d ed. 791, 792; *Flint & P. M. R. Co. v. Stark*, 88 Mich. 714; *Cole v. McKee*, 66 Wis. 500, 57 Am. Rep. 298; 1 *Shearn & Redf. Neg.* 4th ed. § 8; *Hallahan v. Hannibal & St. J. R. Co.* 71 Mo. 118. The petition therefore states no facts sufficient to constitute a cause of action,—a fatal defect, which may be noticed in this court for the first time (*Smith v. Burrus*, 106 Mo. loc. cit. 97, 18 L. R. A. 59, and cases cited), or on which account objection could have been taken in the lower court to the introduction of any evidence (*Butler v. Larson*, 72 Mo. 227). Other matters in regard to the petition will receive comment in a subsequent paragraph.

3. Inasmuch as the trial court granted instructions in the nature of a demurrer to the evidence, it has been thought proper to make 84 L. R. A.

exhibition and proffer of that evidence somewhat at large. In cases of this sort, as must be obvious, facts are indispensable factors in determining the correctness of the action of the trial court in nonsuiting the plaintiff since those facts must constitute the *propositum* of plaintiff's action and of the defendant's defense.

From the facts in evidence it appears illuminating oil that is sold as kerosene (coal oil) will not give off vapor nor produce gas under ordinary temperature; that it only explodes or burns by contact; that crude petroleum, if placed in a large, open vessel in a closed room, would after a short time, if subjected to a temperature of about 60° Fahrenheit, give off sufficient vapor—not gas—to cause an explosion if the room were entered with a light. There was no evidence, however, as to what the temperature of the sewer was, nor as to what the effect would be in the way of generating gas or vapor in the sewer, where, according to the testimony, the proportion of the crude petroleum, etc., must have been exceedingly small when contrasted with the vast quantities of water contained in a sewer 16 feet wide, 12 feet high, and from 5 to 6, 7 and 8, feet deep, even if we adopt the bare conjecture that there was as much as 3,000 or 4,000 gallons of oil turned into the sewer. It is true that the testimony shows that naphtha, etc., would give off vapor at a much lower temperature than crude petroleum, but there is no testimony showing what the temperature of the sewer was nor that any naphtha, etc., was turned into the sewer on the day of the fire. So, that, under the testimony, we must put out of view as constituents of the litigated injury naphtha and gasoline, because not shown to have escaped from the tanks, nor to have been conducted into the trenches leading into the sewer; and besides, conceding such escape and such conducting of those fluids, no temperature of the sewer was shown. So that, under the testimony, kerosene or coal oil and crude petroleum must also be excluded from consideration as injury-producing ingredients, because the former does not generate either gas or vapor under ordinary temperature, 60°, nor the latter generate anything but vapor—not gas—under that temperature; and no testimony as to what degree of heat or cold existed in the sewer, and gases—not vapors—are alleged in the petition as the cause of the explosion. These things alone would certainly seem to warrant the ruling of the trial court in giving the instructions complained of.

4. But other inferences are to be drawn from the facts in evidence already related, which, if possible, even more strongly tend to support the conclusion reached by that court. It cannot be known with any plausible degree of probability from the facts developed in evidence what was the cause of the explosion. No one can carefully read the testimony, and, after due deliberation upon it, be enabled to say what gas or combination or commingling of gases produced the unfortunate result which gave origin to this action. The conditions were favorable, as the evidence shows, to the generation of several gases, *viz.*: Methane, or marsh gas; or carburated hydrogen, formed by the decomposition of vegetable matter under water, also known as fire damp, colorless and

inodorous, which is the cause of the explosions which so frequently take place in coal mines, and is given off when the mud in stagnant pools and marshes is stirred; and the indications are of the possibility of making this gas from the elements, since its constituents may be thus formed (Remsen, Organic Chem. 28 *et seq.*), and which constitutes the most abundant ingredient of coal-gas (Flownes, Elem. Chem. 229). Sulphureted hydrogen, or hydrogen sulphide, also a colorless gas, but by no means inodorous, having the odor of putrid eggs, and being the frequent product of the putrefaction of organic matter, both animal and vegetable. Id. 178. Now, if we say nothing of a gas or gases which might result from an admixture of those aforesaid, and if we admit that the conditions were also favorable to the generation of gas in the sewer from the oils introduced therein, as one of the incidents of the fire, still we are confronted by the rule which declares that where an action is brought for damages which are occasioned by one of two causes, for one of which defendant is responsible and for the other not, the plaintiff is fated to failure if his evidence fails to show that the damages were produced by the former, or if, from the evidence, the probabilities are equally strong that the damages were caused by the one as by the other. *Searles v. Manhattan R. Co.* 101 N. Y. 661. This principle finds recognition in *Priest v. Nichols*, 116 Mass. 401, and *Smith v. First Nat. Bank*, 99 Mass. 606, 47 Am. Dec. 59.

5. Recurring for a moment to the petition, preparatory to a further discussion of the evidence from other points of view, we find that it charges that "said sewer was provided with openings especially designed to carry off any gases which might arise in said sewer, and be liable to combustion and explosion, etc., yet said city, its agents and servants, knowing that said defendant the Waters Pierce Oil Company had flooded said sewer with oil, neglected to open said vents [and carelessly and negligently to take measures and precautions to prevent gases arising in said sewer so as to endanger the same]", etc. The words not included in the brackets are those which allege plaintiff's cause of action, because, where a particular act of negligence is specified as a cause of action, there evidence will not be received to support a general allegation of negligence, but the plaintiff will be confined to the act of negligence specifically assigned (*Schneider v. Missouri P. R. Co.* 75 Mo. 295; *Walsh v. Hannibal & St. J. R. Co.* 71 Mo. 514; from which premise it results that no evidence was properly admissible in regard to the words in brackets. Besides, those words were but the statement of a legal conclusion, something not traversable. No issue of fact could be raised upon them. *Bliss*, Code Pl. 8d ed. §§ 212, 213, 418. Under our Code, the facts in pleading are constitutive, and in order to be proved, must be distinctly alleged. *Pier v. Heinrichs*, 52 Mo. 833; *First Nat. Bank v. Hatch*, 78 Mo. 18; *McKinzie v. Mathews*, 59 Mo. 99; *Nichols v. Larkin*, 79 Mo. 264; *Lanitz v. King*, 93 Mo. 518. Taking, then, the facts specifically assigned as negligence, and contrasting them with those offered in evidence in their support, we find that within a radius of 250

feet from Fuchs' place of business there were four openings through which the gases in the sewer could escape, saying nothing of the sewer connections at Peters' store, and at Follenius' marble works; and so the only thing that remains of plaintiff's claim of the city's negligence in this regard is as to the manhole in the center of the street where Fourth and Fifth streets intersect each other, and that at the sidewalk on the west side of Fifth street. Respecting the first one, Dr. Fuchs' testimony shows that it was constructed with a goose neck, so as to prevent the escape of gases, having been changed from a straight pipe, because the people in the locality complained of the odors formerly coming from it; so that, even if the covering had been removed from this manhole, no gases could have escaped, and it will not be presumed that plaintiff intended to include in her petition this manhole, but only those whose covers, if removed, would have given ventilation to the sewer,—that is to say, egress for the gases therein. As to the second manhole cover, it was the only one which could have been removed that was not removed. But did the nonremoval of this one so retard or prevent the escape of gases as to cause the accident? If it did, then the burden is on plaintiff to show that it did. It devolved upon her to "prove facts and circumstances, from which it can be ascertained with reasonable certainty what particular precaution the defendant ought to have taken but did not take" (1 Shearn & Redf. Neg. 4th ed. § 57), which of course would include, as a legitimate corollary therefrom, that, had such particular precaution been taken, the reasonable probability is that the accident would not have occurred. Thus, in *Daniel v. Metropolitan R. Co.* L. R. 3 C. P. 216, 591, Willes, J., said: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further, and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." Though the judgment in this case was reversed on another ground, this doctrine was distinctly affirmed in the same volume (page 591) and in the house of lords (L. R. 5 H. L. Cas. 45); and the language employed by Willes, J., has been frequently cited and quoted with approval. *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Philadelphia, W. & B. R. Co. v. Stebbing*, 63 Md. 504; *Williams v. Great Western R. Co.* L. R. 9 Exch. 157; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 24 L. ed. 745; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008; *Lovegrove v. London, B. & S. C. R. Co.* 18 C. B. N. S. 669.

In the case at bar there was no attempt to make the proof here indicated as necessary; in short, to connect the neglect to remove the cover of the single manhole with the accident. In illustration of this principle it has been ruled, where the jury are told that, if all the evidence satisfied them that there had been negligence on the part of the defendant, although they might not be able to satisfy themselves in what that negligence consisted, they

would be authorized to find a verdict for plaintiff, that such a charge was erroneous; that, if the jury could not find any rational ground upon which to impute negligence to defendant, they should give a verdict in its favor. *McCaig v. Erie R. Co.* 8 Hun, 599; *Searles v. Manhattan R. Co.* *supra*.

6. Again, if the city is to be held responsible for failing to keep open the vents to the sewers within its jurisdiction, is it to be held liable also if some person passing while the vents are open casts a lighted match into one of them, or the gas from it rises and catches fire from a street lamp, thereby causing an explosion? Is it possible that the city can be thus held responsible whether it does or does not open vents? And yet, if the position taken by plaintiff as ground for recovery in this action be correct,—that the city is responsible for the gases which breed in its sewers,—then the spectacle will soon be presented of actions for damages against the city because—First, it does not open its sewers, and thereby allow the gases therefrom to escape, thereby causing an explosion; because, second, it does open its sewers, and thereby an explosion is caused; because, third, it opens its sewers to allow the gases to escape, and thereby becomes liable for disease and death scattered by reason of the escape of such gases; because, fourth, it does not pump out the sewage from the sewers, or at least does not use a liberal quantity of disinfectants so as to deodorize the contents of the sewer and thus render them, if not sweet, at least innocuous. Such are the possibilities of municipal liability which present themselves if the present action can be maintained. And if it can, it might be well to suggest that, if the city is thus to be made an insurer, it ought, at least, as some compensation, to be allowed to issue accident policies, and take premiums on the multitudinous risks it is thus compelled to assume. Hitherto it had been supposed that it was the peculiar and exclusive purpose and function of sewers, and that they were adapted, devised, and designed, to conceal and carry off the foulness which accumulates where great bodies of people congregate, and not to disseminate mephitic odors and gases, thus poisoning the atmosphere throughout the city.

7. Furthermore, Mill Creek sewer, as was conceded at the trial, was constructed in a manner that left nothing to be desired. It had been built some thirty-four years, and no accident of the nature now presented had ever occurred in it. Indeed, it does not appear that an occurrence of such sort had ever before happened. Now, it is settled by abundant authorities, and by numerous and frequent adjudications, that it is not negligence to omit a precaution which, if taken, would have prevented the injury, when the injury could not reasonably have been anticipated, and would not, unless in exceptional circumstances, have happened because of the omission. Such instances are assigned to the domain of inevitable accident, for which, no one being negligent, no one is responsible. Thus in *Dougan v. Champlain Transp. Co.* 56 N. Y. 1, D., plaintiff's intestate, was a passenger upon defendant's boat on Lake Champlain. The forward deck was surrounded by bulwarks 8

or 4 feet high, with gangways upon each side, closed by rails hinged to the bulwarks, and of the same height, and coming down upon stanchions in the center of the gangway, leaving the space beneath open. This deck was not designed for passengers, but they were permitted to come upon it with knowledge of defendant's employees. D. came out thereon. His hat blew off. He sprang to recover it, slipped under the gangway rail, fell overboard, and was drowned. It appeared that all the boats upon the lake were constructed in the same manner; that they had been so run for many years; and there was no proof tending to show that any one had ever before gone overboard in this way, or that such danger had been apprehended. Held, that the evidence failed to show negligence on the part of defendant, and that plaintiff was properly nonsuited. So, too, in *Hubbell v. Yonkers*, plaintiff was riding along one of defendant's streets, the roadbed of which was 80 feet wide, macadamized, and in good condition. On one side, where the street was graded up about 12 feet, there was a sidewalk 10 feet wide, separated from the roadbed by a curbstone 8 inches high. There was no fence, wall, or other obstruction to guard the outer edge of the sidewalk. The horse attached to the wagon in which plaintiff was riding became frightened and commenced to shy, and, spite of the efforts of the driver, went over the curbstone and sidewalk, and down the embankment, carrying the wagon and plaintiff with him. In an action to recover damages for injuries received by plaintiff it appeared that the street had been in the same condition since its opening, over ten years before, and, so far as appeared, no similar accident had occurred. Held, that defendant was not liable, that the accident was one of a class so rare, unexpected, and unforeseen, defendant could not be charged with negligence for a failure to guard against it. 104 N. Y. 484, 58 Am. Rep. 522. A mule caught its foot in a hole in a railroad track so small that no one could have foreseen such result. Held, no liability. *Nelson v. Chicago, M. & St. P. R. Co.* 80 Minn. 74. Similar nonliability was announced where a workman was painting by lamplight the inside of a tank with an approved and long-used paint, bought ready for use, and the benzine in the paint caused an explosion. *Allison Mfg. Co. v. McCormick*, 118 Pa. 519. From some unexplained cause a telegraph wire across a track sagged, and, hitting a brakeman on top of a car, broke, at the same time becoming fastened to the car brake. The end caught a man engaged in business near the depot, and, the wire being drawn along by the moving train, the man was killed. Held to be an accident. "Negligence," says Mitchell, Ch. J., "is not to be presumed from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional, and extraordinary character." *Wabash, St. L. & P. R. Co. v. Locke*, 119 Ind. 404. Like rulings have been announced where accidents have happened from machinery, where their liability to happen is proved only by their actual happening. *Richards v. Rough*, 58 Mich. 212; *Sjogren v. Hall*, Id. 274. In *O'Malley v. Missouri P. R. Co.* 118 Mo. 819, the tunnel had

been used for thirteen years, and in an action brought for the death of the plaintiff's husband, employed in the defendant's tunnel, through which it operated locomotives and cars, the petition charged that the tunnel, because the fan that ventilated it was out of repair, was in a dangerous condition, being filled with steam, smoke, and poisonous gases; and that defendant, well knowing this fact, which was unknown to the deceased, negligently ordered him to go into the tunnel, whereby he was choked, strangled, and killed. Held that as there was total failure of the evidence to show that the smoke in the tunnel, when defendant entered, was dangerous to human life, or to show that defendant could have anticipated a condition of the tunnel dangerous to human life, plaintiff could not recover. To the like effect, see *Conley*, Torts, 91 *et seq.*; *Withers v. North Kent R. Co.*, 37 L. J. Exch. 417; *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Cleveland v. New Jersey S. B. Co.*, 68 N. Y. 306; *Butten v. New York C. & H. R. R. Co.*, 66 N. Y. 243; *Bishop*, Non-Cont. L. §§ 182, 447; *Bishop v. Union R. Co.*, 14 R. I. 314, 51 Am. Rep. 336; *Wright v. Wilmington*, 92 N. C. 156. The same principle is recognized in *Flori v. St. Louis*, 69 Mo. 341, 38 Am. Rep. 504, where the city was held not liable to a person for injuries inflicted by the fall of a market house, caused by a wind storm of unprecedented force and violence. It is unnecessary to say here whether the case might not have rested on another ground. It is certainly opposed, in any event, to a recovery by plaintiff.

8. Moreover, the defendant city, in the construction of Mill Creek sewer and in its maintenance, was and is engaged as a governmental agency in the performance of a public, sanitary duty for the public good, and not for its own private advantage or emolument. In such circumstances it is well settled in this state, as well as in many other jurisdictions, that a municipality is not liable in damages for the wrongful or negligent acts of its officers and servants, unless made thus liable by positive law or by inevitable implication. *Murtaugh v. St. Louis*, 44 Mo. 479; *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *McKenna v. St. Louis*, 6 Mo. App. 330; *Armstrong v. Brunswick*, 79 Mo. 319; *Carrington v. St. Louis*, 89 Mo. 212, 53 Am. Rep. 106; *Maximilian v. New York*, 63 N. Y. 160, 20 Am. Rep. 468; *Hill v. Boston*, 123 Mass. 344, 23 Am. Rep. 333; *Detroit v. Blackaby*, 21 Mich. 84, 4 Am. Rep. 450; 2 Dill. Mun. Corp. 4th ed. §§ 965, 965a, 975-977, 980, and cases cited. *Carrington v. St. Louis*, *supra*, while it correctly states the principle applicable to this class of cases, yet its application in that instance suggests an interrogation point, as to which see §§ 58, 60, 210, 974, 975, Dill. Mun. Corp. 4th ed. Besides, if the theory contended for by plaintiff is to prevail, it would result in casting on defendant city a task impossible of performance, as already indicated, and one which, if it could be performed, would subject the city to fresh liabilities by reason of such performance, and, in addition thereto, would defeat and destroy the very purpose and function which a sewer is obviously designed to accomplish, to wit, to prevent the air of the municipality from being

contaminated by foul odors and other contagious and infectious gases and emanations. When a city has, as in this instance, built a sewer in a most admirable manner, and has kept such health-preserving conduit free from obstructions, its complete duty, whether considered a public or a corporate one, has been entirely discharged.

9. It only remains to say that there is nothing in the facts in evidence which by any possibility casts any blame or liability on defendant oil company. It cannot be considered as having permitted the oils to escape and run into the sewer, merely because it did not forbid the oils which ran from its premises into the streets and on the railroad tracks from being turned, by means of trenches dug, into the sewer, nor because it did not use force to prevent this from being done. For the foregoing reasons the judgment should be affirmed; and for which reasons I dissent from the majority opinion.

Burgess and Robinson, JJ., concur.

(Division 2).

STATE of Missouri; Appt.,

v.

Alexander McCABE *et al.*, Resp'ts.

(.....Mo.....)

1. The name and signature of a claimant agency subscribed to threatening letters and circulars which are sent in violation of Rev. Stat. 1892, § 3782, is entirely immaterial to the offense of the persons who sent them.
2. The constitutional rights of property do not include the right to send letters or circulars to a debtor, threatening to advertise a claim against him for sale, which constitutes an offense under Rev. Stat. 1892, § 3782, as a threat to injure his credit or reputation.
3. The constitutional guaranty of the right to speak, write, or publish on any subject, does not extend to the sending of letters or circulars to a debtor, threatening to advertise a claim against him for sale, which is a threat to injure his credit or reputation, in violation of Rev. Stat. 1892, § 3782.

(October 7, 1896.)

APPEAL by the state from a judgment of the St. Louis Court of Criminal Correction quashing an indictment for sending threatening letters contrary to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. Thomas E. Mulvihill, James L. Hopkins, and Howe & Howe, for appellant.

The information is drawn under § 3782, Rev. Stat. 1892, and is in proper and approved form.

Kelley, Crim. Law & Pr. § 919; *State v. Barr*, 23 Mo. App. 84.

NOTE.—For libel by bad-debt collection agency, see also *State v. Armstrong* (Mo.) 13 L. R. A. 419; *Muetze v. Tuteur* (Wis.) 9 L. R. A. 55.

This is an unlawful threat and was made for the purpose of extorting money through fear that could not be collected by legal process. But if the threat were even ambiguous the state is entitled to introduce parol evidence to explain its contents or meaning, and whether it contained the alleged threat as charged is a question for the jury.

Kelley, Crim. Law & Pr. § 919; *State v. Linthicum*, 68 Mo. 66; *People v. Braman*, 80 Mich. 463; *State v. Barr*, *supra*.

Mr. Willis H. Clark, for respondents:

Penal statutes are always to be strictly construed for the benefit of the citizens. A statute ought to be so construed that no man who is innocent can be punished or endangered.

State v. McLain, 49 Mo. App. 898; *State v. McCance*, 110 Mo. 898; *State v. Bryant*, 90 Mo. 584.

On an indictment for robbery in the first degree, the prosecuting witness gave evidence tending to prove the offense, and the defendants gave evidence admitting taking money from him by force and violence, but showing, if true, that he owed one of them \$2, that they demanded it of him, forcibly took a \$5 bill and some silver from him, and offered to give him his change over the \$2, which he refused. The act committed was within the letter of the statute (§ 8530), but was it within its intention and spirit? This court ruled that if the evidence of defendants was true there was no offense committed and defendants should be acquitted.

State v. Brown, 104 Mo. 365; *Brown v. State*, 28 Ark. 126; *Driscoll v. People*, 47 Mich. 418.

One does not commit robbery who by violence compels a debtor to pay him what he owes.

Bishop, Crim. L. § 1162; *Reg. v. Hemmings*, 4 Fost. & F. 50; *Reg. v. Johnson*, 14 U. C. Q. B. 569.

The statute against sending threatening letters with a view of extorting money, etc., was intended to embrace only cases where the intent is to obtain that which in justice and equity the writer of the letter is not entitled to receive.

People v. Griffin, 2 Barb. 427; *Mann v. State*, 47 Ohio St. 556, 11 L. R. A. 656; *People v. Thomas*, 8 Hill, 169; *Rex v. Williams*, 7 Car. & P. 354; *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791; *Com. v. Jones*, 121 Mass. 57, 23 Am. Rep. 257; *United States v. Elliott*, 51 Fed. Rep. 807; *Embry v. Com.* 79 Ky. 439.

An injury, legally speaking, consists of a wrong done to a person, or in other words a violation of his right.

Parker v. Griswold, 17 Conn. 803, 42 Am. Dec. 739; *Victor Min. Co. v. Morning Star Min. Co.* 50 Mo. App. 525; *Charles v. Rankin*, 22, 566, 66 Am. Dec. 642; Cooley, Torts, 2d ed. 380.

Where a party has a legal right to do a particular act the motive with which he may assert his right will not give a right of action even where malice prompted the act.

Mahan v. Brown, 18 Wend. 261, 28 Am. Dec. 461; *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 444; *Chatfield v. Wilson*, 28 Vt. 49; *Occum Co. v. A. & W. Sprague Mfg. Co.* 34 Conn. 580; *Stevenson v. Newnham*, 18 C. B. 285; 1 84 L. R. A.

Wait, Act. & Def. 35, 36; Cooley, Torts, 2d ed. 832.

The letters sent out in the information show that the claimant agency held for a creditor a claim against Post the existence and validity of which claim are not negated in the information, and is therefore confessed.

State v. Hammond, 80 Ind. 80, 41 Am. Rep. 791; *Embry v. Com.* 79 Ky. 439.

The unpaid and valid claim against Post in the hands of the creditor or his agent or attorney was and is as much property as a horse or a house. Its owner possessed every right and attribute of ownership over it including the right to demand and receive payment or to advertise and sell it, as he might sell any other property and as accounts are daily bought and sold.

Reg. v. Coghlan, 4 Fost. & F. 816; *McClair v. Wilson*, 18 Colo. 82; *Wilson Sewing Mach. Co. v. Curry*, 126 Ind. 161.

Depriving an owner of property of one of its essential attributes is depriving him of his property within the meaning of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law.

State v. Julow, 129 Mo. 163, 29 L. R. A. 257.

Grant, P. J., delivered the opinion of the court:

This is an appeal by the state from a judgment of the St. Louis court of criminal correction, quashing an information against the respondents. On January 17, 1896, an information was filed in said court charging defendants with the offense of sending a threatening letter. It was quashed on motion of defendants. On January 28th an amended information was filed by the assistant prosecuting attorney, in words and figures as follows:

State of Missouri, Plaintiff, vs. Alexander McCabe, Henry S. McCabe, and H.

M. Tileston, Defendants.

In the St. Louis Court of Criminal Correction.

Richard M. Johnson, assistant prosecuting attorney of the St. Louis court of criminal correction, now here in court on behalf of the state of Missouri, amended information makes as follows:

That Alexander McCabe, Henry S. McCabe, and H. M. Tileston, in the city of St. Louis aforesaid, on the 8th day of January, 1896, unlawfully, knowingly, and maliciously did send and deliver to one James Post, by United States mail, inclosed in one envelope, certain letters, writings, printings, circulars, and cards, with the name and signature of "The Claimant Agency" subscribed thereto, directed to the said James Post by the name and description of Mr. James Post, signed on the back thereof, then and there and therein threatening to injure the credit and reputation of the said James Post, which said letters, writings, printings, circulars, and cards were and are in words and figures as follows, that is to say:

"The Claimant Agency (Incorporated), Room 120, Lucile Building, St. Louis, Mo., 1-18, 1896. We are authorized to publish in our

'For Sale' columns the claim we hold against you. You have ignored it so long, the patience of your creditor has become exhausted. The Claimant will contain the same in its next issue. We must also place every month in the houses opposite and adjacent to your residence fifty of the inclosed circulars directed to your address. If you are unable to settle in full, a payment will stop proceedings against you, as well as publication of the debt.

Respectfully,

The Claimant Agency.

"Make settlement direct with this office.

"The claim of \$—— we hold against you is yet unpaid. 'Honesty is the best policy.' Call and make arrangements to settle the debt.

"Complimentary. The Claimant Agency, Publishers, Room 120, Laclede Building, St. Louis. Fill out the coupon, and return to us with list of accounts. We will offer for sale ten claims complimentary, and mail copy of the Claimant containing same to each debtor. Before publishing we will endeavor to obtain some money for you on the accounts. The Claimant Agency.

"Collection Department. Our regular membership fee is \$10.00 per year, including subscription to the Claimant. Claims 'For Sale' can be inserted therein at the rate of 25 cents per name, per month, by nonmembers.

"FOR SALE—The following judgments: Against Leon D. Boucher, 1049 De Hodiarnot avenue, \$24.88, for unpaid grocery bill. Against George W. Ferguson, 5036 Bell avenue, \$64.25, for unpaid grocery bill. Against John J. McCann, 1710 Chestnut street, \$29.95, for unpaid grocery bill.

"The Claimant Agency (Incorporated), Publishers and Collectors, Room 120, Laclede Building, St. Louis, Mo."

Which said letters, writings, printings, circulars, and cards were sent out and delivered through the United States mails to the said James Post by said defendants, unlawfully, knowingly, and maliciously, for the purpose of, and therein threatening to, injure the credit and reputation of the said James Post, by bringing him into disrespect and disrepute with his friends, neighbors, and associates, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Richard M. Johnson.

Aast. Pros. Atty. for St. Louis Court of Criminal Correction.

Subscribed and sworn to by James Post, Jan'y. 28, 1896, before the clerk of said court.

On the same day the defendants filed their motion to quash, in the following words: "(1) Said information is not sufficient in law. (2) Said information is not sufficient in substance. (3) Said information is vague, indefinite, and uncertain. (4) Several distinct charges against these defendants are alleged in said information in one count. (5) The acts charged against these defendants in said information are such as these defendants have an inherent right to do, which right is guaranteed to them, and each of them, under and by the Constitution of the state of Missouri, and under and by the Constitution of the United States of America. (6) Said information fails

to inform these defendants with certainty as to the nature and cause of the accusation against them, therein violating the provisions of the Constitution of the state of Missouri and the Constitution of the United States of America. (7) Said information is in violation of the provisions of the Constitutions of the state of Missouri and of the United States of America with reference to the deprivation of life, liberty, and property without due process of law. (8) Said information affirmatively shows that neither of these defendants is guilty of any offense against the laws of the state of Missouri such as is charged against them therein. (9) Said information affirmatively shows that neither of these defendants is guilty of any offense against the laws of the state of Missouri. (10) The names of all material witnesses are not indorsed upon said information." This motion also was sustained, and the prosecuting attorney took all proper steps to have said ruling of the court reviewed in this court, on the ground that the decision of the cause involved the construction of the Constitutions of the United States and of this state. Mo. Const. art. 6, § 12.

The information was intended to charge an offense under § 3782, Rev. Stat. 1889, which provides that "every person who shall knowingly send or deliver any letter, writing, printing, circular, or card, with or without a name subscribed thereto or signed with a fictitious name, or any letter, mark, or device, threatening to accuse any person of a crime, or to kill, maim, or wound any person, or to do any injury to the person, property, credit, or reputation of another, though no money or property be demanded or extorted thereby, shall, on conviction, be adjudged guilty of a misdemeanor." It will be observed that this section, which was numbered 1526, Rev. Stat. 1879, has been amended by inserting the words "credit or reputation." The St. Louis court of appeals, in *State v. Barr*, 28 Mo. App. 84, in 1887 held that the sending of a letter threatening to publish a person's name in a "dead-beat" book, whereby his credit would be ruined, was not an offense under § 1526, Rev. Stat. 1879, because "credit and reputation" were not property, within the meaning of the section as it then read. It is obvious that the insertion of "credit and reputation" in the next revision after the promulgation of that decision was intended to cover threats of injury to the credit or reputation, as well as to property or person. The information sufficiently charges that the defendant sent a letter to the prosecuting witness which contained circulars and writings threatening to injure his credit among his neighbors, and fully set out the means and the character of the agencies which would be adopted and employed to effectually destroy his credit and reputation, to wit, by placing every month in the houses opposite and adjacent to his residence fifty of the circulars inclosed, directed to his address.

The point made that there is no allegation as to what the "Claimant Agency" was, or how defendants were connected with it, is without force, for the reason that it is wholly immaterial whether it is a corporation or a firm name, or wholly fictitious. The offense charged is that defendants sent these threatening circulars

and writings. They are guilty in lending themselves to this scheme of destroying the credit and reputation of the prosecuting witness. They were fully advised in the information of the nature and character of the offense with which they were charged.

They raise the question of the constitutionality of the law itself. They assert that, conceding they did threaten to ruin the credit and reputation of the prosecuting witness as a business man, they were guilty of no offense under the laws of this state, because they say they had a right to do so. Let us examine this contention. Can it be maintained that the guaranty in the Federal and state Constitutions of life, liberty, and property justifies any citizen in threatening to destroy the credit or reputation of another citizen? If it can, then it amounts to this: that not only are the courts open to him to obtain a judgment for any sum due him, and the process of the law is awarded him to enforce that judgment, but in addition thereto he has the right to threaten the publication of a criminal libel whereby he may destroy his debtor's credit and reputation. More than this, he may avoid the courts altogether, deprive his debtor of all just credits and set off, all lawful pleas in defense, and, through fear of the ruin of his credit, he may even collect an unjust debt, or obtain an unconscionable advantage. The law will not countenance or tolerate this method of collecting debts. The state has provided every needed remedy, both ordinary and extraordinary, to enforce the payment of all just debts through the agency of her courts of justice, and among these remedies is not included the right to threaten to destroy credit and reputation. Such a course is well calculated to produce a breach of the peace. If once permitted and sanctioned by the courts, it will soon degenerate into an intolerable and oppressive wrong. Unjust claims will be extorted from timid debtors. Honest and deserving men will be held up to scorn, and published as dishonest, merely because they have not the means with which to meet their obligations. The position of counsel that, because a man is too poor or unable to meet all his obligations as soon as due, no wrong can come to him by publishing his inability to do so, in the most offensive manner, cannot be countenanced by this court. It is alike unsound in law and morals. The law does not authorize the collection of just debts even by the malicious threatening to injure the debtor in his person, property, credit, or reputation. To deny him the privilege of so doing in no sense deprives him of the protection of his property rights under the Bill of Rights or Constitution.

Does it trench upon that other constitutional right, securing freedom of speech, which guarantees "that every person shall be free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty?" Judge Cooley, in his great work on Constitutional Limitations, 6th ed. p. 518, 84 L. R. A.

says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals." The Constitution grants no immunity from punishment for criminal libels. "Libel" is defined by our law as follows: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; any malicious defamation made public as aforesaid designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends." Rev. Stat. 1889, § 3869. As was said in *State v. Armstrong*, 106 Mo. 385, 18 L. R. A. 419, "The evident purpose and design of the defendant and the association he employed . . . was to publish the prosecutrix as a bad debtor, a dishonest person, who would not pay her honest debts, and to degrade her in the eyes of the public and her employers, and as such was clearly libelous, and within the meaning of the statute." The proposed mode of publishing the threatened libel clearly indicates that it was actuated by malice. There is nothing in the Bill of Rights which would exonerate defendants from responsibility for such a criminal libel, if actually uttered and published, nor to shield them from the offense denounced against sending a letter threatening to so libel him. The reason why libelous publications are public offenses is their direct tendency to provoke breaches of the public peace by the injured parties, and their friends and families to acts of revenge, and the same reason underlies statutes against letters which threaten extortion by means of libel. Such statutes do not infringe the constitutional right of any law-abiding citizen. Communications of this character, with the intention of extorting money, have been the common subjects of legislation both in England and the states of this Union. 3 Archbold, Crim. Pr. & Pl. p. 1060, and notes. And such laws have never been supposed to be obnoxious to freedom of speech, as understood in our free institutions. On the contrary, it is a libel on the Bill of Rights, which guarantees free speech, to assert that it was intended to protect anyone in such despicable practices. *State v. Goodwin*, 87 La. Ann. 713.

Without further elaboration, we hold that the court of criminal correction erred in quashing the information, and its judgment is reversed and the cause remanded.

Sherwood and Burgess, JJ., concur.

WISCONSIN SUPREME COURT.

Isaac LUND, *Respt.*,

v.

CHIPPEWA COUNTY *et al.*, *Appls.*

(.....Wt.....)

1. Counties are municipalities within the meaning of Laws 1895, chap. 138, authorizing municipalities to make donations to the state home for the feeble-minded.
2. Implied power to issue bonds is given to a county by authority to make a donation "of money or other securities" for the benefit of a state home for the feeble-minded.
3. Donations by a county, made merely to secure a site for a state institution for the feeble-minded, and in no way affecting the efficiency and successful operation of the institution when established, are not against public policy.
4. The constitutional rule of uniformity in taxation is not violated by a statute authorizing a county to make a donation to secure the location of a state institution within the county, although that county as well as others will be taxed for its maintenance.
5. The use of county funds to make a donation to a state institution for the feeble-minded in order to secure its location within that county is for a public purpose, and may be authorized by the legislature.

(June 19, 1896.)

A PPEAL by defendants from an order of the Circuit Court for Chippewa County overruling a demurrer to the complaint in an action brought to enjoin the issuance and sale of certain county bonds. *Reversed.*

Statement by Cassoday, Ch. J.:

It appears from the complaint, and chapter 138, Laws 1895, therein referred to, entitled "An act to Establish a Home for the Custody, Training, and Education of the Feeble-Minded, Epileptic, and Idiotic, and to Appropriate Certain Sums of Money therein Named," and which was published and went into effect April 9, 1895, and which act, among other things, provided in effect that there is hereby created and established, for the care, custody, and training of the feeble-minded, epileptic, and idiotic of this state, an institution to be known as "The Wisconsin Home for the Feeble-Minded." (1) That the state board of control select a suitable site for such a home, and have power to receive proposals for a donation of land to the state for such site, and to receive the same by gift, or to purchase such site; that they may receive proposals for donations of money or other securities, in behalf of this state, for the benefit of such home; that they may locate the same, by and with the consent of the governor of the state, at such point as they, together with

the governor, shall deem for the best interests of this state, and receive donations or bequests which may be made for its maintenance and support; that the site selected shall comprise not less than 200 acres of land possessing good facilities for drainage and sewerage, and an abundant supply of pure water; that municipalities of this state are hereby empowered to make the donations herein mentioned for the establishment and building of such a home. (2) That the general supervision and government of the home shall be vested in the state board of control, pursuant to the law creating and defining the duties of said board, and they shall establish a system of government for the institution, and shall make all necessary rules and regulations for enforcing discipline, imparting instruction, preserving health, and for the proper care and training of the persons in said home; that they shall appoint a superintendent, a matron, and such other officers, teachers, and employees as shall be necessary, who shall severally hold their offices or places during the pleasure of the board. (3) That all feeble-minded, epileptic, and idiotic persons, residents of the state, or any such persons found therein whose residence cannot be ascertained, may be admitted to said home, and receive the benefit thereof, free of charge, subject to such rules and regulations as may be made by the said board of control; that they shall adopt and publish a schedule of maximum charges and expenses for such patients as may be placed in the home, but who shall not be entitled to be admitted or kept free of charge; provided, that all provisions of chap. 32, Rev. Stat. relating to the support of insane persons, and the liability of counties therefor, shall also apply, as far as practicable, to persons admitted to the home for feeble-minded. (4) That said home shall be organized into three departments, as follows: First, a school department for the educable grades or classes; second, a custodial department for the helpless and lower types; third, such other departments or colonies as the needs of the institution may require. (5) That as soon as practicable such trades and manual industries as are adapted to these several departments shall be introduced and established by the state board of control. (6) That some time prior to November 19, 1895, the state board of control located said home at Chippewa Falls; that the place of said location is the extreme southerly end of the county; that the board of supervisors for Chippewa county at its regular annual meeting held November 19, 1895, passed an ordinance entitled "An ordinance to provide for the donation of certain money to the Wisconsin Home for the Feeble-Minded, and to provide for the issue of county bonds therefor;" that the ordinance was duly published as required by law November 20, 1895; that pur-

NOTE.—The effect of a gift to the public as bribery, when made to obtain the location of county buildings or to obtain some other public improvement, is the subject of a note to State, North Orange Baptist Church, v. Orange (N. J.) 14 L. R. A. 62. See, in addition, Ayres v. Moan (Neb.) 15 L. R. A. 501. 34 L. R. A.

What are public purposes for which public money may properly be used is the subject of a note to Daggett v. Colgan (Cal.) 14 L. R. A. 474. See, on the same question, Baltimore v. Keeley Institute (Md.) 27 L. R. A. 644.

suant to and by virtue of that ordinance the defendants Firth and Sharp, as county clerk and chairman of the board of supervisors, threatened to, and were about to issue and execute, in their official capacity as such clerk and chairman, in behalf of the county, twelve negotiable bonds of the face value of \$1,000 each, and one negotiable bond of the face value of \$700, bearing interest at the rate of 5 per cent per annum, payable annually, and the principal sums to be evidenced by such bonds to be made payable five years from that date, and that the treasurer of the county, Henry Goetz, has advertised for sale, and threatened to sell, said bonds, December 5, 1895, at public auction, to the highest bidder; that December 4, 1895, the plaintiff, a resident and freeholder and taxpayer of Chippewa county, commenced this action in behalf of himself and all other taxpayers of that county, against the county, its treasurer, clerk, and chairman of its board of supervisors, and in his complaint alleged, in effect, the facts stated, and giving a copy of said ordinance, and also alleged, in effect, that the county clerk threatened to and would insert \$3,750 annually in the tax roll of the county for five years, beginning with 1896, and would, unless restrained, levy the same against all the taxable property of the county for the purpose of paying said bonds; that said ordinance was and is illegal and void; that the appropriation therein contained for the payment of said bonds was and is wholly without authority of law, in that the county board had no legal authority to create an indebtedness of the county for the purposes mentioned; that the plaintiff's taxes, and the taxes of all other taxpayers of the county, would be largely increased by reason of such illegal appropriation; and that they would thereby suffer irreparable loss and injury. The plaintiff prayed judgment that the ordinance, and all proceedings under and by virtue thereof, be set aside and declared null and void; that the defendants named and their successors in office, be perpetually restrained and enjoined from enforcing the same. To such complaint the defendants demurred on the ground that it did not state a cause of action. From the order overruling that demurrer, the defendants bring this appeal.

Messrs. W. R. Hoyt and L. J. Rusk, for appellants:

The county is a municipality within the act. *Norton v. Peck*, 3 Wis. 714; *Eaton v. Manitowoc County Supers.* 44 Wis. 489; *State v. Hogue*, 71 Wis. 384; *Bookhout v. State*, 66 Wis. 415.

The county board of supervisors had authority to issue bonds.

Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; *Clark v. Janesville*, 10 Wis. 136; *State v. Madison*, 7 Wis. 688; 1 Dill. Mun. Corp. 4th ed. § 118; *Beach, Mun. Corp.* § 885; *La Pointe Supers. v. O'Malley*, 47 Wis. 332.

The unconstitutionality of the act is sustained by only two decisions.

Livingston County Supers. v. Weider, 64 Ill. 427; *Wasson v. Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795.

Livingston County Supers. v. Weider, *supra*, has been overruled in *Burr v. Carbondale*, 76 Ill. 455, and *Livingston County v. Darlington*, 84 L. R. A.

101 U. S. 407, 25 L. ed. 1015; *Hensley Twp. v. People*, 84 Ill. 544.

In *Wasson v. Wayne County Comrs.* *supra*, the court cites as authority to sustain its decisions the cases of *State, Board of Edu.*, *v. Haben*, 22 Wis. 661; *Livingston County Supers. v. Weider*, *supra*; *Sleight v. People, Weller Twp.* 74 Ill. 47.

The constitutionality of this act is sustained by *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Brodhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *Speer v. Blairsville School Directors*, 50 Pa. 150; *State, McCurdy, v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Curtis v. Whipple*, 24 Wis. 350; *Knott v. Rock County Supers.* 9 Wis. 410; *Soens v. Racine*, 10 Wis. 271; *Hasbrouck v. Milwaukee*, 13 Wis. 88, 80 Am. Dec. 718; *Whitting v. Sheyboygan & F. du L. R. Co.* 25 Wis. 167, 8 Am. Rep. 30.

Mr. T. F. Frawley, with **Mr. C. T. Bundy**, for respondent:

The court, at the instance of a taxpayer, will enjoin the issue and sale of bonds for an illegal or unlawful purpose or when issued without authority of law; and will enjoin the levy of a tax not authorized by law, or one which violates a constitutional provision.

High, Inj. §§ 1283, 1299; *Wright v. Bishop*, 88 Ill. 302; *Ourlenius v. Hoyt*, 87 Mich. 583; *Foster v. Kenosha*, 12 Wis. 617; *Lawson v. Schnellen*, 38 Wis. 288; *Willard v. Comstock*, 58 Wis. 566, 46 Am. Rep. 657.

Chapter 138 of the Laws of 1895, authorizing "the municipalities of this state to make the donations therein mentioned," does not authorize a county to make such donations; a county is not a municipality.

Enc. Britanica, *Municipality*, 1 Dill. Mun. Corp. §§ 22-27; 1 Desty, *Taxn.* §§ 97-99; *Cooley, Const. Lim.* §§ 240, 241; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *Lorillard v. Monroe*, 11 N. Y. 392, 63 Am. Dec. 120; *Williamsport v. Com.*, *Bair*, 84 Pa. 499, 24 Am. Rep. 208; *Norton v. Peck*, 3 Wis. 714; *Eaton v. Manitowoc County Supers.* 44 Wis. 489; *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 195, 36 Am. Rep. 840; *Smith v. Sherry*, 50 Wis. 218; *Cathcart v. Comstock*, 56 Wis. 609; *State, Hiles, v. Wood County Supers.* 61 Wis. 280.

Chapter 138, Laws of 1895, contravenes § 1, art. 8, of the Constitution of Wisconsin, and is void.

The legislature has no power to levy a tax on the property of Chippewa county separately from the taxable property of the rest of the state, for a state purpose, without the consent of the people of Chippewa county.

Cooley, Const. Lim. 283; *Cooley, Taxn.* 140, 142; *Dorgan v. Boston*, 12 Allen, 223; *Hammitt v. Philadelphia*, 65 Pa. 146, 8 Am. Rep. 615; *Ex parte Marshall*, 64 Ala. 266; *State, McCurdy, v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *State, Board of Edu.*, *v. Haben*, 22 Wis. 660.

The entire taxing power is vested in the legislature, which can, in proper cases and for certain purposes, delegate such power to the political subdivisions of the state. Such political subdivisions have no inherent power to levy a tax for any purpose, but have such only as is delegated to them by the legislature.

1 Deaty, Taxn. 353, 470-475; Cooley, Taxn. 329; 2 Dill. Mun. Corp. § 821; *United States v. New Orleans*, 98 U. S. 881, 25 L. ed. 225; *Justice v. Logansport*, 101 Ind. 826; 25 Am. & Eng. Enc. Law, p. 18; *Knowlton v. Rock County Supers.* 9 Wis. 411.

The legislature has no power to delegate its taxing power to a municipal corporation or political subdivision, except for local or corporate purposes.

1 Deaty, Taxn. 26, 253, 259, 274; Cooley, Const. Lim. 280; *People v. Parks*, 58 Cal. 644; *Roster v. Kenosha*, 12 Wis. 618; *Slinger v. Henneman*, 38 Wis. 510; *Taylor v. Chandler*, 9 Heisk. 349; *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *State, McCurdy, v. Tappan*, 29 Wis. 634, 9 Am. Rep. 622; Const. art. 3, § 22; *Jensen v. Polk County Supers.* 47 Wis. 313.

The legislature cannot delegate any greater power than the state itself possesses, and it must observe the restrictions of the organic law.

Cooley, Const. Lim. 240; 2 Dill. Mun. Corp. §§ 740, 778; 1 Deaty, Taxn. 259; *O'Donnell v. Bailey*, 24 Miss. 386; *Primm v. Belleville*, 59 Ill. 142; *Weightman v. Clark*, 103 U. S. 256, 26 L. ed. 892; *Wasson v. Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795; *People, Detroit & H. R. Co., v. Salem Twp. Board*, 20 Mich. 474, 4 Am. Rep. 400; *Anderson v. Hill*, 54 Mich. 487.

The rule of uniformity, provided by § 1, art. 8, of the Constitution, requires that taxation shall be uniform within and for the district for which the tax is levied.

25 Am. & Eng. Enc. Law, p. 60; Cooley, Const. Lim. 494; Cooley, Taxn. 140, 143, 244; 1 Deaty, Taxn. 175, 176; *Livingston County Supers. v. Weider*, 64 Ill. 427; *Wasson v. Wayne County Comrs. supra*; *New Orleans v. Fourchy*, 30 La. Ann. 912; *Dyar v. Farmington*, 70 Me. 515; *Pleuler v. State*, 11 Neb. 547; *East Portland v. Multnomah County*, 6 Or. 62; *Weightman v. Clark*, 103 U. S. 256, 26 L. ed. 892; *Knowlton v. Rock County Supers.* 9 Wis. 411; *Hale v. Kenosha*, 29 Wis. 603.

A rule of taxation that requires a county to contribute twice to the same burden, while other counties are required to contribute but once, violates § 1, art. 8, of the Constitution and is void.

Cooley, Taxn. 222; *State, Nunnemacher, v. Mann*, 76 Wis. 498.

If chapter 186 of the Laws of 1895 violates the rule of uniformity it is unconstitutional and void, and the consent of the board of supervisors cannot validate the tax levied under it.

Cooley, Const. Lim. 240; Cooley, Taxn. 143; 1 Deaty, Taxn. 259, 481; *O'Donnell v. Bailey*, *Primm v. Belleville*, *People, Detroit & H. R. Co., v. Salem Twp. Board*, and *Wasson v. Wayne County Comrs. supra*; *Whiting v. Sheboygan & P. du L. R. Co.* 25 Wis. 173, 8 Am. Rep. 30; *Anderson v. Hill*, 54 Mich. 491.

Under chapter 186 of the Laws of 1895, the county board of Chippewa county had no authority to issue the bonds in question.

Mere political bodies, constituted as counties, are for the purpose of local police administration, and, having the power of levying taxes for the purpose of paying all county charges created, have no power to make commercial 34 L. R. A.

paper of any kind, unless such power is expressly conferred upon them or clearly implied from some other power expressly given.

1 Dill. Mun. Corp. §§ 123, 507; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470; *Police Jury v. Britton*, 82 U. S. 15 Wall. 566, 21 L. ed. 251; *Nashville v. Ray*, 86 U. S. 19 Wall. 468, 22 L. ed. 164.

The Constitution is a limitation, and not a grant of power.

Bushnell v. Beloit, 10 Wis. 196.

The benefits to be derived by Chippewa county from the location of this institution at Chippewa Falls, are not such as to make a tax levied to establish and maintain it a tax levied for a corporate purpose.

Livingston County Supers. v. Weider, 64 Ill. 427; *Wasson v. Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795; *State, Board of Edu., v. Haben*, 23 Wis. 664; *State, McCurdy, v. Tappan*, 29 Wis. 604, 9 Am. Rep. 622.

The legislature cannot do indirectly (by delegation) what it cannot, under the Constitution, do directly.

Cooley, Const. Lim. 240; *Nevil v. Oliford*, 63 Wis. 447; *La Pointe Supers. v. O'Malley*, 47 Wis. 337.

A tax cannot be apportioned to the benefits or supposed benefits received. This can only be done by "assessments" in cities and in incorporated villages.

Wis. Const. art. 11, § 3; *Weeks v. Milwaukee*, 10 Wis. 256.

On rehearing.

All the power of taxation is vested in the legislature; all taxes levied by a political subdivision are, in legal effect, levied by the state. The power of the legislature to tax is limited by the Constitution.

Any single individual has a right to insist that the public does not own or control his property for the purpose of donation.

People, Detroit & H. R. Co., v. Salem Twp. Board, 20 Mich. 487, 4 Am. Rep. 400.

Taxes levied by municipal corporations, which are for this purpose instruments of the state, are, in legal effect, levied by the state.

Justice v. Logansport, 101 Ind. 826; *Knowlton v. Rock County Supers.* 9 Wis. 411.

Can the state, by its legislature or its inferior agents, apportion a tax for a state purpose?

A tax levied for a state purpose must be levied upon all the taxable property within the state, and cannot be apportioned.

Weeks v. Milwaukee, 10 Wis. 256.

If this money was not voted for a local purpose, but for a state purpose, the rule of uniformity was broken.

Wasson v. Wayne County Comrs. 49 Ohio St. 622, 17 L. R. A. 795; *State, Board of Edu., v. Haben*, 23 Wis. 664; *State, McCurdy, v. Tappan*, 29 Wis. 679, 9 Am. Rep. 622; *Deaty, Taxn.* 274; Cooley, Taxn. 140; *Knowlton v. Rock County Supers.* 9 Wis. 411, Approved in *Hale v. Kenosha*, 29 Wis. 664.

In respect of public or quasi corporations, such as counties, as distinguished from municipal corporations proper, the general current of authority is against the proposition that, as ordinarily recognized they possess any power to issue negotiable instruments.

1 Dill. Mun. Corp. 507; *Cooley, Const. Lim.* 240, 241; *Cooley, Taxn.* 143; *Clark v. Janesville*, 10 Wis. 170; *Merrick v. Amherst*, 13 Allen, 500; *State, Board of Edu., v. Haben*, 29 Wis. 660; *State, McCurdy, v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Whiting v. Sheboygan & P. du L. R. Co.* 25 Wis. 167, 8 Am. Rep. 80; *Ellis v. Northern P. R. Co.* 77 Wis. 118.

A town cannot assume, nor can the state compel it to assume, as a town charge, a burden which should properly be borne by the whole state. A local assessment for a general benefit is unconstitutional.

Deady, Taxn. 274; *Forster v. Kenosha*, 12 Wis. 618; *Gordon v. Cornes*, 47 N. Y. 608; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *State v. Nelson County*, 1 N. D. 88.

Cassoday, Ch. J., delivered the opinion of the court:

It is contended by counsel for the plaintiff that a county is not a municipality, within the meaning of chap. 188, Laws 1895. Properly speaking, municipal corporations are brought into existence at the instance or request of the persons residing therein, for their own local advancement and convenience. On the other hand, counties are local subdivisions of the state, created by its own sovereign power and will, without the particular solicitation, consent, or concurrent action of the citizens thereof, and almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration. 1 Dill. Mun. Corp. § 28. The same learned author says: "The phrase 'municipal corporation' is used with us, in general, in the strict and proper sense just mentioned; but sometimes it is used in a broader sense, that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the state, and not for the regulation of the local and special affairs of a compact community." Id. § 20. We are constrained to hold that counties are municipalities, within the meaning of the provision of the act which declares that "municipalities of this state are hereby empowered to make the donations herein mentioned for the establishment and building of such a home." Laws 1895, chap. 188, § 2. Thus in *Eaton v. Manitowoc County Supers.* 44 Wis. 493, it is said: "Towns are often called in common parlance, and sometimes, unguardedly in statutes, 'municipal corporations,' in connection with counties, cities, and villages; but when so called it is in the sense of mere corporations, or quasi corporations, or corporations *sub modo*, only, and not in the sense of municipalities proper." *Cathcart v. Comstock*, 56 Wis. 606, 608. The site to be selected was to comprise not less than 200 acres of land, with good drainage and sewerage facilities, and an abundant supply of pure water. It would hardly be expected to find such a site in a city or incorporated village. Besides, the act makes all the provisions of chap. 82, Rev. Stat., relating to the support of insane persons and the liability of counties therefor, applicable, as far as practicable, to persons admitted to the home for the feeble-minded. § 4. Since the chapter of the Revised Statutes so made applicable has little or

no reference to cities or villages, but deals throughout with counties, we must conclude that by the word "municipalities," as used in the act in question, the legislature intended to include counties.

2. It is contended that the language of the statute is not broad enough to authorize the proposed issue of the bonds. It is not contended that the county board would have had such power in the absence of chap. 188, Laws 1895. By that act the state board of control was expressly empowered to "receive proposals for donations of money or other securities in behalf of this state for the benefit of such home," and may also "receive any donations or bequests which may be made for its maintenance and support," and the "municipalities of this state" were thereby expressly "empowered to make the donations herein [therein] mentioned for the establishment and building of such a home." § 2. The words, "other securities" are certainly broad enough to include bonds. If the county board had power to issue such "securities," then, under the decisions of this court, they had the implied power to put them in the form of bonds. *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 731; *State v. Madison*, 7 Wis. 688; *State, Priest, v. Regents of Wis. University*, 54 Wis. 170; *Gilman v. Milwaukee*, 61 Wis. 592, 1 Reid, Corporate Finance, § 8.

3. "The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative, and administrative character, as they shall from time to time prescribe." Wis. Const. art. 4, § 22. In construing this provision of our Constitution, this court has held "that, when any subject of legislation is intrusted to said county boards by general words in a statute, they acquire a right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them, and for that purpose have all the powers of the state legislature over that subject, unless the statute restricts the power, or directs its exercise in a certain way." *La Pointe Supers. v. O'Malley*, 47 Wis. 833; *Knight v. Ashland*, 61 Wis. 233. The county was expressly empowered by statute "to apportion and order the levying of taxes, as provided by law, and direct the raising of such sums of money as may be necessary to defray the county charges and expenses, and all necessary charges incident to or arising from the execution of their lawful authority." Rev. Stat. § 669, subd. 5.

4. It is contended that the authority thus given to the county by the act in question to donate to the state "money or other securities for the establishment and building of such home" was contrary to public policy, and therefore void. This court has held that "the legislature may impose conditions precedent to the removal of a county seat, in addition to those imposed by the state Constitution." *State, Park, v. Portage County Supers.* 24 Wis. 49. In that case the act which was held valid provided, in effect, that, after a majority of the votes should be cast in favor of removing the county seat to the city of Stevens Point, yet it should not be so removed until that city should first place at the control of the county board \$10,000, with which to build county

buildings at that place. To the same effect is *Pepin County v. Prindle*, 61 Wis. 811-814. Such donations have been sanctioned in several states. *Id.*, and cases there cited; *Beham v. Ohio*, 75 Tex. 87. The donation here authorized was merely to secure a site for the home, and in no way affected the efficiency and successful operation of the institution when established. Upon the authorities cited, we must hold that the authorizing of such donation was not against public policy.

5. The principal contention is that the authorization of such donations was repugnant to that clause of our Constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." § 1, art. 8. This provision manifestly requires such uniformity, in case of a state tax, to extend throughout the state; in case of a county tax, to extend throughout the county; in case of a city tax, to extend throughout the city; and, in case of a town tax, to extend throughout the town. In other words, the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes. If the proposed tax to pay the \$12,700 in securities donated by Chippewa county may properly be regarded as a county tax, then the question of uniformity is not involved, since there is no pretense that, in levying that tax upon the taxable property in that county, any other than such uniform rule is to be followed. It is sought to bring the case within the condemnation of the constitutional provision quoted, on the theory that the proposed home is to be a state institution; that it is to be governed, controlled, and managed wholly by state officers and agencies; that it is to be established, built, and maintained by all the taxpayers and taxable property throughout the state, including such property and taxpayers in Chippewa county; that the state would have had no power, by direct action, to compel one or more counties of the state, less than the whole, to pay an additional amount for such establishment, building, and maintenance; and hence that the legislature could not, by delegating such authority to such municipalities, do indirectly what, under the Constitution, it could not have done directly. It is certainly to be a state institution; to be governed, controlled, and managed by the state; and to be established, built, and maintained by the state. But it does not follow that the state could not authorize a municipality in which it should be located to do what the state itself could not do directly. In speaking of the twofold character of such municipalities,—as agencies of the state government, and as "corporations endowed with capacities, and permitted to hold property and enjoy peculiar privileges for the benefit of their corporators exclusively,"—Mr. Cooley says: "The legislature may permit the incurring of expense, the contracting of obligations, and the levy of taxes which are unusual, and which would not be admissible under the powers usually conferred. Instances of the kind may be mentioned in the offer of military bounties, and the payment of a disproportionate share of a state burden in consideration of peculiar local benefits which are to spring from it. But it is believed the

legislature has no power, against the will of a municipal corporation, to compel it to contract debts for local purposes in which the state has no concern, or to assume obligations not within the ordinary functions of municipal government. . . . The state in such cases may remove restrictions and permit action, but it cannot compel it." Cooley, Const. Lim. 230, 231. We have a good illustration in this state. Our Constitution provides that "the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works," § 10, art. 8. Nevertheless the legislature has, from time to time, commencing with the early history of the state, authorized such municipalities to contract such debts, if not to be a party in carrying on such works, and such legislation has frequently been held to be valid. *Hasbrouck v. Milwaukee*, 18 Wis. 42, 80 Am. Dec. 718. Cases to such effect are numerous. *Atty. Gen. v. Eau Claire*, 37 Wis. 400. That the legislature may authorize municipalities to levy taxes for purposes for which it cannot compel them to levy taxes might be illustrated by the citation of numerous adjudications, but it is unnecessary. See, however, *Brodhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *State, McCurdy, v. Tappan*, 29 Wis. 664, 9 Am. Rep. 623. This court has held that legislation to the effect that where the cost of a bridge in a town exceeds a certain per cent of all the taxable property of the town, the county may be required to pay one half of the cost thereof, is valid, and does not break the rule of uniformity. *State, Baraboo, v. Sauk County Supers.* 70 Wis. 485.

6. Since the securities authorized to be donated in the case at bar are securities issued by the county, and since the proposed taxes in payment of the same are to be county taxes, the precise question presented is whether the purpose for which such securities were donated, and for which such taxes are to be raised, is such as to justify the provisions of the enactment in question. This court has sustained the validity of acts of the legislature authorizing municipalities to raise moneys by taxation to pay bounties to volunteers in the United States army. *Brodhead v. Milwaukee*, and *State, McCurdy, v. Tappan, supra*. In those cases it was, among other things, in effect, held that while "the legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose," and while "the objects for which money is raised by taxation must be public, and such as subserve the common interest and wellbeing of the community required to contribute," yet "to justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be immediately perceptible to every mind;" that "claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax;" that "the legislature may authorize a town or other municipality to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received, or will receive, some direct advantage,

or where the tax is to be expended in defraying the expenses of the government, or in promoting the peace, good order, and welfare of society, or in paying claims founded upon natural justice and equity, or upon gratitude for public services or expenditures, or in discharging the obligations of charity and humanity." True, in *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 8 Am. Rep. 30, two of the three members of this court, as then constituted, held that an act authorizing a county to issue its orders in aid of the construction of a railroad therein, and to levy a tax to pay such orders, without becoming a stockholder in the company, was invalid, on the ground that such orders and tax were for a private purpose. But that case was expressly overruled, and the same act of the legislature was held valid, by the Supreme Court of the United States, on the ground that such railroad was a public highway, and hence the purpose of such county orders and county taxes in aid of its construction was for a public purpose. *Olcott v. Fond du Lac County Supers.* 83 U. S. 16 Wall. 678, 21 L. ed. 882. That decision has steadily been adhered to since, and seems to be in harmony with the rule established in most of the states. *Humbird v. Jackson County Supers.* 154 U. S. 592, 38 L. ed. 1089; *Roberts v. Northern P. R. Co.* 158 U. S. 17, 39 L. ed. 879, Affirming *Northern P. R. Co. v. Roberts*, 42 Fed. Rep. 734; *Folsom v. Township Ninety Six*, 159 U. S. 628, 40 L. ed. 284, and cases there cited. Whatever force may be given by this court to the decision of *Whiting v. Sheboygan & F. du L. R. Co.* it is manifest that it ought not to be extended. Counsel cite *State, Board of Edu., v. Haben*, 22 Wis. 660, where it was held that "money raised in a city, by taxation, for the purpose of erecting a high-school building, cannot be diverted by an act of the legislature, without the assent of the city or its inhabitants, to the purchase of a site for a normal school in said city." That decision does not tend to invalidate the act in question, but rather tends to support it. This is apparent from two extracts from the opinion of Dixon, Ch. J., in that case, where he said: "To say that the legislature can, without the assent of the proper municipal authorities or of the inhabitants, take the money of the city of Oshkosh, and appropriate it to the establishment of a state normal school, is to say that it can take the money of any municipal corporation, and apply it to any general state purpose. . . . The advantages incidentally accruing to the citizens of Oshkosh from the establishment of a state normal school at that place, though sufficient, with the consent of the legislature, to justify the citizens themselves, or the proper municipal

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officers, in levying a tax to aid in the purchase of a site or the erection of buildings, do not change the nature of the question here presented." See *Gordon v. Cornes*, 47 N. Y. 608. In *Curtis v. Whipple*, 24 Wis. 350, the act to empower the town to raise money by taxation for the benefit of Jefferson Liberal Institute, a private corporation, was held invalid by two members of the court on the ground that it was "essentially a private educational institution," and by the other member of the court "mainly on the ground that the constitutional provisions for public schools of every grade" were exclusive. To the same effect, *Cole v. La Grange*, 118 U. S. 1, 28 L. ed. 896. In *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015, an act of the legislature of Illinois establishing a state reform school, and authorizing municipal corporations to donate money to secure the location of the same within their limits, was sustained and held valid, there being no settled or uniform decision to the contrary by the supreme court of that state. In Indiana, legislation authorizing counties to make donations for the purpose of securing the location of an agricultural college within their jurisdiction was held valid; and it was there further held that an obligation by the county for such purpose was "solely a county purpose, local in its nature, and properly assessed and collected as are taxes for other county purposes." *Marks v. Purdue University*, 87 Ind. 155, 16 Ind. 288. So it has been held in Massachusetts that the legislature have power to pass an act authorizing a town to raise money for the establishment of an agricultural college therein. *Merrick v. Amherst*, 12 Allen, 500. See also *State v. Nelson County*, 1 N. D. 88; *Cooley*, Const. Lim. 230, 231.

In the case at bar it must be conceded that the establishment and building of the Wisconsin Home for Feeble-Minded was and is a public purpose. It must also be conceded that there are peculiar and special benefits which will naturally spring from such location. This is manifest from the fact that numerous such municipalities, by a tender of such donations, entered into competition for such location. The right of convenient visitation by friends of the unfortunate inmates is of itself a valuable right. Without further specification or discussion, we must hold the provisions of the act in question to be valid.

The order of the Circuit Court is reversed, and the cause is remanded, with direction to sustain the demurrer, and for further proceedings according to law.

Rehearing denied.

ALABAMA SUPREME COURT.

ANNISTON TRANSFER COMPANY,
Appl.,
v.

S. M. GURLEY.

(107 Ala. 600.)

The contract of a baggage transfer company to transport baggage from a residence to a railroad depot is fully performed so that its responsibility ceases when the baggage is delivered to the agent of the railroad company at the depot.

(June 22, 1895.)

APPEAL by defendant from a judgment of the City Court of Anniston in favor of

plaintiff in an action brought to recover the value of a trunk and contents which had been delivered to defendant for transportation. *Reversed.*

Defendant was engaged as a transfer company in transporting baggage about the city of Anniston. It was employed by plaintiff's agent to take a trunk from a residence to the Georgia Pacific Railway depot. The trunk was delivered to a driver of one of defendant's wagons and carried to the depot.

Further facts appear in the opinion.

Messrs. Knox, Howie, & Pelham for appellant.

Messrs. Methvin & Kelly for appellee.

NOTE.—*Liability of baggage transfer companies.*

- I. *As common carriers.*
- II. *When liable.*
- III. *Limitation of liability.*
- IV. *When not liable.*
- V. *The effect of a custom.*

The question of the liability of baggage transfer companies rests upon the same principles as that of other common carriers, and is determined in like manner. They are liable according to the manner in which they hold themselves out and transact their business.

The holding of the court in the principal case of *ANNISTON TRANSFER CO. V. GURLEY*, is in harmony with the prior decisions.

I. As common carriers.

The question whether a baggage transfer company is or is not a common carrier must be determined by the following general principles laid down in cases wherein the question has been discussed.

A person who makes it a business to solicit from the public the carriage of trunks and packages from place to place for hire is to all intents and purposes a common carrier. *Robinson v. Cornish*, 24 N. Y. S. R. 695.

The test is, whether he holds out, either expressly or by a course of conduct, that he will carry for hire the goods of all persons indifferently who send them to him. *Ibid.*

A truckman who transfers from place to place the goods of all choosing to employ him is a common carrier, even though his charges be not fixed as to the amount. *Jackson Architectural Iron Works v. Harburt*, 15 Misc. 98. In this case the court followed the ruling in the earlier cases of *Richards v. Westcott*, 3 Bosw. 589, and *Allen v. Sackrider*, 27 N. Y. 341, and although it was not one in which baggage was transported, yet it is here cited as showing a bearing upon the question in hand.

But if the defendant or party hired to carry does not follow such calling as a general or habitual business, but carries the articles in question under a special contract, he will not be liable as a common carrier, but only upon his contract. *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393.

In *Richards v. Westcott*, *supra*, it was proved that the trunk was delivered to the defendant company, who carried trunks for hire between the depots in the city, to be carried to the passenger depot of the railroad company to accompany the plaintiff's agent on his journey, and that by reason of the defendant's negligence the trunk was not delivered at the depot. It was held that the defendants were common carriers and liable as such.

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In *Robinson v. Cornish*, *supra*, the defendant, a city expressman having a license to carry on such business in the city of New York, had a parcel delivered to him by the plaintiff for carriage between points in said city, which package was received by his driver and was lost or stolen from his wagon. Upon suit brought to recover its value it was held that he was liable as a common carrier, or if not as such, he was still liable as a private carrier, or as a bailee for hire, on the theory of negligence.

Where a railroad passenger on arriving at his destination entered into a contract with a transportation company for an agreed price to procure his baggage from the railroad company's depot and haul it to his residence, and surrendered his baggage checks to such company, it was held that the transportation company was liable for the safe keeping of the baggage and for its safe delivery, a contractual relation existing between the parties which the passenger might enforce by action and sequestration. *De Ponte v. New Orleans Transfer Co.*, 42 La. Ann. 699.

The case of *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 273, was an action to recover the value of articles in a trunk delivered by the appellee to the appellant to be carried for hire from the depot to the appellee's residence. In affirming the judgment of the court below in favor of the appellee, the court held that the appellant was a common carrier and as such was bound to carry the trunk and its contents safely, though it was not such as was usually carried by him as baggage, there being no fraud or deception practiced by the appellee as to the contents of the trunk, the appellant not inquiring as to such contents, and the appellee not being under a special obligation to make the contents known.

And although hotel proprietors and innkeepers are not generally carriers, yet in cases where they have engaged to carry or transport the baggage of their guests from their premises to the depots the courts have looked upon them as such.

In *Dickinson v. Winchester*, 4 Cush. 114, 50 Am. Dec. 760, an innkeeper who, by public notice, engaged to carry all guests and their baggage free from the depot to his house, and *vice versa*, was held liable for the baggage of a guest lost by the negligence of the driver of the hack, the court basing its opinion upon the principles of the doctrine of estoppel, the innkeeper by reason of his notice being looked upon as making the driver his agent or servant. In this case, however, the question as to whether or not the innkeeper was to be held responsible by reason of his having engaged in such business, or whether he was responsible as a common carrier, was mooted but not decided by the court.

In *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460,

Head, J., delivered the opinion of the court:

We are satisfied, from the testimony, which is practically without dispute on this point, that the contract between the parties was that the defendant company should carry the plaintiff's trunk to the depot, and deliver it there to the baggage agent of the railroad company. The plaintiff herself testified that the trunk was delivered to the defendant's driver, "to be deposited in the baggage room of the Ga. Pacific R. R.;" and her son-in-law, Robinson, who acted for her, says he informed the defendant's general manager that he wanted the trunk carried to the Georgia Pacific depot, and, furthermore, that, when he accompanied the plaintiff to the train, the next morning, he inquired for the trunk of the baggage agent of the Georgia Pa-

cific Railroad, at the depot in Anniston where he had ordered the trunk to be taken. We have only to decide whether the defendant performed that contract; and we are clearly of the opinion that it did perform it fully, both in its letter and spirit. The testimony shows, without conflict, that the driver, Joe Lindsay, immediately upon receiving the trunk, carried it to the depot, and put it on the covered platform between the passenger and baggage departments, in front of the door of the baggage room, at the place, and only place, set apart and especially designated by the baggage agent for the deposit of baggage to be received by him for the railroad, and where the railroad company had, for a long time been accustomed to receive baggage. The driver, Lindsay, testifies that he called the attention of

the defendant was a proprietor of an omnibus which ran from his hotel, at which the plaintiff stopped, to the railroad depot. The baggage for the loss of which the action was brought, was received by the defendant at his hotel and brought out by his servants to be sent to the depot with the plaintiff. It was held that the proprietor was liable as a common carrier for such baggage, he being a common carrier of passengers.

And the case of *Dickinson v. Winchester*, *supra*, established the doctrine that the keeper of a public house, giving notice that he will furnish free conveyances to and from the depot to all passengers with their baggage who stay at his house, and who for that purpose engages the proprietors of carriages to carry such passengers free of charge to them, will be held liable for the loss of a passenger's luggage incurred through the negligence of the carriage proprietors, their drivers or servants.

In that case the court stated that the question whether the defendant was to be considered liable either as an innkeeper or as a common carrier was immaterial, as he was liable in either capacity.

As to who are common carriers, see *note* to *Staub v. Kendrick* (Ind.) 6 L. R. A. 619; and to *Browning v. Goodrich Transp. Co.* (Wis.) 10 L. R. A. 415.

II. When Liable.

Inasmuch as baggage transfer companies are considered as common carriers, it follows that their responsibility is the same. They are bound to deliver the baggage intrusted to their care according to the terms of their contract, and will be liable for negligence in case of a neglect of such duty.

In *Southern Exp. Co. v. Armstead*, 50 Ala. 360, the express company was held liable as a common carrier for a trunk taken for hire and delivered by them upon the railroad company's platform, without leaving it in charge of any person, such an act being considered gross negligence.

In the above case the express company, who at first declined to receive the articles, as it had no agent to receive them at the depot and the railroad company had refused the use of its depot, subsequently took the goods and marked them at "owner's risk" without the knowledge or consent of the consignor, but the consignee had knowledge of such facts. It was held that such facts did not relieve it from responsibility.

A student's manuscript books are baggage for which an expressman will be liable as a common carrier when lost through his negligence, if contained in such student's trunk. *Hopkins v. Westcott*, 6 Blatchf. 64.

In *Verner v. Sweitzer*, 32 Pa. 208, the defendant's agent, whose business it was to board all trains at the depot and collect passengers' baggage checks, took from the plaintiff his checks for baggage

upon the train, handing him a ticket in return therefor. The baggage being lost, it was held in an action to recover damages for the same, that the defendant was liable no matter whether he was a common or a private carrier, there being proof of want of ordinary care on his part without any proof of ordinary negligence on plaintiff's part.

In *Springer v. Westcott*, 2 App. Div. 256, the plaintiff, while a passenger by railroad, delivered the check for her trunk to the defendant's agent, with instructions to procure her baggage and deliver it at a certain address, taking the usual receipt. The trunk was delivered to her soiled, broken, and empty, and had the defendant's usual yellow label thereon. On the trial in the court below verdict was rendered for the defendant, but upon appeal it was reversed and a new trial ordered, the court stating that it was for the defendant to show that the trunk was in such a condition when received by him from the railroad company, and that in the absence of such a showing the presumption was that it was in good condition when received by him, the case being one for the jury upon the evidence.

Under §883, N. Y. Rev. Ord. 1881, a person who has a license from the mayor to use and employ express wagons in the conveyance and transportation of goods from place to place in a city for hire, wages, or pay, upon conforming to and obeying in all respects the ordinances of the common council, is responsible for all articles intrusted to the drivers of his wagons. *Robinson v. Cornish*, 34 N. Y. S. R. 695.

See also *supra*, I.

III. Limitation of Liability.

The question whether or not such companies can limit their liability would seem to depend, as in other cases of common carriers, upon the question of assent on the consignor's part, for when a limitation of liability is indiscriminately made, no presumption of assent can or ought to be indulged. *Southern Exp. Co. v. Armstead*, 50 Ala. 360, 362.

An express company, or a baggage transfer company, cannot by the use of a general printed receipt, limit its liability so as to relieve itself from responsibility beyond a certain amount. *Ibid*.

In *Woodruff v. Sherrard*, 9 Hun, 338, the facts showed that the plaintiff gave a check for her baggage to defendants and engaged them to transfer the same from the depot to her house, taking the company's receipt therefor, which unknown to her contained a special contract limiting defendants' liability. In an action to recover for the loss of the goods it was held that the company was liable, as there was nothing to show that plaintiff assented to the terms of the special contract.

So, in *Grossman v. Dodd*, 68 Hun, 334, Affirmed

Crabtree, the agent, to the trunk, telling him who had sent it to the train, and when it was going off, and that Crabtree said, "All right," or something of that sort. It is true that Crabtree testified that the trunk was not delivered to him, and that he did not receive it, yet, on cross-examination, he shows, by stating that he so swears because he did not check the trunk, that he was merely expressing an erroneous legal conclusion. His further statements that "the trunk was deposited at the proper place set apart and designated by me, as the railroad company's baggage agent, for the delivery of baggage to me as baggage agent, and at the place at which I check all baggage, and have received and checked all baggage continuously for the railroad for the last three years;" and that "when Joe Lindsay put the trunk on

the covered platform, near the baggage-room door, he called my attention to it, and told me whose trunk it was, and what train it was going off on. I do not remember what reply I made to him, but I did not object in any way to his leaving it there,"—leave no room to doubt that there was a good delivery to and acceptance by him of the trunk, which completed the performance of the defendant's contract. It was expressly made known and understood, at the time of the making of the contract of carriage, that the trunk could not be carried the next morning to meet the 8 o'clock train, on which the plaintiff expected to take passage, for the reason that the driver had to go at that time to another depot to take the mail; and, in view of this, it was expressly agreed that he should go at once, that after-

127 N. Y. 500, the court reached a similar conclusion, the plaintiff not having assented to the terms of the special contract limiting the defendant's liability, no such contract arising as a matter of law from the mere acceptance of such a receipt. In that case the plaintiff's trunk and baggage were delivered to the company to be transferred from the pier at which plaintiff had landed to the city, and were damaged by falling into the river through the defendant's negligence.

Again, in *Blossom v. Dodd*, 48 N. Y. 264, 3 Am. Rep. 701, the question of limitation of liability on the part of the express company arose, and was decided against the defendants, no assent to or knowledge of the restriction being shown on the plaintiff's part. The facts showed that plaintiff delivered his baggage check to the agent of the defendant company on the car, which was badly lighted and received a receipt which contained a limitation of liability, and was badly printed. The company was held liable for the baggage which was lost or stolen in transit.

In *Madan v. Sherard*, 78 N. Y. 529, 20 Am. Rep. 153, the facts and circumstances were very similar to those in the case of *Blossom v. Dodd*, except that the receipt, which the plaintiff neglected to read but folded up and put in his pocket, was printed in large type and upon larger paper. The court held that the mere fact that he did not read the paper was not *per se* evidence of negligence, and no assent being proved on the part of the plaintiff to the special contract, the defendant was liable for the loss of the trunk in question, the plaintiff having a right to regard the paper as a voucher to enable him to follow and identify the goods, no notice to the contrary being given him.

And in *Staub v. Kendrick*, 121 Ind. 220, 6 L. R. A. 619, where the appellant, engaged in the transportation of trunks and baggage to and from the various hotels and depots in his town, was sued by the appellee for the value of a valise and its contents, and damages resulting from its loss. In affirming the decision of the court below, it was held that one engaged in the business of transporting baggage was liable for the value of articles, necessary for use in traveling, contained in a valise delivered to his agent for transportation, and lost solely through such agent's negligence, even though the defendant posted notices that he would not be responsible for valises, and instructed his agents not to receive the same, the owner of the valise being ignorant of such notice.

The contrary view would appear to have been taken by the courts in some cases.

In *Hopkins v. Westcott*, 6 Blatchf. 64, the facts showed that upon receipt of the baggage check by defendants they handed plaintiff a paper containing the number of the check and also a notice exempting them from liability for jewelry, and for 34 L. R. A.

loss by fire, and also for an amount exceeding that specified "upon any articles unless specially agreed in writing on this check receipt, and the extra risk paid therefor." The notice was not read by plaintiff until after notice from defendant that his trunk was lost. The court held that the plaintiff was to be considered as having notice of the terms, the same being printed in large type, and that the same was therefore to be taken as a qualification of such liability.

In the above case the question arose as to whether upon the construction of such notice the carrier was only liable for the amount specified therein, or whether he was liable for such amount upon every article lost, except those expressly exempted, provided it was of such value. The court held the latter to be the just construction of the notice, upon the ground that the notice, not being clear, was to be construed strictly against the carrier, the terms used being "any article" thus indicating a liability to such extent upon any article contained in the trunk as baggage.

IV. When not liable.

Before the company or defendant can be held liable, the baggage must be delivered to him, and there must be a breach of the contract to deliver on his part.

Such a company is not liable for the jewelry of a third person carried in a traveler's trunk as merchandise, where it is not made known to the company, the same not being baggage in the ordinary sense. *Richards v. Westcott*, 3 Bosw. 550.

In *Manheim v. Carr*, 62 Me. 473, the plaintiff sued to recover for value of baggage alleged to have been lost through the defendant's negligence in delivering the same to the express company at the depot, to be forwarded by an early morning train, pursuant to plaintiff's instructions given to the hotel proprietor upon leaving his hotel. It was held that the defendant, having taken and left the baggage at the depot, with other baggage pursuant to his contract, to be forwarded as instructed, was not liable for its loss.

The direct question of the liability of city expressmen or baggage transfer agents arose in the case of *Henshaw v. Rowland*, 54 N. Y. 242. The facts showed that the plaintiff delivered a trunk to the defendant to be taken to the depot and delivered there for the plaintiff by a certain time, the plaintiff intending to take a train later in the day. The baggage was duly delivered by the defendant at the depot, but upon plaintiff's calling for same it could not be found. It was held, in an action against the expressman to recover the value of the trunk and its contents, that he having fulfilled his contract, which was to deliver the trunk at the depot, and not to deliver it there to the plaintiff, the latter could not recover.

noon, and take the trunk to the depot. The idea that, after then taking it, the defendant was to keep it in its custody until the next morning, and then deliver it to the plaintiff, at the depot, where she was ready to take the train, is expressly excluded by the very fact which rendered necessary its immediate carriage. The plaintiff's agent and witness, Robinson, testifies that he knew the defendant had no place to store baggage, that it had no warehouse, and that storing baggage was not a part of its business, so that we are convinced that the plaintiff received the very performance of the contract which the parties understood would be made. *South & North Ala. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749. This case is essentially unlike that of *Southern Exp. Co. v. Armstead*, 50 Ala. 350, relied upon by

appellee. There, the express company's agent knew that the railroad agent had refused to allow the express company to deposit goods in its depot at the point of destination, and yet he left the package on the platform, merely calling the attention of the depot agent to it, as the property of the plaintiff. The railroad agent had no duty to perform in regard to it, and, under the circumstances, the action of the expressman was held to be gross carelessness, entitling plaintiff to recover for the loss. The loss of the trunk in this case cannot be attributed to any fault of the defendant. The plaintiff was not entitled to recover, and hence the judgment of the city court must be reversed, and a judgment here rendered for the defendant.

Reversed and rendered.

In *Aikin v. Westcott*, 123 N. Y. 363, the only question was whether the defendant company actually received into its custody the plaintiff's trunk. It was assumed that the trunk in question reached the railroad company's depot in advance of an employee and agent of the plaintiff, who checked them on the journey and stopped over. The trunks were taken off the train on its arrival by employees of the defendant company and left at the depot at the incoming baggage room, under the railroad company's control. The plaintiff's agents still had the checks, of which the defendants became possessed the following day for the purpose of delivering the trunks at the plaintiff's place of business. The baggage was not forthcoming. The court, in an action against the defendant company, held that the trunk was not formally delivered to the defendant nor was it in its control, and that the fact that the cars were unloaded by the defendant's agent did not alone render him liable, as the goods never passed out of the control of the railroad company.

The case of *Patten v. Johnson*, 131 Mass. 297, was one in which the defendants were proprietors of a hack stable and owners of hacks, which they furnished with horses and drivers for the transportation of persons with their baggage from one part of the city to another. The plaintiff, whose baggage was heavy, hired of defendant a hack and driver for transportation purposes and refused other help, taking only the hack driver along. The facts showed that he assisted in the delivery of the baggage and assented to the method of delivery employed by the driver. In an action to recover damages for the loss of a trunk the court held the carrier was not liable.

See also cases *infra*, V., and *Hopkins v. Westcott*, 6 Blatchf. 64, *supra*, III.

V. The effect of a custom.

It often becomes a question whether a baggage transfer company which receives baggage to be carried and delivered at a railroad depot, in advance of the intended passenger, is liable for the loss of such baggage when the same is lost or stolen from the depot before such passenger applies for it.

Upon this point it would seem that such companies are free from responsibility for the loss of baggage, where they deliver it according to their contract and to the usual custom.

In *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 233, 54 Am. Rep. 319, the appellee sent a trunk to appellant's railroad by an expressman the night before she took her ticket and traveled over the appellant's railroad, and on her producing her ticket to the baggage master and demanding her trunk to be sent upon the train, found that it had

been lost or stolen. In an action to recover its value, wherein the railroad company sought to free itself from liability on the ground that they had adopted a rule that a person intending to become a passenger should purchase a ticket or pay a fare before the company could receive baggage and become responsible, the court held that the company might make such a rule, but that if it did not adopt it, or if having adopted it, it pursued a different practice by accepting baggage relying upon the good faith of the owner, it would be liable whether the loss occurred before or after the arrival and departure of the train, or before or after the purchase of a ticket or fare, if the owner intended to become a passenger, and that the baggage agent was the company's agent for the receipt of such baggage. In that case the agent had received the baggage in the same manner as on previous occasions, and the expressman or transfer company had fulfilled his contract by delivering the baggage at the depot pursuant to his contract and the custom.

So, in *Green v. Milwaukee & St. P. R. Co.* 38 Iowa, 100, where the plaintiff's baggage, according to custom, was sent by her through a drayman to defendant's depot the evening before her departure, and was left in the company's waiting room by the carrier, it was held that the railroad company was liable for its loss, the custom being established and the baggage accepted by them.

And in the case of *Henshaw v. Rowland*, 54 N. Y. 242, the court also recognized the custom in such cases, which showed that it was the usage to send baggage to the depot ahead of the owner, to be left there until the owner thereof should call for the same to be placed on the train on which he had taken his passage, and therefore the transfer company having delivered according to the custom was free from liability.

In *Rogers v. Long Island R. Co.* 1 Thomp. & C. 396, Affirmed 55 N. Y. 620, action was brought against defendant as a common carrier to recover the value of a trunk and its contents alleged to have been lost by its negligence at the depot. The facts showed that an expressman took the trunk to the depot at the plaintiff's request and placed it beside a baggage crate at the same time informing the agent in charge of the depot where the trunk was, such agent saying it was all right and instructing two men in the depot to take charge of it, whereupon the expressman left. On plaintiff's arriving later in the day and purchasing his ticket and applying for a check for his baggage, the trunk was missing. The court held that under the evidence the company was responsible for the safe delivery of the property, there having been a sufficient delivery thereof to it by the expressman.

R. W.

INDIANA SUPREME COURT.

CLEVELAND, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY, Appt.,
v.

William T. MONEYHUN, Guardian of
Charles Moneyhun.

(.....Ind.)

1. The failure of a carrier to furnish a seat for a passenger does not justify him in going to a place of peril on the platform when there is plenty of standing room in the car.
2. Going from a car in which there is plenty of standing room to the lower step of the car platform in order to vomit when the train is running at the rate of 25 miles per hour constitutes such contributory negligence on the part of a boy fifteen years of age as to preclude any recovery from the carrier for his injuries when thrown off by a jerk of the train.

(October 21, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Madison County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. John T. Dye and Lovett & Ryan, with *Messrs. Byron K. Elliott and William F. Elliott*, for appellant;

Such actions, as a general rule, can be brought only in the name of the infant by his next friend.

1 Rev. Stat. 1894, §§ 256, 257; *Spencer v. Robbins*, 106 Ind. 530; *Wilson v. Galey*, 108 Ind. 257.

The failure to find any one of a number of facts which is necessary for the plaintiff to prove in order to entitle him to recover is equivalent to a finding against him thereon, and the verdict will not support a judgment in his favor.

2 Elliott, Gen. Pr. § 983; *Cleveland, C. O. & St. L. R. Co. v. Martin*, 13 Ind. App. 485; *Mitchell v. Brawley*, 140 Ind. 210; *Noblesville Gas & I. Co. v. Locher*, 124 Ind. 79; *Housworth v. Bloomhuff*, 54 Ind. 487; *Buchanan v. Milligan*, 108 Ind. 483; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 483.

Where negligence and contributory negligence are in question, and more than one inference can reasonably be drawn, the special verdict must find both the specific facts and the inference or ultimate fact of negligence and freedom from contributory negligence.

Cincinnati, I. St. L. & C. R. Co. v. Grames, 136 Ind. 39; *Smith v. Wabash R. Co.* 141 Ind. 93; *Bloomington v. Rogers*, 18 Ind. App. 121; *Louisville, N. A. & C. R. Co. v. Costello*, 9 Ind. App. 463.

The fact that there are jerks and sudden starts in the movement of the train does not

constitute negligence on the part of the company.

Baltimore & Y. Turnp. Road v. Cason, 73 Md. 377; *Siner v. Great Western R. Co.* L. R. 4 Exch. 123; *Dublin, W. & W. R. Co. v. Slatery*, L. R. 3 App. Cas. 1155; *Rockford, R. I. & St. L. R. Co. v. Coultas*, 67 Ill. 398; *Illinois C. R. Co. v. Green*, 81 Ill. 19, 25 Am. Rep. 255; *Malcom v. Richmond & D. R. Co.* 106 N. C. 63; *Chicago, B. & Q. R. Co. v. Hazard*, 26 Ill. 373; *Bemis v. New Orleans City & L. R. Co.* 47 La. Ann. 1671.

Appellee's ward was guilty of contributory negligence.

Goodwin v. Boston & M. R. Co. 84 Me. 208; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L. R. A. 326; *Camden & A. R. Co. v. Hooley*, 99 Pa. 492, 44 Am. Rep. 120; *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 28 L. R. A. 758.

It is negligence to stand and ride upon the platform of a commercial railroad car while it is in rapid motion.

Alabama & G. S. R. Co. v. Hawk, 73 Ala. 112, 47 Am. Rep. 403; *Jackson v. Crilly*, 16 Colo. 103; *Paterson v. Central R. & Bkg. Co.* 85 Ga. 658; *Bemis v. New Orleans City & L. R. Co. supra*.

The appellee's ward at the time he was injured had reached the age when an infant is presumed to understand danger as well as an adult.

Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 33 Am. Rep. 413; *Tucker v. New York O. & H. R. R. Co.* 124 N. Y. 308; *Wendell v. New York C. & H. R. R. Co.* 91 N. Y. 420; *Hayes v. Norcross*, 163 Mass. 546; *Wallace v. New York, N. H. & H. R. Co.* 165 Mass. 236; *Lewis v. Baltimore & O. R. Co.* 38 Md. 533, 17 Am. Rep. 521; *Krenzer v. Pittsburgh, O. & St. L. R. Co.* (Ind.) 43 N. E. 649; *Shirk v. Wabash R. Co.* (Ind.) 43 N. E. 656; *Reynolds v. New York O. & H. R. R. Co.* 58 N. Y. 243; *Lofdah v. Minneapolis, St. P. & S. S. M. R. Co.* 88 Wis. 421; *Butler v. Pittsburgh & B. R. Co.* 139 Pa. 195; *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 195.

Messrs. Goodykoontz & Ballard for appellee.

Jordan, J., delivered the opinion of the court:

This action was commenced and prosecuted in the lower court by appellee, William T. Moneyhun, as guardian of Charles Moneyhun, a minor under the age of twenty-one years. The action arises out of injuries sustained by said ward, while a passenger upon a train of cars operated by the appellant, by reason of the alleged negligence of the latter. Upon the trial there was a special verdict returned by the jury, and upon the facts therein found the court adjudged that appellee was, as such guardian, entitled to recover damages for the said injuries for the benefit of the ward, and rendered judgment accordingly against appellant for \$5,000, the amount mentioned in the verdict. The legal proposition submitted by the parties to this appeal arise under the facts embraced in the special finding of the jury.

NOTE.—For contributory negligence of a passenger, see *Mitchell v. Southern P. R. Co.* (Cal.) 11 L. R. A. 130; also a considerable number of other cases in the note thereto; likewise see *Upham v. Detroit City R. Co.* (Mich.) 12 L. R. A. 129.

34 L. R. A.

The following facts are all which we deem it necessary to set out in order to present the mooted questions of law herein involved: Appellee is the father and the duly appointed guardian of Charles Moneyhun; the latter having no estate, either real or personal. This ward at the time he sustained the injuries in question was a boy of average size, intelligence, and education for one of his age, being at the time nearly fifteen years of age. On June 9, 1895, after advertising the same, the railroad company (appellant herein) ran an excursion train over its road from Anderson, Indiana, to Benton Harbor, Michigan, and return; the train being composed of two sections, and the cars thereof being vestibuled. Appellee's ward, Charles Moneyhun, with the knowledge and consent of his father, purchased a ticket and boarded said train as a passenger, at Anderson, for the purpose of being carried as such to Benton Harbor. He entered one of the coaches of the second division, and seated himself therein. When said train arrived at Alexandria, a station about 12 miles from Anderson, the coach in which said Moneyhun was seated was detached from the train, and left upon a side track, because of a hot box, which was occasioned by reason of the box being worn and not properly packed. The passengers in this coach, including young Moneyhun, were informed by the conductor in charge of the train that they must leave this car and go into others. On entering the car to which he and other passengers had been transferred, he found all of the seats occupied and the aisle thereof and other places therein filled with passengers who were standing, and he was unable to find a seat upon the train, and for this reason accepted standing room in the car which he entered. After detaching the car from the train for the reason stated, appellant did not replace it by another in order to accommodate the passengers on the train with seats. Moneyhun, after standing in the aisle of the car until the train was near the city of Warsaw, Indiana, became sick. What made him sick, however, is not disclosed by the verdict. Believing that he would be compelled to vomit, by reason of nausea, and in order to avoid soiling the car and persons standing near him, he voluntarily left the car in which he was riding, and passed out through the door of the vestibule, and went down on the lower step of the steps, leading from the ground to the car, and stood upon this lower step for a short time, holding to the railing. While so standing upon this step his back was towards the platform of the car, and his head was leaning forward and outward. The train at the time he left the car, and while he was standing upon said step was running at a speed of 25 miles per hour; and while so standing he was thrown off the train, by reason of the engineer suddenly, unnecessarily, and without warning, applying steam, which caused the car to give a sudden jerk. By being thrown from the train in the manner stated, Moneyhun was severely injured, being the same injury complained of by appellee. The jury also find that there was ample room in the car where he was for him to ride, without going upon the platform or steps, and, had he remained upon the inside of the coach in which

he was riding, he would not have been injured; that it was not safe, but dangerous, for him to leave the car and "go onto and stand upon the car step," as he did while the train was running at the rate of 25 miles per hour. The jury further found that "it was not safe for a person to stand where he did, even if the ran smooth and did not jerk." The cars were so vestibuled as to render it safe for a passenger to pass from one car to another, and on the car door there was a printed notice forbidding passengers to ride upon the platform of the car, but, owing to the door being at the time swung back, it was thereby obscured from view. The injuries sustained by appellee's ward consisted of several fractures of both the right and left leg, and dislocation of his left ankle. These injuries are found to be permanent.

The inquiries arising under the above facts embraced in the special verdict are those which usually arise under the issues in actions based upon negligence: First, is the injury in question the result of the negligence of appellant? Second, is the ward of appellee chargeable with contributory negligence? At the very threshold of these questions counsel for appellant challenge the right of the guardian to maintain this action upon the ground that it could be brought only in the name of the infant by his next friend, under §§ 256, 257, Rev. Stat. 1894, Rev. Stat. 1881, §§ 255, 256. Section 29 of the Code of 1881, Rev. Stat. 1894, § 267, and Rev. Stat. 1881, § 266, provides that "a father, or in case of his death or desertion of his family, or imprisonment, the mother may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward." In the case of *Louisville, N. A. & O. R. Co. v. Goodykoonts*, 119 Ind. 111, this court on page 118 interpreted this section as follows: "If a minor under guardianship sustains an injury to his person from the wrongful conduct of another, his guardian may maintain an action and recover for the benefit of the ward precisely as the latter might have recovered through the intervention of a *prochein ami* in case he had not been under guardianship. This is so whether the ward's father or mother be living or not. The pain and suffering endured and the permanent injury resulting from the wounding or maiming of a minor are personal to himself, and damages for such pain and injuries are always recoverable for his benefit." We yield adherence to the above interpretation of the statute, and are of the opinion that it clearly authorizes a guardian of an infant who has received a personal injury as the result of a wrongful act of omission or commission by another to sue and recover from the wrongdoer such damages as are personally sustained by his ward. The contention of appellant upon this proposition must therefore be denied, and the action of the appellee in instituting this suit as the guardian of the injured minor is sustained.

The special verdict does not find that the ward of appellee was without fault, or free from contributory negligence upon his part, at the time the injury occurred. As freedom from fault or negligence at the time of the accident

upon the part of the latter is an essential factor which must exist in order to entitle the appellee to recover in this action, we may therefore assume, without deciding, that appellant, under the circumstances, is chargeable with actionable negligence, and address our inquiry first to the question of contributory negligence, which counsel for appellant so strenuously insist, under the facts, must be imputed to appellee's ward. It is conceded by appellee that under the facts his ward must be deemed to have been, at the time he sustained the injury, capable of being guilty of contributory negligence. The absence of contributory negligence upon the part of the injured party at the time he received his injuries was in issue, as well as the alleged negligence of the appellant, and the burden rested upon the appellee to establish *inter alia* both of these requisite facts before he would be entitled to a recovery. The rule is firmly settled that, if the special verdict of the jury or a special finding of the court omits to find any fact essential to support the judgment below, the latter cannot be sustained. No presumptions or intendments are available in favor of a special verdict, and the omission to find a fact in favor of the party upon whom the *onus* of proving it is cast is equivalent to finding such fact against him. As a legal rule, that which is not proved is the same as that which does not exist. See *Housworth v. Bloomhuff*, 54 Ind. 487; *Buchanan v. Milligan*, 108 Ind. 488; *Albion v. Hetrick*, 90 Ind. 543, 46 Am. Rep. 230; *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433; *Noblesville Gas & L. Co. v. Loehr*, 124 Ind. 79; *Mitchell v. Brawley*, 140 Ind. 216; 2 Elliott, Gen. Pr. § 938. It is also a well-settled proposition in this state that whenever, under the facts disclosed by a special verdict, the question is presented either as to the negligence of the defendant, or as to whether the plaintiff was without fault, and two inferences may reasonably be drawn as to either of said ultimate facts,—one in favor and the other against,—then the determination of such fact is within the province of the jurors, and their finding will be accepted by the court as controlling. *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 136 Ind. 89; *Rush v. Coal Bruff Min. Co.* 131 Ind. 135; *Woolery v. Louisville, N. A. & C. R. Co.* 107 Ind. 881, 57 Am. Rep. 114; *Smith v. Wabash R. Co.* 141 Ind. 92; *Louisville, N. A. & C. R. Co. v. Costello*, 9 Ind. App. 462; *Bloomington v. Rogers*, 13 Ind. App. 121. But if the facts found are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, then the finding of such ultimate fact, whatever it may be, will be disregarded by the court. *Smith v. Wabash R. Co. supra*.

In the case at bar, however, there is but one reasonable inference to be deduced from the facts relative to the acts of appellee's ward at the time he sustained his injuries, and that is to the effect that his own negligence contributed to said injuries; hence a finding by the jury that he was free from fault could not have affected the legal result. It is manifest, we think, from the facts shown, that the ward of appellee was thereunder chargeable with

contributory negligence. While it is true that it was a duty incumbent upon the railroad company to furnish a seat within its car for each passenger taken aboard of its train, and not merely standing room in the aisle of the car, the mere fact, however, that he was compelled to accept standing room would not justify him in voluntarily leaving a place of safety and going to one of peril. The jury found that there was ample room in the car in which he was riding, and in other cars upon the train, and that there was no necessity for him to go upon the platform or car steps, and that, had he remained inside of the car, he would not have sustained the injuries which he did; that it was unsafe and dangerous for him to leave the car when the train was running at the rate of 25 miles an hour, and stand upon the steps as he was doing when the accident happened. The jury further found that the place where Moneyhun stood when injured was not a safe place to stand, "even if the train ran smooth and did not jerk." He was not content to step on the platform, but went upon the lower step, and stood there with his back towards the platform and his head leaning outward, as it is expressly shown by the verdict. We are of the opinion that the facts disclose a clear and undoubted case of contributory negligence upon the part of appellee's ward, which cannot be controverted from any legal standpoint. While it may be said, in the sense of decency, that it was proper for this boy, when admonished of the fact that he was about to vomit, to make an effort to avoid befouling his fellow passengers, yet even under this view the law would not justify him in exposing himself to peril, or excuse or mitigate his negligence when he seeks redress in an action for injuries sustained. The authorities cited by the learned counsel for appellee are, under the facts, distinguishable from the case at bar, and lend but little if any support to his contention upon the question involved. The conclusion reached is in harmony with and supported by the following authorities: *Goodwin v. Boston & M. R. Co.* 84 Me. 203; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L. R. A. 326; *Camden & A. R. Co. v. Hooley*, 99 Pa. 492, 44 Am. Rep. 120; *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 386, 23 L. R. A. 758; *Alabama G. & R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 408; *Jackson v. Crilly*, 16 Colo. 108; *Paterson v. Central R. & Bkg. Co.* 85 Ga. 653; *Bemis v. New Orleans City & L. R. Co.* 47 La. Ann. 1871; *Wendell v. New York O. & H. R. R. Co.* 91 N. Y. 420; *Hayes v. Norcross*, 162 Mass. 548; *Wallace v. New York, N. H. & H. R. Co.* 165 Mass. 236; *Kronzer v. Pittsburg, C. O. & St. L. R. Co.* (Ind.) 43 N. E. 649; *Lewis v. Baltimore & O. R. Co.* 38 Md. 588, 17 Am. Rep. 521; *Shirk v. Wabash R. Co.* (Ind.) 42 N. E. 656; *Reynolds v. New York O. & H. R. R. Co.* 58 N. Y. 248; *Loftdahl v. Minneapolis, St. P. & S. S. M. R. Co.* 88 Wis. 421; *Butler v. Pittsburgh & B. R. Co.* 189 Pa. 195; *Edliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196; *Patterson, Railway Acc. Law*, § 272; *Cincinnati, I. St. L. & C. O. R. Co. v. McClain* (Ind.) 44 N. E. 306; *St. Louis S. W. R. Co. v. Rice*, 9 Tex. Civ. App. 509; *Scheiber v. Chicago, St. P. M. & O. R. Co.* 61 Minn. 499; *Chicago & N. W. R. Co. v. Oer-*

roll, 5 Ill. App. 201; *Toledo, St. L. & K. O. R. Co. v. Wingate*, 143 Ind. 125, and 184.

It follows that the court erred in denying the appellant's motion for judgment in its favor on the special verdict.

The judgment is therefore reversed and the cause remanded, with instructions to the lower court to sustain this motion and render judgment upon the special verdict in favor of appellant.

VIRGINIA SUPREME COURT OF APPEALS.

J. L. GLEAVES *et al.*

F. H. TERRY, Secretary of Wythe County Electoral Board.

(.....Va.....)

1. So much of the records of the electoral board as relates to the appointment and removal of judges and commissioners of election and registers or the ordering of a new registration may be inspected and copied by citizens.
2. Mandamus will not lie to compel the secretary of the electoral board to permit memoranda to be taken from records in his possession which may be properly copied, until it is shown that such right has been denied.
3. No citizen other than the proper officials has a right to inspect and take memoranda from so much of the records of the electoral board as relates to the preparation and printing of the official ballots, certification of the same, and their distribution to the judges of election of the several precincts.

(August 4, 1896.)

PETITION for a writ of mandamus to compel defendant to permit petitioners to take memoranda from records in defendant's possession. *Denied.*

The facts are stated in the opinion.

Mr. James A. Walker, for petitioners:

A public record is a memorandum made by a public officer authorized to perform that function.

When by express direction of statute a memorandum is required to be kept the memorial made in compliance with the statute is a public record.

A book or memorandum kept by persons in public office because required or made useful by the nature of the office or expressly required to be kept by statute is a public record.

20 Am. & Eng. Enc. Law, pp. 505, 511; 1 Greenl. Ev. §§ 471-478; *Clay v. Ballard*, 87 Va. 790.

Being a public record the right of inspection by any party having an interest therein exists at common law and is sustained by an unbroken line of decisions.

Clay v. Ballard, 87 Va. 791; 1 Greenl. Ev. §§ 471-478.

The right to take memoranda of a public record is an incident to the right of inspection.

Clay v. Ballard, 87 Va. 790; 2 Dill. Mun. Corp. § 684; High, Extr. Legal Rem. § 830; 2 Starkie, Ev. 415; 20 Am. & Eng. Enc. Law, p. 523, and notes; 1 Greenl. Ev. §§ 471-478.

Petitioners are citizens and registered voters and have an interest in common with every citizen of Wythe county in knowing who are the registrars and judges of election when they were appointed, etc. They have the right to this information because they are interested in having only honest and capable officers chosen, and in knowing to whom they shall apply for registration, transfers, etc. It is not necessary that he should have any special or private interest in the record.

3 Dill. Mun. Corp. § 684; High, Extr. Legal Rem. § 830; *Brouwer v. Cothrel*, 10 Barb. 216; 20 Am. & Eng. Enc. Law, pp. 521-523, and notes; *Clay v. Ballard*, 87 Va. 795.

Mr. J. H. Fulton for respondent.

Cardwell, J., delivered the opinion of the court:

The petitioners represent that they are citizens and voters of Wythe county; that they have applied to F. H. Terry, secretary of the electoral board of the county, at his office in Wytheville, and demanded the right to examine and inspect the records kept by the secretary of the proceedings of the electoral board, and to take written memoranda therefrom; and that said Terry, while allowing them to inspect the records in his presence, refused to permit petitioners to copy the records or to take memoranda therefrom. The prayer of the petition is for a mandamus commanding Terry to allow petitioners to examine the records of the electoral board of Wythe county, and to take memoranda or copies thereof. The respondent answers the petition, and says that it is true that he is a public officer of this state; that he is a member of the electoral board of Wythe county, and its secretary, duly qualified as such by taking the oath to perform the duties of his office according to law; that he has faithfully performed his duties as such, and has always looked to the statute creating the office for his duties and the manner of performing them. Respondent further says that, while it is also true that the peti-

NOTE.—The above decision is of much interest as a determination of the extent to which election records may be inspected by individuals. As to the power of courts to require ballot boxes to be

opened or produced in proceedings other than election contests, see *Ex parte Arnold* (Mo.) 38 L. R. A. 386, and note.

tioner J. L. Gleaves has within the past six weeks made frequent visits to respondent's office, with first one and then another of the petitioners, demanding an inspection of the records of the electoral board, asserting the right to take extracts from and to bring a clerk to make copies of them, respondent has not refused to allow the records which were under his control to be inspected in his presence, as far as proper, by petitioners, or any citizen who wished to do so, and offered to allow all of the petitioners to inspect the same, although respondent does not consider it his duty to do so; but, knowing that these records were under his authority and in his custody, and being responsible for same, has ever, and will ever, unless compelled by authority of law, refuse to allow the records to be taken out of his presence, or memoranda to be taken, or copies of same to be made. He responds, further, that he told petitioners that he was only a member of the electoral board of Wythe county, and that, if petitioners would get the consent of the electoral board, respondent would cheerfully allow, not only an inspection, but a copy, of the records of the proceedings of the board to be made, etc.

Section 67 of chap. 8 of the Code provides for the appointment of registrars by the electoral board in the several counties and cities of the commonwealth; § 69, for the filling of vacancies in the office of registrar, and for the removal of judges of election who fail to discharge their duties according to law; § 71, for the ordering of a new registration under certain contingencies; § 117, for the appointment of judges of election, and § 183, for the designation by the electoral board of five persons to act as commissioners to canvass the election returns. By an act of the assembly (Sess. Acts 1893-94, p. 730), amending § 68 of the Code, the secretary of each board is required to keep in a book, to be provided for the purpose, an accurate account of all the proceedings of the board, including all appointments and removals of judges and registrars; and, by an act approved March 4, 1896 (Sess. Acts 1895-96, pp. 768-770), amendatory of the act of March 6, 1894, entitled "An Act to Provide for a Method of Voting by Ballot," the printing of the ballots, the certification of the same as the official ballots, and their distribution to the judges of election of the several precincts of their county or city, are delegated to the electoral board of each county and city. So far as the appointment or removal of registrars, judges, and commissioners of elections is concerned, or the ordering of a new registration of voters, the law enjoins no secrecy. Therefore, the inspection by the public of this part of the board's acts is not in conflict with any provision of law; but the duties of the board as to the preparation of the ballot, its verification, and the stamping of the seal of the board thereon, as required by §§ 9 and 10 of the act of March 4, 1896, *supra*, are required to be performed in secret; and it is manifest that, if this were not so, the whole object of the law, *viz.*, to provide for the voter a legal ballot, verified in such manner as to preclude its being counterfeited,

and to frustrate as far as possible the use of unofficial and illegal ballots, would be defeated. The vote by ballot *ex vi termini* implies a secret ballot. *Pearson v. Brunswick County Supers.* 91 Va. 334. And the provisions of the statutes referred to, for the use of an official ballot, are, we think, plainly in furtherance of the constitutional provision for the exercise of the right of the voter to cast a secret ballot.

"To justify the issuance of a writ to enforce the performance of an act by a public officer, two things must concur: The act must be one the performance of which the law specially enjoins as a duty resulting from an office, and an actual omission on the part of the respondent to perform. It is incumbent on the relator to show, not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him, at the time of the application." "The office of the writ of mandamus, when addressed to a public officer, is to compel him to exercise such functions as the law confers upon him." "But the writ neither creates nor confers power upon the officer to whom it is directed. It can do no more than to command the exercise of powers already existing." "The writ of mandamus lies to compel a public officer to perform a duty concerning which he is vested with no discretionary power and which is either imposed upon him by some express enactment or necessarily results from the office which he holds." 14 Am. & Eng. Enc. Law, pp. 105, 180, 140, and authorities there cited in notes. That the record of the proceedings of the electoral board of Wythe county, required by law to be kept by its secretary and custodian, is a public record, and open to inspection by the public, except in so far as secrecy is enjoined by law, there can be no doubt; but where the disclosure of their contents would be injurious to the public interest, an inspection will not be granted. 1 Greenl. Ev. §§ 475, 476; 4 Minor, Inst. p. 714. The law, however, does not require of the secretary of the board, expressly or by fair implication, the duty of making copies when demanded, or provide compensation to him for doing so, as is the case with all public records, so far as we now recall; nor does the law by express enactment require him to allow copies to be made; and the granting of the writ of mandamus applied for in this case must therefore depend upon whether or not the duty to allow copies to be taken of the record of the proceedings of the electoral board necessarily results from the office of secretary to the board, held by the respondent. It has already been observed that there are portions of these records the disclosure of which would be injurious to the public interests; and by law, if there be a disclosure of any part of the record by the secretary as to which secrecy is enjoined, he is subjected to a penal *v* for his neglect or violation of duty. Therefore, if copies of these records are to be made by any citizen who demands the right, to avoid a disclosure of that part as to which secrecy is enjoined the secretary would necessarily have to be

constantly in attendance while the copies are being made, and in the performance of a duty not prescribed by law, and for which no compensation is provided. If copies can be made by one person, no one could be refused; and it well might be asked, Is it reasonable to assume that the secretary is to be required to devote an unreasonable portion of his time to allowing copies to be made of the records in his custody, and that this duty necessarily results from the office he holds? When, in point of time, are these copies to be made? And what discretion is to be exercised, and by whom, as to the length of time to be consumed in making the copies? If the secretary is clothed with discretion as to when the copies may be made, or the length of time that is to be consumed in making the copies of the records, or as to what portions thereof may be inspected or copied without injury to the public interests, and without violation of his duties, a mandamus must be denied. The statement is not made that respondent has denied petitioners the right to inspect the records. On the contrary, the statement is that respondent did not deny them this right. Nor is the statement made as to what memoranda or notes from the records petitioners desired to make, or the length of time that would have been required to make the memoranda or notes; but the complaint is merely that respondent refused to allow copies or memoranda to be made of the records. The court is of opinion:

1. That so much of the record of the proceedings of the electoral board of Wythe county, contained in the book provided by law, and committed to the custody of the

respondent as secretary of the board, as relates to the appointment and removal of judges and commissioners of election and registrars, or the ordering of a new registration, is a public record, open to inspection by any citizen and voter of Wythe county, and that he may take therefrom memoranda or notes of the proceedings of the electoral board as to which secrecy is not enjoined by law, which memoranda or notes may be made at and within a reasonable time, in the presence of the secretary; but, until it is shown that the right to inspect these records, or to make memoranda or notes, proper to be made as aforesaid, has been denied, a mandamus should not issue requiring respondent to allow such memoranda or notes to be made.

2. That so much of the record of the proceedings of the electoral board of Wythe county, in the custody of its secretary, as relates to the preparation and printing of the official ballots prescribed by law, certification of the same, and their distribution to the judges of election of the several precincts in the county of Wythe, is not a public record, that is open to inspection by any one, other than the officers of the county to whom the duties of preparing, printing, certifying, and distributing the ballots is delegated by law, and that the respondent cannot be compelled to allow petitioners to make memoranda or notes of these proceedings, or to inspect them.

3. That the petition of the applicants here, Gleaves and others, does not make a case upon which the mandamus prayed for should issue, and it must therefore be denied.

KANSAS SUPREME COURT.

John W. BREIDENTHAL

W. E. EDWARDS, Secretary of State.

(.....Kan.....)

*1. After the hearing and overruling by the tribunal provided for by § 10 of the Australian ballot law, of all objections to the nomination certificate filed by authority of a state convention of a political party, the further duties of the Secretary of State as to certification under § 18 of said law are ministerial only; and he has no right to challenge, and the courts have no authority to consider, the motives actuating any political party convention in its course, and he should certify any proper and requisite matter duly appearing on the nomination certificate.

2. A vice-presidential candidate whose name (together with that of his associate presidential candidate) has been certified by author-

*Headnotes by MARTIN, Ch. J.

ity of a state convention of his party as an addition to the party appellation, and who has not declined the national nomination, nor withdrawn as a candidate in Kansas, has no right, under § 8 of said Australian ballot law, to forbid such use of his name on the electoral ticket nominated by his party in this state.

(Johnston, J., dissents.)

(October 27, 1893.)

PETITION for a writ of mandamus to compel defendant to certify to the county clerks the name of Thomas E. Watson as candidate for Vice President upon the People's ticket among the names which were to be certified as candidates at a coming election. *Granted.*

Statement by MARTIN, Ch. J.:

The following facts appear from the alternative writ of mandamus and the answer thereto: At a national convention of dele-

NOTE.—This case is believed to have no precedent. The modern statutes providing for official ballots, have given rise already to a variety of

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questions, but this is the first time in which a question has been raised as to use thereon of the names of candidates for President or Vice President.

gates of the People's party held in July, 1896, William J. Bryan was nominated for President and Thomas E. Watson for Vice President; that afterwards in August, 1896, a state convention of said party, held at Abilene, indorsed said national nominations, and ten candidates were nominated as electors for President and Vice President, to be voted for at the ensuing general election; that in due time and form there was filed in the office of the Secretary of State a certificate, signed and verified by the presiding officer and the secretary of said convention, setting forth the names and residences of said candidates for electors, giving the name "People's Party" as the party represented by said candidates, and naming William J. Bryan and Thomas E. Watson as its candidates for President and Vice President respectively, as an addition to be made to the party appellation "The People's Party;" that objections in writing to said certificate were filed, and, after due notice, were considered by the Secretary of State, the auditor of state, and the attorney general, and on October 17, 1896, were decided not to be valid, and said certificate was held to be valid and effectual, and no other or further objections have been filed or considered; yet on the same day the Secretary of State received from Abe Steinberger, secretary of the Middle of the Road Populist committee of the state of Kansas, a telegram in the following words and figures, to wit:

Thompson, Ga., Oct. 16.

Abe Steinberger, Topeka, Kansas: Hand this request to Secretary of State. Do not certify my name on Abilene ticket to county clerks. My affidavit withdrawing my name has been mailed to you. Thomas E. Watson.

And accompanying said telegram was the affidavit of said Steinberger, as follows, to wit:

STATE OF KANSAS, } ss.
SHAWNEE COUNTY.

I, Abe Steinberger, being duly sworn according to law, depose and say that I am the duly authorized agent and representative in the state of Kansas of Thomas E. Watson, the Populist nominee for Vice President, and that I am fully empowered and have been authorized, as evidenced by telegram filed herewith, and as such agent and representative, and with the further knowledge that the said Thomas E. Watson's refusal to permit his name to appear on such ticket, accompanied by required affidavit, has been mailed to the Secretary of the State of Kansas. I hereby protest against the certification by the Secretary of State of the name of the said Thomas E. Watson on the so-called "People's Party Ticket," over the names of the Bryan and Sewall electors named at the Hutchinson Democratic convention, and pretended to have been named at the Abilene People's Party convention, and I request that the Secretary of State omit the name of Thomas E. Watson from the heading of such ticket.

A. Steinberger.

Subscribed and sworn to before me, this 17th day of October, 1896.

T. S. Stover, Assistant Secretary of State.
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And on October 19, 1896, the Secretary of State received by mail a notice from said Thomas E. Watson as follows, to wit:

STATE OF GEORGIA, } ss.
COUNTY OF McDUFFIE.

I withdraw as candidate for Vice President on ticket nominated at Abilene, Kansas, and decline to have my name used upon official ballot upon that ticket; it being placed there to deceive Populist voters to vote for Democratic electors.

Thos. E. Watson.

Sworn to and signed before me, this Oct. 16th, 1896. John A. Faucett,

Ordinary of McDuffie County, Georgia.
[Seal.]

The electors named in the certificate of nomination of the People's party are the same as those certified as electors of the Democratic party, whose national nominees for President and Vice President are William J. Bryan and Arthur Sewall, respectively, and said electors are members of the Democratic party. It is further alleged in the answer that, if said electors are chosen, they will not vote for Thomas E. Watson for Vice President, and that it is desired to use his name at the head of said ticket to mislead the voters of the state, and to induce them to vote for said electors under the belief that they were voting for electors belonging to the People's party, and who would vote for said Thomas E. Watson for Vice President if chosen. The allegations in the answer not included in the foregoing relate only to matters of law. The plaintiff moved for a peremptory writ of mandamus, notwithstanding the answer.

Mr. G. C. Clemens for plaintiff.
Messrs. F. B. Dawes, Attorney General,
A. A. Godard, Assistant Attorney General,
and Waggener, Horton, & Orr, for defendant.

Martin, Ch. J., delivered the opinion of the court:

1. This case involves certain of the duties of the Secretary of State under the Australian ballot law, being chap. 78, Sess. Laws 1893. Section 6 relates to the form of the certificate, and provides that, "in case of electors for President and Vice President of the United States, the names for the candidates for President and Vice President may be added to the party or political appellation." And § 14, relating to the printing of the names of the candidates under the proper party appellation or group, enacts that "the ballot shall contain no other names, except that, in case of electors for President and Vice President of the United States, the names of the candidates for President and Vice President may be added to the party or political organization." Section 13 reads as follows: "Not less than fifteen days before an election to fill any public office, the Secretary of State shall certify to the county clerk of each county within which any of the electors may by law vote for the candidates for such office, the name and residence of each person nomi-

nated for such office, as specified in the certificates of nomination or nomination papers filed with the Secretary of State." It will be observed that § 13 does not expressly provide for the certification of the names of presidential candidates, nor even of the party appellation; but, as the certification would be unintelligible without the latter we think it, and also any proper addition of the names of presidential and vice-presidential candidates, to be fairly included within the phrase "as specified in the certificates of nomination or nomination papers." In these respects a certificate of nomination is the guide to the Secretary of State, and he should follow it in giving directions to the county clerk as to the making up of the official ballot. We think it plain that he has no right to omit the party appellation, nor the names of the presidential and vice-presidential candidates added to the party appellation by authority of law, and properly appearing in the certificate.

The motion for a peremptory writ of mandamus notwithstanding the answer is in the nature of a demurrer, and, for the purposes of this hearing, admits every allegation of fact well pleaded in the answer. It does not admit conclusions of law, nor prophecies, nor general allegations of fraud unaccompanied by any statement of fact on which fraud is based, nor matters which the defendant has no right to plead nor the court jurisdiction to entertain. The allegation in the answer that the electors named in the certificate will not vote for Thomas E. Watson for Vice President is clearly not one of fact, and the court should not be guided by the pretense of anyone to the powers of divination. In such cases courts must deal with facts, not with prophecies. Besides, if these electors should be chosen, they will be under no legal obligation to support Sewall, Watson, or any other person named by a political party, but they may vote for any eligible citizen of the United States. Article 12 of Amendments to the Constitution of the United States. And neither the Secretary of State nor any court may interfere with them in the performance of their duties. The charge made by the Secretary of State that it is desired to use the name of Watson at the head of the People's party ticket to mislead the voters must be disregarded for several reasons: First. As to his separate official duties under this statute he is a mere ministerial officer, and not a censor of political parties, nor a guardian of the public morals, and it follows that he has no authority to make such a charge. Secondly. The only facts upon which any claim of fraud is based are that the certificate gave the party appellation as the "People's Party," and named the national candidates as an addition thereto, and then stated the names and residences of the candidates nominated by the convention as presidential electors, and these were Democrats, and the same men who were nominated for a like place by the Democratic party, but this must be held admissible, under *Simpson v. Osborn*, 52 Kan. 328. Thirdly. This court has no authority to investigate and pass judgment upon the motives which actuate

any political party convention in its course, for this is not jurisprudence, but politics. Fourthly. Although the record does not show the nature of the objections made to the certificate before the Secretary of State, the auditor of state, and the attorney general, and overruled by that tribunal on October 17, 1896, yet it is presumable that all proper matters of objection were then heard and decided. After the hearing and overruling of all objections by the tribunal provided for by § 10 of said act, it was the plain duty of the Secretary of State to certify the names of the presidential and vice-presidential candidates of the People's party as specified in the nomination certificate, unless the papers emanating from Watson and Steinberger relieved him from it.

2. What, if any, effect should be given to the communications and documents signed by Watson and Steinberger? Section 8 of said act provides that "any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination by his request in writing, signed by him and acknowledged before an officer qualified to take acknowledgment of deeds, and filed with the Secretary of State not less than fifteen days . . . previous to the day of election, and no name so withdrawn shall be printed upon the ballot." The telegram and the affidavit of Steinberger should be disregarded, and it is doubtful if the affidavit of Watson, filed October 19, was in due time or in proper form. The certificate of the ordinary (an officer in Georgia, nearly answering to a probate judge in Kansas) is in form a jurat, and not an acknowledgment. But, waiving these questions as to time and form, we think that the document is entirely ineffectual. Watson was not nominated by the Abilene convention, and how shall a man withdraw from a nomination which has never been conferred? That convention had no right to nominate a candidate for Vice President to be voted for at the next election. It did nominate ten electors to be voted for at that election. Doubtless, any one of them might have withdrawn by complying with said § 8. A Vice President is not elected at the general election held in November. He should be elected on the 1st Wednesday in December, and only ten citizens of Kansas will have a voice in the matter. In a legal sense, the people of this state vote for no candidate for President or Vice President, that duty being delegated to ten citizens, who are authorized to use their own judgment as to the proper eligible persons to fill those high offices. Again, Mr. Watson does not attempt to decline the national nomination, nor even withdrawn as candidate in Kansas, if such a thing can be done; but he says he declines to have his name used upon a certain official ballot. He does not "withdraw from nomination," within the meaning of said § 8. No national candidate for President or Vice President residing elsewhere has as much authority as the humblest voter in this state to dictate how his name shall be used on an official ballot here.

The order of the court is that the Secretary of State shall forthwith duly certify to the

county clerks of this state the names and residences of said nominees for electors of President and Vice President, and that he add to the party appellation of the "People's Party" the name of William J. Bryan as said party's candidate for President, and the name of Thomas E. Watson as said party's candidate for Vice President.

Allen, J., concurs

Johnston, J., dissenting:

Thomas E. Watson is endeavoring to prevent the use of his name as a candidate for Vice President upon what has been designated as the "Abilene Ticket," because, as he states upon oath, it was "placed there to deceive Populist voters to vote for Democratic electors." In obedience to his request and withdrawal, the Secretary of State, in certifying the names of candidates to county clerks, proposed to omit the name of Watson from that ticket. The extraordinary remedy of mandamus has been employed to compel Watson to be a candidate upon the ticket, against his protest, and to compel the Secretary of State to certify him as a candidate thereon, notwithstanding his withdrawal. It was argued that the withdrawal of Watson is informal, and, further, that he is not a candidate who can withdraw, within the meaning of our election statute. The withdrawal is not exactly formal, but it appears to be a substantial compliance with the statute. In § 8 it is provided that the request shall be in writing, signed by the candidate, and acknowledged before a competent officer. Watson's request was executed in the presence of an ordinary, a judge of one of the courts of Georgia; and at the same time, and before the same officer, Watson verified the facts stated in the withdrawal by his oath.

Is Watson a candidate, and, under our statute, is he entitled to withdraw? The nominees for President and Vice President are recognized and spoken of as candidates in the same statute which authorizes the withdrawal of candidates. In §§ 6 and 14 they are specifically named as candidates; and then, in § 8, it is provided that "any person whose name has been presented as a candidate may cause his name to be withdrawn from nomination by his request, in writing," etc. It will be observed that the language is general, authorizing "any person" who has been presented as a candidate to withdraw; and the high rank of the office should not preclude the candidate from availing himself of the right of withdrawal. It is true, we do not vote directly for President and Vice President, but, according to the usage which has prevailed for many years, personal selections are made by the electors, with almost the same certainty that could be accomplished by a direct vote. It is well known that the preliminary steps to a national election are taken by political parties, and the candidates for President and Vice President are chosen by them. After nominations are made, the adherents of the several parties in the several states put forward electors of the same political faith as the candidates, and these electors, if chosen, are in honor

bound to vote for such candidates. Although there is no other obligation than that of honoring upon electors so chosen, it is, as counsel for plaintiff remarked, impressive and noteworthy that in all our history no elector has ever violated his honor or betrayed the trust of those who elected him. It would seem to be proper, therefore, to treat them as candidates, within the statute; and the legislature of Kansas, as we have seen, has so recognized them. It is strange, indeed, if there is no way for a national candidate to retire from a ticket if his name should be placed there with a sinister purpose, and that he should be denied the right of withdrawal where his name is merely used to cast a stigma upon him, or to defeat the principles for which he stands. Apart from the question of formality, however, and granting that there is a chance for division of opinion as to whether national nominees for President and Vice President are candidates, within the meaning of the statute, I am still firmly of the opinion that the peremptory writ should not be allowed. The right to this remedy depends upon the averments of the defendant's answer. As the case was submitted, the facts stated in the answer stand confessed; and taking them to be true, as we must, the plaintiff is not entitled to the writ. It is admitted that the purpose of using Watson's name at the head of the ticket is to mislead the voters of Kansas, and induce them to vote for the electors on that ticket under the belief that they are voting for electors who would vote for Watson for Vice President. It is admitted that the electors on the ticket in question are the same as those on the Democratic ticket, who have been certified as electors to vote for the Democratic nominees for President and Vice President. It is further admitted that the electors so named are not members of the People's party, to which Watson belongs, but are members of the Democratic party, and, if chosen, will not vote for Thomas E. Watson for Vice President of the United States. If these facts are true, the placing of Watson's name upon the ticket will be a palpable deception of the voters of the state and a great injustice to him. Shall the Secretary of State be compelled to participate in the deception and wrong and should the solemn mandate of the court be employed to compel such participation? Mandamus is the highest judicial writ known to the law, and the court is vested with large discretion in granting or withholding it. It is not always awarded where the court has power to do so, but, in the exercise of this discretionary power, the court is controlled by consideration of justice and equity. It is fundamental in the law of mandamus that the writ never will be granted where it will prove unavailing, effect a deception, or accomplish injustice. It is clear that the court is not required to compel action that will mislead the voters of the state, or become an instrument in carrying out an injustice. One of the leading ideas in our Australian ballot law is the prevention of deception and fraud in the elections, and to obtain a free and intelligent expression of the voters. This purpose will be frustrated, and the aim of the law

defeated, by the proposed writ, if the averments of the answer be true. That the statements of deception and wrong would be difficult to prove if denied is no longer a matter of concern. Proof is dispensed with by the admissions in the pleadings. Watson has attempted in good faith to withdraw. He bases his withdrawal on the fact that it will result

in a deception of the voters. The Secretary of State has yielded to his request; and, since it is admitted that the certification and placing of the name on the ballot will operate to mislead and deceive voters, the court, in the exercise of a wise judicial discretion, should refuse the writ.

MICHIGAN SUPREME COURT.

Charles F. STERLING

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN.

(.....Mich.....)

1. **Mandamus to compel the state board of regents** to comply with the provisions of a statute as to the location of a department of the state university does not lie at the suit of a private citizen who has not obtained permission from the court to apply for the writ.

2. **Clauses in a Constitution providing for a board of regents** to be elected by the people, and to have general supervision of the state university and the control of all expenditures from the university interest fund, will exclude the legislature from power to designate where departments of the university shall be located.

(July 28, 1896.)

APPPLICATION for a writ of mandamus to compel respondents to comply with a statute requiring them to remove the branch of the state university known as the Homœopathic Medical College from Ann Arbor to Detroit. *Denied.*

Statement by Grant, J. :

In 1895 the legislature passed act No. 257, Laws 1895, the material part of which reads as follows: "That the board of regents of the University of Michigan are hereby authorized and directed to establish a homœopathic medical college as a branch or department of said university, which shall be located in the city of Detroit, and the said board of regents are hereby authorized and directed to discontinue the existing homœopathic college now maintained in the city of Ann Arbor as a branch of said university and to transfer the same to the city of Detroit." The title of the act is "An Act to Amend § One of an Act Entitled, 'An Act for the Establishment of a Homœopathic Medical Department of the University of Michigan,' Approved April 27, 1875, being § 4932 of How. Anno. Stat." The regents of the university de-

clined to comply with said act. The relator thereupon presented this petition for the writ of mandamus to compel the regents to comply with the act. The grounds for such refusal are (1) that it was not, in their judgment, for the best interests of the university; (2) that the legislature has no constitutional right to interfere with or dictate the management of the university. Among other things in their answer, they say: "A large part of the course of instruction required to be given in the other medical department of the university, and in the homœopathic medical college, is common to the two schools. This fact has enabled the regents to provide for such common instruction at the expense, to that extent, of the support and maintenance of a single department; thus saving to the benefit of the university and to the people of the state a large sum of money annually, which otherwise would be required for the continuous support of two medical departments, which would be wholly separate throughout their several courses of instruction in case both departments of medicine were not located in the city of Ann Arbor. It appears to the regents that great advantage arises to the university as a whole, and to the students in the various departments of the university; that all the various branches of the university are located and maintained at the proper seat of the university, at Ann Arbor. It appears also to the regents that whatever suggestions may be made for the advantages to be derived of the homœopathic medical college as a department of the university, by the removal of such department to a larger city, or to any other locality than the city of Ann Arbor, are suggestions which may, perhaps, be used for the removal of the other medical department of the university and other departments of the university to some other location than the city of Ann Arbor, by parties or interests desiring to secure such removal. It further appears to the regents that the removal of one of the established departments of the university suggests a movement for an entire change in that policy of concentration of the departments of the university at the proper seat of the university which has hitherto promoted the growth and advancement of the university to its present place among the great schools of the world. The claim which is made under the application of the relator, that the provisions of act No. 257 command the discontinuance and removal of the homœopathic medical department

NOTE.—As to the nature of universities or other incorporated institutions belonging to the state, see *State, Little, v. Board of Regents of University (Kan.)* 29 L. R. A. 378.

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of the university by the regents, without any reference to their power of supervision of the university, suggests to the regents the question whether such provisions do not curtail and impair the power of supervision and control of the university which has been vested in the regents by the Constitution of the state. It is the purpose, as well as the plain duty, of the regents, to exercise, according to their best judgment, the supervision and control of the university, which has been vested in them by the state Constitution, to promote both the interests of the university and the interests of the people of the state, which are involved in the welfare of the university. The regents have not undertaken to decide for themselves upon the wisdom or unwisdom of the purpose of the provisions of said act No. 257, under which the relator's application is made. They have been advised that grave doubts exist in respect to the validity of said act. They have also been advised that to the extent that the provisions of the act are a foundation for the application for a writ to compel action on the part of the regents, denying their right to exercise judgment, supervision, or control in relation to the subject of the discontinuance of an existing department of the university, there are grave doubts in respect to the validity of the act."

Messrs. Geer & Williams, for relator:

The laws locating the university upon a specified tract of land were not designated to localize all of its educational operations but simply to make that the great center, as state buildings and county buildings or corporation offices are made centers for corporate purposes, while many functions may be performed elsewhere.

People, Regents of University, v. Auditor General, 17 Mich. 161, 191.

In that case the regents were contending that they had the power to change the location of a branch of the university without being authorized to do so by the legislature.

Mr. Justice Christiancy, in speaking of this contention, at page 170 says: "While I do not concur in this view, but hold that, the university, having been located at Ann Arbor by the act of 1837 (Sess. Laws, p. 103), however desirable it may be to establish a department or professorship elsewhere, a legislative permission to that effect must first be obtained. See *Underwood v. Waldron*, 12 Mich. 73; *People v. Geneva College*, 5 Wend. 211; *People, Platt, v. Oakland County Bank*, 1 Dougl. (Mich.) 232; Comp. Laws, § 2192. Though doubtless the regents may perform their functions anywhere in the state, and all the powers of the several faculties are not necessarily confined to that locality, yet I do not, for the purposes of this case, consider it necessary to discuss this question of power in any way."

The question whether the legislature has the power to require or compel the regents to move the Homœopathic college from Ann Arbor to Detroit has been before this court several times, and because of an equal division of the court each time the question is still an open one.

People, Drake, v. Regents of University, 4 Mich. 98; *People, Regents of University, v. Auditor General*, 17 Mich. 161; *People v. Re-* 34 L. R. A.

gents of University, 18 Mich. 469; *People, Atty. Gen., v. Regents of University*, 30 Mich. 473.

The regents of the University of Michigan constitute a public corporation created for public purposes alone, and like all other public corporations it is subject to legislative control unless it has been placed by the Constitution beyond the control of the legislature.

Messenger v. Teagan, 2 Det. L. N. 485; *Cooley, Const. Lim.* 88; *People, Wood, v. Draper*, 15 N. Y. 533.

There is nothing in § 8, art. 18, of the Constitution which was intended to remove the university from legislative control.

If it had been the intention to give the regents any power inconsistent with legislative control different language would have been used.

It certainly was not the intention of the framers of the Constitution that the regents should be given absolute power. The legislature of 1851, which met soon after the Constitution was adopted, was composed in part of members of the constitutional convention. Act 151 of the Laws of 1851 gives the regents minute directions and instructions as to the course to be pursued by them in the supervision of the university, and in so far as these provisions have not been amended by subsequent acts of the legislature, the regents from that day to this have proceeded in harmony with the provisions of that act.

The fact that "the regents of the University of Michigan" is mentioned and recognized in the Constitution makes it a constitutional corporation, but that alone does not give it powers beyond the control of the legislature.

1 Dill. Mun. Corp. 181; Beach, Pub. Corp. § 719; 15 Am. & Eng. Enc. Law, p. 572; *Baltimore v. State, Board of Police*, 15 Md. 376, 74 Am. Dec. 572.

Mr. B. F. Graves, with **Messrs. Hanchett & Hanchett**, for respondent:

To the extent that authority is granted to the regents by the provisions of the Constitution, their authority is not subject to limitation, diminution, or control by the legislature.

People, Drake, v. Regents of University, 4 Mich. 98; *Regents of University v. Detroit's Young Men's Soc.* 12 Mich. 138; *Alpin v. Regents of University*, 38 Mich. 467, 10 L. R. A. 376; *Weinberg v. Regents of University*, 97 Mich. 246.

It was not the intention of the Constitution to abrogate the principle of government of the university by the people. That principle is fully preserved.

People, Drake, v. Regents of University, supra; *People, Regents of University, v. Auditor General*, 17 Mich. 161.

Instead of the university being governed by the legislature elected by the people it is governed by the board of regents, who are elected by the people.

The question whether the legislature has power under the Constitution to govern the action of the regents in matters relating to their supervision of the university has been presented to this court in the following cases, with the result that the court has each time refused to enforce statutes in which such government was attempted:

People, Drake, v. Regents of University, 4

Mich. 98; *People v. Regents of University*, 18 Mich. 469; *People, Atty. Gen., v. Regents of University*, 80 Mich. 478.

Grant, J., delivered the opinion of the court:

1. The petitioner does not in his petition show any interest in the matter, or the right to question the action of the board of regents. The attorney general is the proper party to move in such a case, and a private citizen does not possess the right, without permission of the court, to apply for this writ to compel a public board to perform an omitted duty. *People, Drake, v. Regents of University*, 4 Mich. 98. The petition in this case does not set forth that the petitioner is a citizen of the state, or that he is in any manner injured by the action of the board. This point is not raised in the briefs of counsel, probably because it is desired to obtain a decision upon the merits. We think that such proceedings should be instituted by proper parties, and that relators should show themselves competent to bring them into court. Inasmuch, however, as the question has not been raised, we shall do as we have sometimes done before,—dispose of the case upon the main issue.

2. The University of Michigan was founded under an act of Congress making an appropriation of lands for the support of a university in this state, approved May 20, 1826. In 1836 an act of Congress was passed in which it was provided "that the 72 sections of land set apart and reserved for the use and support of a university by an act of Congress approved May 20, 1826, are hereby granted and conveyed to the state, to be appropriated solely for the use and support of such university." 5 U. S. Stat. at L. 59. This grant of lands was accepted by the state by an act of legislature approved July 25, 1836. By the Constitution of 1835 (art. 10, § 5) it was provided: "The legislature shall take measures for the protection, improvement, or other disposition of such lands as have been or may hereafter be reserved or granted by the United States to this state for the support of a university, and the funds accruing from the rents or sale of such lands, or from any other source, for the purpose aforesaid, shall be and remain a permanent fund for the support of said university, with such branches as the public convenience may hereafter demand for the promotion of literature, the arts and sciences, and as may be authorized by the terms of such grant. And it shall be the duty of the legislature, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university." By subsequent acts of the legislature the lands were sold and the state received the proceeds, and they were made a permanent fund for the support of the university. In 1837 the university was located at Ann Arbor, upon a tract of land donated for that purpose. Laws 1837, p. 142. The same legislature passed an act establishing the university, providing for a board of regents of twelve members, for three departments, and for the establishment of professorships. It also provided that the regents, together with the superintendent of

public instruction, should establish such branches of the university in the different parts of the state as should from time to time be authorized by the legislature; also, for the establishment, in connection with each branch, of an institution for the education of females in the higher branches of knowledge, whenever suitable buildings should be prepared; and also for a department of agriculture.

Under the Constitution of 1835, the legislature had the entire control and management of the university and the university fund. They could appoint regents and professors, and establish departments. The university was not a success under this supervision by the legislature, and, as some of the members of the constitutional convention of 1850 said in their debates, "some of the denominational colleges had more students than did the university." Such was the condition of affairs when that convention met. It is apparent to any reader of the debates in this convention in regard to the constitutional provision for the university that they had in mind the idea of permanency of location, to place it beyond mere political influence, and to intrust it to those who should be directly responsible and amenable to the people. After these constitutional provisions, substantially in their present form, had been presented to the convention, and the question arose as to how they should be selected, whether by election or appointment, Mr. Whipple said: "If we select eight (and I should prefer twelve), your regents will be distributed over every part of the state, and the public will thus obtain a knowledge of this institution; for the convention will observe that the concerns of this university are to be placed in the hands of the regents. They will obtain very important knowledge in regard to the establishment, and the people among whom they live will become informed as to the nature of this institution, and will become interested in it." Const. Debates, 782. The public men of those times were greatly interested in the university. Methods for its management were discussed by governors in their messages, by reports of the board of regents to the legislature, and by committees of the legislature. The general consensus of opinion was that it should be under the control and management of a permanent board, who should be responsible for its management. The regents, in March, 1840, in obedience to a joint resolution of the legislature, reported that "the first change in the organic law deemed essential is the proper restriction of responsibility to the board of regents. At present the responsibility is divided, and the board would be greatly facilitated in their action were such amendments made as would throw entire responsibility on them." In the same report they also urged that the trust and management of the funds of the university should be placed in the regents. A select committee was appointed by the legislature in 1840 to inquire into the condition of the university. No more forcible argument could well be made than is found in that report for placing the entire control of the university in the hands of a permanent board, and taking it away from the legislature. House Documents 1840, p. 470. I quote from

that report as follows: "No state institution in America has prospered as well as independent colleges, with equal, and often with less, means. Why they have not may be ascribed, in part, to the following causes: They have not been guided by that oneness of purpose and singleness of aim (essential to their prosperity) that others have whose trustees are a permanent body.—men chosen for their supposed fitness for that very office, and who having become acquainted with their duties, can and are disposed to pursue a steady course, which inspires confidence and insures success, to the extent of their limited means. State institutions, on the contrary, have fallen into the hands of the several legislatures, fluctuating bodies of men, chosen with reference to their supposed qualifications for other duties than cherishing literary institutions. When legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed. When they have acted through a board of trustees, under the show of giving a representation to all, they have appointed men of such dissimilar and discordant character and views that they never could act in concert; so that whilst supposed to act for and represent everybody, they, in fact, have not and could not act for anybody. Again, legislatures, wishing to retain all the power of the state in their own hands, as if they alone were competent or disposed to act for the general good, have not been willing to appoint trustees for a sufficient length of time for them to become acquainted with their duties, to become interested in the cause which they were appointed to watch over, and feel the deep responsibility of the trust committed to them. A new board of trustees, like a legislature of new members, not knowing well what to do, generally begin by undoing and disorganizing all that has been done before. At first they dig up the seed a few times, to see that it is going to come up; and, after it appears above the surface, they must pull it up, to see that the roots are sound; and they pull it up again, to see if there is sufficient root to support so vigorous branches; then lop off the branches, for fear they will exhaust the root, and then pull it upon again, to see why it looks so sickly and pining, and finally to see if they can discover what made it die. And, as these several operations are performed by successive hands, no one can be charged with the guilt of destroying the valuable tree. Whilst state institutions have been, through the jealousy of state legislatures, thus sacrificed to the impatience and petulance of a heterogeneous and changeable board of trustees, whose term of office is so short that they have not time to discover their mistakes, retrace their steps, and correct their errors, it is not surprising that state universities have hitherto, almost without exception, failed to accomplish, in proportion to their means, the amount of good that was expected from them, much less than colleges in their neighborhood, patronized by the religious public, watched over by a board of trustees of similar qualifications for duty, and holding the office permanently, that they may profit by experience. The argument by which

legislatures have hitherto convinced themselves that it was their duty to legislate universities to death is this: 'It is a state institution, and we are the direct representatives of the people, and therefore it is expected of us; it is our right. The people have an interest in this thing, and we must attend to it.' As if, because a university belongs to the people, that were reason why it should be dosed to death for fear it would be sick, if left to be nursed, like other institutions, by its immediate guardians. Thus has state after state, in this American Union, endowed universities, and then, by repeated contradictory and over legislation, torn them to pieces with the same facility as they do the statute book, and for the same reason because they have the right." All these reports and discussions were undoubtedly known to the members of the convention, and their action should be construed in the light of such knowledge. I am unable to find a single utterance by any member of that convention from which it could be inferred that the members believed or supposed that they were leaving the control of that institution to the legislature. The result has proved their wisdom, for the university, which was before practically a failure, under the guidance of this constitutional body, known as the "Board of Regents," has grown to be one of the most successful, the most complete, and the best known institutions of learning in the world. That such was the understanding of the meaning of the Constitution of 1850 is shown by the report of the superintendent of public instruction, published in 1852, in which he refers to "the additional and general interest created by a change of the organic law in 1850, in placing the university under the control of regents elected by the people." Report, Pub. Inst. 1852, p. 26.

The provisions of the Constitution of 1850 in regard to the university are these (art. 18):

"Sec. 2. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to this state, for educational purposes, and the proceeds of all lands or other property given by individuals, or appropriated by the state for like purposes, shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant, or appropriation."

"Sec. 6. There shall be elected in the year 1863, at the time of the election of a justice of the supreme court, eight regents of the university, two of whom shall hold their office for two years, two for four years, two for six years and two for eight years. They shall enter upon the duties of their office on the first of January next succeeding their election. At every regular election of a justice of the supreme court thereafter, there shall be elected two regents, whose term of office shall be eight years. When a vacancy shall occur in the office of regent, it shall be filled by appointment of the governor. The regents thus elected shall constitute the board of regents of the University of Michigan."

"Sec. 7. The regents of the university, and their successors in office, shall continue to com-

stitute the body corporate, known by the name and title of the 'Regents of the University of Michigan.'

"Sec. 8. The regents of the university shall, at their first annual meeting, or so soon thereafter as may be, elect a president of the university, who shall be *ex officio* a member of their board, with the privilege of speaking but not of voting. He shall preside at the meetings of the regents, and be the principal executive officer of the university. The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund."

The board of regents elected under the new Constitution immediately took control of the university, interpreted the Constitution in accordance with its plain provisions, denied the power of the legislature to interfere with its management or control, and for forty-six years have declined obedience to any and every act of the legislature which they, upon mature reflection and consideration, have deemed against the best interests of the institution. This court has sustained them in that position, and has on every occasion when asked denied its writ to interfere with their action. In January, 1886, in the case of *People, Drake, v. Regents of University*, 4 Mich. 98, this court, in denying the writ of mandamus to compel the regents to establish a professorship authorized by the legislature, said: "They [the regents] aver that they have acted in good faith, but at the same time under the influence of much uncertainty as to the constitutionality of the law, and we are compelled to recognize in this question what might well suggest doubts of the binding force of the law, and occasion some hesitation in their action." Obviously, it was not the intention of the framers of the Constitution to take away from the people the government of this institution. On the contrary, they designed to, and did, provide for its management and control by a body of eight men elected by the people at large. They recognized the necessity that it should be in charge of men elected for long terms, and whose sole official duty it should be to look after its interests, and who should have the opportunity to investigate its needs, and carefully deliberate and determine what things would best promote its usefulness for the benefit of the people. Some of the members of the convention of 1850 referred in the debates to two colleges (one in Virginia and the other in Massachusetts) which had been failures under the management by the state. It is obvious to every intelligent and reflecting mind that such an institution would be safer and more certain of permanent success in the control of such a body than in that of the legislature, composed of 132 members, elected every two years, many of whom would, of necessity, know but little of its needs, and would have little or no time to intelligently investigate and determine the policy essential for the success of a great university.

Now, in the face of the facts that the regents have for forty-six years exercised such control, and openly asserted its exclusive right to do so; that the courts have refused to compel them to comply with the acts of the legislature;

that this court held in *Weinberg v. Regents of University*, 97 Mich. 246, that they were a constitutional body, upon whom was conferred this exclusive control; and in the face of this plain constitutional provision,—this court is now asked to hold that the regents are mere ministerial officers, endowed with the sole power to register the will of the legislature, and to supervise such branches and departments as any legislature may see fit to provide for. By the power claimed, the legislature may completely dismember the university, and remove every vestage of it from the city of Ann Arbor. It is no argument to say that there is no danger of such a result. The question is one of power, and who shall say that such a result may not follow? The legislature did once enact that there should be a branch of the university in every judicial circuit. If the regents comply with the present act, the next legislature may repeal it, and restore that department to the university at Ann Arbor, or place it elsewhere. Some legislatures have attached conditions, and they have the undoubted right to do so, to appropriations for the support of the university, and a subsequent legislature has removed the conditions. Some legislatures have attached to appropriations the condition for the establishment of a homeopathic professorship in the old medical department. Other legislatures have refused to attach any such condition. What permanency would there be in an institution thus subject to the caprice and will of every legislature? Under this power, the legislature could remove the law department from the university at Ann Arbor to Detroit, and provide that the law library, to which one citizen of Michigan has donated \$20,000, could also be removed. It might scatter the great library (to the collection of which private citizens have contributed nearly or quite one half), and also its great museums, laboratories, and mechanical appliances. Other results will readily suggest themselves. It appears to us impossible that such a power was contemplated. Furthermore, it renders nugatory the express provision of the Constitution that "the regents shall have the direction and control of all expenditures from the university interest fund." It is significant that, at the time of the adoption of the Constitution, this fund constituted the sole support of the university, aside from fees which might be received from students. The state had made no appropriations for its support, and there is nothing to indicate that any such appropriations were contemplated. It is unnecessary to argue that the above provision means what it says, and that it takes away from the legislature all control over the income from that fund. The power therein conferred would be without force or effect if the legislature could control these expenditures by dictating what departments of learning the regents shall establish, and in what places they shall be located. Neither does it need any argument to show that the power contended for would take away from the regents the control and direction of the expenditures from the fund. The power to control these expenditures cannot be exercised directly or indirectly by the legislature. It is vested in the board of regents in absolute and unqualified terms. This act,

in express terms, prohibits the regents from using any of this fund to support a homoeopathic department at the university at Ann Arbor, since it prohibits them from maintaining such a department there. This power cannot be sustained without overruling the case of *Weinberg v. Regents of University*. The basis of the majority opinion in that case is that the board of regents is a constitutional body, charged by the Constitution with the entire control of that institution. The result could could not have been reached upon any other basis. It was held not to be a state institution under the control and management of the legislature, as were the other corporations enumerated in the statute then under discussion. We there said: "Under the Constitution, the state cannot control the action of the regents. It cannot add to or take away from its property without the consent of the regents." We might with propriety rest our decision upon that case, and should be disposed to do so were it not for the urgent contention of the counsel on the part of the relator that that case does not apply. We are therefore constrained to state some further reasons to show that the legislature has no control over the university or the board of regents.

(1) The board of regents and the legislature derive their power from the same supreme authority, namely the Constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred upon one necessarily excludes its existence in the other, in the absence of language showing the contrary intent. Neither the university nor the board of regents is mentioned in article 4, which defines the powers and duties of the legislature; nor in the article relating to the university and the board of regents is there any language which can be construed into conferring upon or reserving any control over that institution in the legislature. They are separate and distinct constitutional bodies, with the powers of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other.

(2) The board of regents is the only corporation provided for in the Constitution whose powers are defined therein. In every other corporation provided for in the Constitution it is expressly provided that its powers shall be such as the legislature shall give. In the case of townships (art. 11, § 2), and in counties (art. 10, § 1), and boards of supervisors (art. 10, § 11), it is expressly provided that each corpo-

ration shall have such powers and immunities as shall be prescribed by law. The same is true of other officers, aside from the regents, provided for in the Constitution. Justices of the peace (art. 6, § 18), the sheriff, the county clerk, the county treasurer, the register of deeds, and prosecuting attorney (art. 10, § 8), and township officers (art. 11, § 1), can exercise such powers as shall be prescribed by law.

(3) Let us apply another test. It is a rule of construction that where a general power over one subject is conferred upon one body in one clause of an instrument, without any restricting or qualifying language, and the like power over another subject is conferred upon another body in another clause of the same instrument, with restricting or qualifying language, the restrictions or qualifications of the second clause cannot be read into the first clause. On the contrary, they must be excluded. By article 18, § 1, the superintendent of public instruction is clothed with "the general supervision of public instruction"; but it is added, "His duties shall be prescribed by law." By article 18, § 9, the board of education is given "the general supervision of the state normal school;" but it is added, "Their duties shall be prescribed by law." Thus, in every case except that of the regents the Constitution carefully and expressly reposes in the legislature the power to legislate and to control and define the duties of those corporations and officers. Can it be held that the framers of the Constitution, and the people, in adopting it, had no purpose in conferring this power, *vis.*, the "general supervision," upon the regents in the one instance, and in restricting it in the others? No other conclusion, in my judgment, is possible than that the intention was to place this institution in the direct and exclusive control of the people themselves, through a constitutional body elected by them. As already shown, the maintenance of this power in the legislature would give to it the sole control and general supervision of the institution, and make the regents merely ministerial officers, with no other power than to carry into effect the general supervision which the legislature may see fit to exercise, or, in other words, to register its will. We do not think the Constitution can bear that construction.

The writ is denied.

Long, Ch. J., and Montgomery and Hooker, JJ., concurred with Grant, J. Moore, J., concurred in the result.

NEW YORK COURT OF APPEALS.

Johann August KUJEK, *Resp't.*,

v.

Manassah L. GOLDMAN, Impleaded, etc.,
App't.

(150 N. Y. 173.)

1. A man who induces another to marry a girl by false representations that she is virtuous when in fact she has been seduced by himself and has become pregnant is liable for damages in an action by the husband for fraud.
2. Exemplary damages are recoverable for fraud in inducing a man to marry a woman who is pregnant by another.
3. A direct precedent for the action is not necessary to give a right of action for a wrong.
4. Loss of the comfort founded upon affection and respect derived from conjugal society is sufficient, irrespective of any pecuniary damages, to sustain an action by a husband against one who has fraudulently induced him to marry a woman who is pregnant by another.

(October 6, 1896.)

APPPEAL by defendant from a judgment of the General Term of the Court of Common Pleas for the City of New York in favor of plaintiff in an action brought to recover damages for the alleged seduction of plaintiff's wife. *Affirmed.*

Statement by Vann, J.:

Prior to January 17, 1891, the defendant Katie Kujek, then named Katie Moritz, was an unmarried woman employed as a domestic in the family of the defendant Goldman, by whom she had become pregnant. Upon discovering the fact, the defendants, as it is alleged in the complaint, conspired to conceal their disgrace and to induce the plaintiff to marry the said Katie, and to that end represented to him that she was a virtuous and respectable woman, and he, believing the same, did marry her on the day last named. The plaintiff, as it was further alleged, would not have contracted said marriage if he had known the facts. Subsequently, and on July 29, 1891, owing to such pregnancy, she gave birth to a child of which said Goldman was the father.

The answer of Goldman was, in substance, a general denial. No answer was served by the other defendant, and no judgment was taken against her.

The evidence tended to sustain the allegations of the complaint.

Mr. Wheeler H. Peckham, with **Mr. Max Altmayer**, for appellant:

Assuming that the appellant perpetrated or conspired to perpetrate a legal fraud upon the plaintiff, the fraud was condoned and ratified by the conduct of the plaintiff subsequent to his discovery of the facts.

Muller v. Muller, 21 N. Y. Week. Dig. 287; *Reynolds v. Reynolds*, 3 Allen, 605; *Bige-*

low, Fr. 553, note 6; *Robertson v. Cole*, '12 Tex. 356; *Baker v. Baker*, 18 Cal. 93; *Scott v. Shufeldt*, 5 Paige, 48; *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

The plaintiff did not rely on the alleged misrepresentations of the appellant, and as a reasonable man he had no right to rely. A representation of chastity is to be taken and is taken by the person to whom it is made as an expression of opinion.

No cause of action was proved, and the motion to dismiss should have been granted.

Moral culpability is not always legal culpability, any more than legal culpability is necessarily moral culpability.

Cooley, Torts, chap. 1, pp. 3, 4.

The woman's alleged premarital incontinence with the appellant, and the concealment of the fact from the plaintiff, were certainly a moral wrong upon the husband, but it would not, even if the woman herself had represented herself as chaste, been ground even for a divorce or an annulment of the marriage, or of any contract made in anticipation or consideration of marriage.

Evans v. Carrington, 2 De G. F. & J. 481; *Reynolds v. Reynolds*, *supra*.

Her concealment of premarital pregnancy is a fraud which will avoid the marriage.

Montgomery v. Montgomery, and *Scott v. Shufeldt*, *supra*; *Orchore v. Orchore*, 97 Mass. 330, 68 Am. Dec. 98; *Reynolds v. Reynolds*, and *Baker v. Baker*, *supra*.

Mere concealment by the appellant of such facts affecting Katie Kujek's chastity or pregnancy as were within his knowledge could not render him legally liable. He was under no duty to disclose.

There was no proof of damage.

Where a woman is inveigled into a void marriage and then abandoned by a wealthy man, her damage plainly appears in the loss of her services, her defilement under the mockery of empty legal forms, her loss of reputation and support.

Withee v. Brooks, 65 Me. 14; *Price v. Price*, 75 N. Y. 244, 31 Am. Rep. 468.

But what damage does the evidence show to the plaintiff?

The testimony is insufficient to sustain a verdict for the plaintiff.

The presumption of law is that a child born in wedlock is the child of the father though begotten prior to the marriage, and where the facts show abundant opportunity to the father prior to the marriage this presumption is a very strong one.

Montgomery v. Montgomery, and *Baker v. Baker*, *supra*.

The plaintiff had but one remedy, if any, the annulment of the marriage.

Montgomery v. Montgomery, *supra*; *Cooley*, Torts, 2d ed. 238, 279; *Freethy v. Freethy*, 42 Barb. 641; *Longendyke v. Longendyke*, 44 Barb. 366; *Wellington v. Small*, 8 Cush. 145, 50 Am. Dec. 719; *Parker v. Huntington*, 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499.

The highest considerations of morality and sound public policy forbid the upholding of the action.

NOTE.—The above case is one of first impression. It is worthy of notice that the opinion plainly recognizes that there is no precedent for the action, and holds that none is necessary to give a right of action for a wrong.

34 L. R. A.

Mr. August P. Wagener, for respondent:

The law of marriage as administered by courts, so far as property interests are concerned, is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance.

Piper v. Hoar, 107 N. Y. 78; *Neville v. Wilkinson*, 1 Bro. Ch. 548; *Roberts v. Roberts*, 3 P. Wms. 66.

The persons who by acts of speech represent property as belonging to the proposed husband when the possession thereof forms an inducement to the marriage shall be bound to make good the thing in the manner represented.

Monteflori v. Monteflori, 1 W. Bl. 363.

Vann, J., delivered the opinion of the court:

The verdict of the jury has established as the facts of this case, beyond our power to review, that the plaintiff married Katie Moritz in the belief that she was a virtuous girl, induced by the representations of the defendant to that effect, when, in fact, she was at the time pregnant by the defendant himself. The case was submitted to the jury upon the theory that if Goldman, knowing that Katie was unchaste, by false representations that she was virtuous induced the plaintiff to marry her, he was entitled to recover damages, and the jury found a verdict in his favor for \$2,000. While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one. In remote times, when actions were so carefully classified that a mistake in name was generally fatal to the case, a form of remedy was devised by the courts to cover new wrongs as they might occur so as to prevent a failure of justice. This was called an "action on the case," which was employed where the right to sue resulted from the peculiar circumstances of the case and for which the other forms of action gave no remedy (26 Am. & Eng. Enc. Law, p. 694). For instance, the action for enticing away a man's wife, now well established, was at first earnestly resisted upon the ground that no such action had ever been brought. In an early case the court answered this position by saying: "The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie; and the objection is founded on Litt. § 108, and Co. Litt. 81 b, and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new

facts in every special action on the case." *Winsmore v. Greenback*, Willes, Rep. 577, 580. As was recently said by this court in an action then without precedent: "If the most that can be said is that the case is novel and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment" *Piper v. Hoard*, 107 N. Y. 78, 76.

The question, therefore is not whether there is any precedent for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages. The defendant, by deceit induced the plaintiff to enter into a marriage contract whereby he assumed certain obligations and became entitled to certain rights. Among the obligations assumed was the duty of supporting his wife in sickness and in health, and he discharged this obligation by expending money to fit up rooms for housekeeping, in keeping house with his wife and caring for her during confinement, when she bore a child, not to him, but to the defendant. Among the rights acquired was the right to his wife's services, companionship, and society. By the fraudulent conduct of the defendant he was not only compelled to expend money to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in child-bed. He thus sustained actual damages to some extent, and as the wrong involved not only malice but moral turpitude also, in accordance with the analogies of the law upon the subject, the jury had the right to make the damages exemplary. By thus applying well settled principles upon which somewhat similar actions are founded, this action can be sustained, because there was a wrongful act in the fraud, that was followed by lawful damages in the loss of money and services. The fact that the corruption of the plaintiff's wife was before he married her does not affect the right of action, as the wrong done to him was not by her defilement, but by the representation of the defendant that she was pure when he knew that she was impure, in order to bring about the marriage. It is difficult to see why a fraud, which, if practiced with reference to a contract relating to property merely, would support an action, should not be given the same effect when it involves a contract affecting not only property rights, but also the most sacred relation of life. Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, are held to constitute an actionable wrong and the usual remedy is to require the person guilty of the fraud to make his representations good. *Piper v. Hoard*, *supra*; *Monteflori v. Monteflori*, 1 W. Bl. 363; *Atherly, Marriage Settlements*, 484. In such cases the injury is more tangible and the measure of damages more readily applied than in the case before us, but both rest upon the principle that he who by falsehood and fraud induces a man to marry a woman, is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered

depending upon the circumstances of the particular case.

We have thus far considered the right of action as resting upon some pecuniary loss, which, although trifling in amount, may be recovered as a matter of right, leaving it to the jury in their sound discretion, as in the case for the seduction of a child or servant, to amplify the damages by way of punishment and example. We think, however, that the action can be maintained upon a broader and more satisfactory ground, and that is the loss of *consortium*, or the right of the husband to the conjugal fellowship and society of his wife. The loss of *consortium* through the misconduct of a third person has long been held an actionable injury, without proof of any pecuniary loss. *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Hutchinson v. Peck*, 5 Johns. 196; *Hermance v. James*, 32 How. Pr. 142. As has been well said by a recent writer: "To entice away, or to corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife. . . . The gist of the action, however, is not the loss of assistance, but the loss of the *consortium* of the wife or husband, which term implies an exclusive right against an invader, of affection, companionship, and aid." Bigelow, *Torts*, p. 158. The damages are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives and of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it, does not change the effect or lessen the injury. While the plaintiff has not been actually deprived of the society of his wife, he has been deprived of that which made her society of any value, the same as if she had been seduced after marriage. Although the formal right to *consortium* may remain, the substance has been taken away. In other words, when he entered into the marriage relation he was entitled to the company of a virtuous woman, yet through the fraud of the defendant that right never came to him. He has never enjoyed the chief benefit springing from the contract of marriage, which is the comfort, founded upon affection and respect, derived from conjugal society. If the defendant had deprived the plaintiff of his right to *consortium* after marriage, the law would have afforded a remedy by the award of damages. Yet the plaintiff, through the fault of the defendant, has suffered a loss of the same nature and to the same extent, except that instead of losing what he once had, he has been prevented from getting it when he was entitled to it. This is a difference in form only and is without substantial foundation. The injury, although affected by fraud before marriage instead of by seduction after marriage, was the same, and why should not the remedy be the same? While the method of inflicting the injury is not the same, as

it is tortious in character, has substantially the same effect and causes damages of the same nature and to the same extent, why should damages be recovered in the one case if not in the other? Where false representations are wilfully made as to a material fact for the purpose of inducing another to act upon them and he does so act to his injury, he may recover such damages as proximately result from the deception. The representations in this case, as the jury has found, were made to promote the marriage, and they were false, as the defendant well knew. They were clearly material. The plaintiff acted upon them and was thereby injured, for he made a contract entitling him to certain rights, which he has not received and which the defendant knew he could never receive. Here are all the elements of a good cause of action founded upon fraud resulting in damage. The contract induced by the fraud was of a peculiar nature, but it was in law simply a contract, conferring certain rights and imposing certain obligations. While it is not agreeable to treat a subject of sacred importance upon this narrow basis, it is necessary to do so, for our law considers marriage in no other light than as a civil contract. If the defendant had induced the plaintiff to enter into any other contract by making false statements of facts, which, if true would have made the contract more valuable, he would have been liable for all the damages that naturally resulted. If he had induced the very marriage contract under consideration by representing to the plaintiff that he owed his proposed wife a certain sum of money, according to the common law, which entitles the husband to the personal property of his wife, he could have been compelled to make his representations good by the payment of that sum. *Montefiori v. Montefiori*, *supra*; *Redman v. Redman*, 1 Vern. 848; *Neville v. Wilkinson*, 1 Bro. Ch. 548; *Scott v. Scott*, 1 Cox, Ch. Cas. 378. These cases, as well as the more important case of *Piper v. Hoard*, *supra*, rest upon the principle that fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto, in order to promote the marriage, are actionable and authorize the recovery of such damages as may be proved. In this case we have a representation that did not relate to property directly, although it involved rights in the nature of property, but did relate to character, and so vitally that its falsity was destructive of all happiness belonging to the plaintiff by virtue of his marriage. The injury was not merely sentimental, for, as has been shown, it extended to a right which the law recognizes as of pecuniary value, and for the wrongful destruction of which it awards damages.

We think that the facts found warrant the recovery, and, after examining all the exceptions, are of the opinion that the judgment should be affirmed, with costs.

All concur, except Bartlett, J., not voting.

PENNSYLVANIA SUPREME COURT.

Logan A. MARSHALL

v.

FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, *Appt.*

(176 Pa. 623.)

1. An insurance company which issues a policy of "permanent insurance" by which it agrees to be and remain "forever" liable to the assured his heirs and assigns, and which provides that any assignment of the policy shall be brought to the company's office to be entered and "allowed," cannot refuse to enter and allow an assignment solely because it has decided not to consent to the transfer of old policies.
2. The holder of a fire insurance policy insuring "forever" the insured and his assigns may, where the insurer wrongfully terminates the policy, secure a new policy in another company and recover from the old company the costs thereof.
3. The assignee of a policy of permanent insurance providing that the insurance company shall be "forever" liable to the assured and his assigns, may maintain in his own name an action for damages resulting from the company's refusal to enter and allow the assignment of the policy as provided for therein.

(July 15, 1894.)

APPEAL by defendant from a judgment of the Court of Common Pleas for York County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jere S. Black, Arthur Biddle, and George W. Biddle, for appellant:

Policies in respect of fire are personal contracts with the insured in which there is always a *delectus personae*.

Lynch v. Dalzell, 4 Bro. P. C. 481; *Sadlers' Co. v. Badcock*, 2 Aik. 554; *Attna F. Ins. Co. v. Tyler*, 16 Wend. 885, 80 Am. Dec. 90.

A policy of fire insurance is not assignable and does not run with the land; and on a total alienation of the property the policy is at an end unless the insurer consents to its assignment.

Park, Ins. 6th ed. 595; *Porter, Ins.* *801; *May, Ins.* 5, 842; 1 *Wood, Ins.* 695, 698; 2 *Wood, Ins.* 753; *Biddle, Ins.* §§ 202, 623.

Defendant was entitled to decline to transfer in this case. The word "allow," in the sense in which it is used here is defined as "to grant permission to, to permit, to assent to, to yield," etc.

A perpetual policy of fire insurance, like the present, does not differ in its legal effect from a time or annual policy with regard to assignability; and the former is not assignable on an alienation of the property insured without the consent of the insurer any more than the latter; nor does the former run with the land.

Boynton v. Farmers' Mut. F. Ins. Co. 43 Vt. 256, 5 Am. Rep. 276.

Policies of fire insurance are not assignable in equity any more than in law without the assent of the insurer, so as to permit the alienee of the property to recover in an action at law as in the present one, where such assignment has never been completed by its entry and allowance by the insurer.

State Mut. F. Ins. Co. v. Roberts, 81 Pa. 441; *Lynch v. Dalzell*, 4 Bro. P. C. 481; *Biddle, Ins.* §§ 262, 263; *May, Ins.* ed. 1891, § 877.

Messrs. George E. Neff and Henry C. Niles, for appellee:

An assignment of a perpetual policy carries with it every right essential to its use and enjoyment.

Rafanzyder's Appeal, 88 Pa. 436; *State Mut. F. Ins. Co. v. Roberts*, 81 Pa. 438; *Buckley v. Garrett*, 60 Pa. 383, 100 Am. Dec. 564.

An insurance company cannot arbitrarily and without cause refuse to allow and approve an assignment.

Boynton v. Farmers' Mut. F. Ins. Co. 43 Vt. 256; 5 Am. Rep. 276; *May, Ins.* ed. 1873, 469, § 887.

Williams, J., delivered the opinion of the court:

We think, with the learned judge of the court below, that this case presents some questions that are new, and must be determined without much aid from our own decided cases. The plaintiff's right to recover is based upon a contract which describes itself as a policy "of permanent insurance." In the caption at the head of the policy it is also called "perpetual." It was issued by the defendant to John Hartman in May, 1889; and it undertakes, in consideration of a deposit of \$120, and certain charges for the policy, and the survey of the insured premises, "to be and remain forever liable to the said assured, his heirs, executors, administrators, and assigns," for any loss that may be sustained by fire to the buildings insured, not exceeding \$4,000. This contract, unconditional and perpetual in its terms, is followed by a statement of the conditions upon which it is made, and of the manner in which the holder of the policy may at any time surrender it and reclaim his deposit, less 5 per cent, and so terminate the contract. The only provision for the termination of the policy by the action of the defendant company must be gathered from the third of these conditions, which is in these words: "In case any assured shall assign or transfer his or her policy, such assignment or transfer shall be brought to the office of the company, to be entered and allowed, within thirty days next after such assignment or transfer, and in default thereof the benefit of the insurance, and all claims upon the company shall be lost. For every transfer of a policy, there shall be paid 56 cents." This stipulation recognizes the permanent character of the insurance, and the

NOTE.—The questions decided in the above case are believed to be new. This is the first decision we have found respecting perpetual insurance. While it is generally said that insurance policies

are not assignable without consent of the assured it will be seen that in the above case the insurance is made to the assured "his heirs, executors, administrators, and assigns."

liability of the company to the holder of the policy, being also the owner of the property insured. All that is required of such holder is that he present the policy within thirty days after he acquires it, at the office of the company, to have the transfer entered and allowed, and pay the fee of 50 cents for such entry and allowance. This had been done with the policy now in question on three different occasions; but when the plaintiff presented his assignment and transfer within the time required, and tendered the fee for the entry of the transfer upon the books of the company, he was met with a flat refusal. This action was brought to recover damages for such refusal. The question thus raised is whether the company may refuse to enter and allow a transfer of a perpetual policy, or is bound, upon the tender of the fee, to allow the transfer, and enter the name of the transferee upon its books as the holder. This depends upon the construction of the word "allow." This word is ordinarily equivalent to the word "permit," or to the words "consent to." Its use in any given case assumes the existence of a power to refuse to allow, permit, or consent to, and the right to elect whether to grant or withhold the allowance or permission asked for. But the nature of the contract, and its express recognition of the right of the insured to sell his policy with the property to which it relates, requires us to hold that this right to elect must be exercised, not arbitrarily and at will, but for cause, and in harmony with the purpose and spirit of the contract. If the purchaser and transferee is a person whose financial condition, habits of life, or moral character are such as to increase the hazard against which the company has undertaken to indemnify the original policy holder, so that if the risk was now offered for the first time it would be refused, it would not be reasonable to deny to the company the right to refuse the increased risk to which the transfer has exposed the insured property. But, on the other hand, if the situation, habits, and moral character of the transferee are unobjectionable, and do not increase the hazard of loss, it would not be reasonable to permit one party to a contract to terminate it without cause, and against the protest of the other party. In this case the defendant company gave a reason for its refusal to enter and allow the transfer, and the validity of that action must depend on the validity of the reason on which it was based. When the plaintiff presented himself at the office of the company with the transfer of the policy, and the fee for its entry and allowance, in his hand, he was told that, as a matter of business policy affecting its own interests, the company had decided not to consent to the transfer of old policies, like that he had brought, but to terminate them, as fast as a transfer became necessary, by refusing to enter and allow such transfer. Was this a valid reason? It was an attempt by one party to a contract to terminate its liability at its own election, and for its own advantage, against the protest of the other party to it. It was the exercise of a power reserved for its protection against risks it had not undertaken to insure against, in a purely arbitrary manner to relieve itself from risks it had undertaken to in-

sure against in violation of its contract, and to the injury of the holder of the policy. It was therefore not a valid reason for the action taken, and the action of the company in refusing to enter and allow the transfer cannot be sustained. It was a violation of the contract for "permanent insurance," of which the plaintiff had a right to complain, and it afforded him a cause of action against the company.

The next question presented relates to the measure of damages. We see no reason for distinguishing this from any case in which the plaintiff sues on a broken contract. He may elect whether he will acquiesce in the action of the defendant, treat the contract as at an end, and recover back the consideration paid, or whether he will refuse to recognize the action of the defendant as terminating the contract, go into the market, and purchase what the defendant has refused to provide in the manner contemplated by the contract, and call upon the defendant to indemnify him against what it may cost when so obtained. The plaintiff has chosen to stand upon the latter of these positions, if the court shall be of opinion that he has the legal right to do so, and has submitted the facts upon which that question may be determined in the case stated agreed upon in the court below. We hold that he has a right to stand upon the position he has chosen, and to say to the defendant: "You terminated my policy in your own company in violation of its terms. You compelled me to buy insurance elsewhere. You must now indemnify me against the loss I have suffered in consequence of your own wrongful repudiations of your contract." This point is ruled by *American L. Ins. Co. v. McAden*, 109 Pa. 399. The injury sued for was sustained by the plaintiff. The loss was his. As the purchaser of the property, and the policy of perpetual insurance upon it, he had the right, under the express terms of the contract, to present the policy for entry and allowance by the company. Its refusal was not supported by any valid reason. The damages resulting from such refusal may be sued for by the plaintiff, who was compelled to suffer them, without using the name of the party originally insured as legal plaintiff. It is not necessary to go into equity, for the cause of action is one enforceable at law. It grows out of a violation of a contract, and is properly redressed by the recovery of damages by way of compensation. The contract does not run with the land in the common-law sense of that phrase, but it is in express terms a contract to indemnify the owner of the property insured, he being also the holder of the policy. It is a contract for the permanent or perpetual insurance of the property, subject to the implied condition that the hazard shall not be materially increased; and, both by the nature of the contract and by its express words, it is made with the owner, whether he becomes such by operation of law, or by the act of him who was the owner at the time the contract was made. In this respect it is clearly distinguishable from the ordinary policy of insurance.

The assignments of error are overruled, and the judgment is affirmed.

IOWA SUPREME COURT.

Mary A. MOHLER

v.

Estate of Anthony SHANK, Deceased *et al.*,
*Appts.*SHANK *et al.*, *Appts.*,

v.

Mary A. MOHLER *et al.*

(38 Iowa, —.)

1. Jurisdiction of a divorce suit cannot be obtained on a complaint by the guardian of an insane man, although the wife is properly served and appears to contest the jurisdiction.
2. A woman is estopped to claim a share in an estate as widow, although a divorce obtained from her in a suit brought by the guardian for the insane husband was absolutely void, where she has accepted alimony under the decree and contracted a subsequent marriage.

NOTE.—Divorce when husband or wife becomes insane.

- I. Insanity as a ground for divorce.
- II. Insanity as affecting adultery.
 - a. As a ground for divorce.
 - b. As a defense to a claim for alimony.
- III. Insanity as affecting abandonment and failure to support.
- IV. Insanity as affecting cruelty.
- V. The defense.
- VI. Actions on behalf of insane persons.

I. Insanity as a ground for divorce.

Insanity occurring after marriage is no ground for dissolution when the statute does not make it one of the grounds of divorce. Lloyd v. Lloyd, 68 Ill. 87; Baker v. Baker, 23 Ind. 144; Tiffany v. Tiffany, 24 Iowa, 122; Wertz v. Wertz, 43 Iowa, 584; Powell v. Powell, 18 Kan. 371, 28 Am. Rep. 774; Pile v. Pile, 94 Ky. 303.

And statutes making insanity a ground for divorce are not of frequent occurrence, and do not seem to have been favored, being found to have existed in four states only.

Thus, in Arkansas it is provided that a divorce may be granted where either party shall subsequent to marriage have become permanently and incurably insane.

And in Washington it is provided by statute that a court may in its discretion grant a divorce in case of incurable, chronic mania or dementia of either party having existed for ten years.

So, in Wisconsin an act previously existed authorizing divorce on the ground of incurable insanity, but this was repealed, except as to pending actions, by Wis. act March 25, 1882, chap. 230.

And Ky. Rev. Stat. chap. 47, art. 3, provides for divorce for lunacy and unsound mind of a confirmed and incurable character, and not less than three years continuance, to be established by the testimony of persons skilled in mental maladies and other proof, providing for the protection of the property interests of the person of unsound mind and for provision for the wife if she is of unsound mind out of the husband's means, and for the appointment of a guardian *ad litem* for the lunatic, with the proviso that divorce shall only be granted where the lunacy or unsoundness of mind was the result of intemperance or hereditary taint of insanity which was concealed from the other party at the time of the marriage, and that the

(January 18, 1888.)

A PPEALS by the representatives of Anthony Shank, deceased, from decrees of the District Court for Montgomery County in favor of the dower right of one claiming to be the widow of said Shank and refusing to quiet the title of the heirs against such claim. *Reversed.*

Statement by Rothrock, J.:

The first of the above-entitled actions is a proceeding in probate, by which Mary A. Mohler demands that her dower or distributive share be set off to her, as the widow of Anthony Shank, deceased. The other case is a suit in equity by the heirs of Anthony Shank, and against Mary A. Mohler and others, to quiet the title of said heirs against any claims of Mary A. Mohler in the estate of said Shank. Both of said actions were tried by the court. The application for the admeasurement of dower was sustained, and the petition to quiet title was

questions of fact shall be tried by jury. Newcomb v. Newcomb, 18 Bush, 544, 28 Am. Rep. 222.

The constitutionality of such statutes has been upheld.

Thus, the act of the territorial legislature of Washington of December 22, 1885, making incurable, chronic mania or dementia one of the grounds on which divorce might be granted, where the affliction had existed for ten years or more, is not contrary to public policy and therefore unconstitutional. Hickman v. Hickman, 1 Wash. 287.

But they would seem to have been subjected to a strict construction.

Thus, Ky. Rev. Stat. chap. 27, art. 3, providing for divorce for lunacy, and unsound mind of a confirmed and incurable character, is only an amendment of the original statute on the subject giving additional causes for a divorce, and does not change the practice in such cases or dispense with the necessity for bringing in the defendant by service of citation. Newcomb v. Newcomb, *supra*.

And a wife who was never ascertained to be a lunatic by any judicial finding, and was confined in an asylum in another state by her husband, and was there in obedience to his commands and subject alone to his control at the time of the institution of the action for divorce by him, and when the judgment was rendered, is not, as to him, an absent or nonresident defendant in contemplation of the statute authorizing constructive service, and such service in such case is void. *Ibid*.

So, a judgment for divorce on the ground of the incurable insanity of the wife under the Wisconsin statute is not final under Wis. Laws 1881, chap. 207, § 3, providing that the court may at any time after rendering judgment therein revise and alter such judgment so far as the custody, support, and maintenance of the insane person are concerned, and may provide for such maintenance by the plaintiff out of property or earnings acquired by him subsequent as well as previous to the decree of divorce, so far as it affects such custody and support, and the action remains pending so far as the custody and support of the lunatic are concerned within the saving clause of the repealing act of March 25, 1882, chap. 230, declaring that it shall not affect pending actions, leaving the court which rendered the judgment full power to alter and revise the same in respect to such custody, support, and maintenance. Hicks v. Hicks, 79 Wis. 466.

And a guardian *ad litem* for the insane wife, ap-

dismissed. The heirs and the administrator of Anthony Shank, deceased, appealed.

Messrs. C. E. Richards and Smith McPherson for appellants.

Messrs. J. M. Junkin and Harl & McCabe for appellees.

Rothrock, J., delivered the opinion of the court:

The two causes involve the same questions, and they will be disposed of in one opinion. The facts are not the subject of dispute, and are, in substance, as follows: Anthony Shank and Mary A. Temple (now Mohler) were married on the 1st day of January, 1865, at the city of Red Oak, in Montgomery county. They lived together as husband and wife, in said county, until the year 1873, when said Anthony Shank, upon inquest duly held, was adjudged to be insane, and was placed in the insane hospital at Mt. Pleasant, in this state, where he was under treatment as a patient until the year 1881, when he was removed to Mercey Hos-

pital, at Davenport, where he remained until his death, which occurred in 1892. He was insane from the time he was so adjudged until his death. Soon after his removal to Mt. Pleasant, his wife was appointed his guardian by the circuit court of Montgomery county. Afterwards, and in 1881, she was, by order of the proper court, removed from said guardianship, and another guardian was appointed. Her removal was ordered on the ground that she mismanaged the property of her ward. A judgment for some \$200 was rendered against her and the sureties on her bond, as money due from her in the matter of said guardianship. In the month of January, 1884, T. H. Alexander, then guardian of said Anthony Shank, commenced a suit for divorce in the circuit court of Montgomery county against the said Mary A. Shank, in behalf of his said ward, based upon the ground of adultery. An original notice was duly served upon the defendant in that suit, and she appeared to the action, and filed a demurrer, one ground of which was that the court had no jurisdiction

pointed by the circuit court in such action, continues to be such guardian until removed by the appointing court, his functions not being suspended by the subsequent appointment of a guardian by the county court, and he remains the proper person to prosecute a petition for a modification of the judgment as to her support. *Ibid.*

So, statutes prescribing other grounds for divorce, of a general or kindred nature, have been uniformly construed so as to exclude insanity after marriage.

Thus, a divorce will not be granted upon the ground that the wife had become insane, under Ill. Rev. Stat. 1845, chap. 23, § 3, providing that in addition to the cause therein before provided for, courts of chancery shall have power to hear and determine all causes for a divorce not provided for by any law of the state. *Lloyd v. Lloyd*, 66 Ill. 87.

And divorce will not be granted on the ground that the wife is hopelessly and incurably insane under the Indiana divorce act (2 Gavin & H. 361, § 7), authorizing the granting of a divorce for any other cause than those previously enumerated, for which the court shall deem it proper that a divorce shall be granted. *Curry v. Curry*, 1 Wils. Super. Ct. (Ind.) 235.

Or under a discretionary power to be exercised upon application of the injured party on that ground, where the insanity resulted from no misconduct on her part, as there would be in no legal sense an injured party. *Ibid.*

Nor will mental disease upon the part of a wife, such as to prevent her from discharging her conjugal duties, warrant a divorce upon the ground of impotency where her mind was diseased without her fault and she lived happily with her husband for several years after marriage, and discharged all the obligations and duties pertaining to the marriage relation. *Pile v. Pile*, 94 Ky. 308.

So, to maintain an action to annul a marriage on the ground that the defendant was a lunatic, under the New York Code, it must appear that cause existed at the time of the marriage. *Forman v. Forman*, 53 N. Y. S. R. 639.

And a divorce upon the ground of insanity of one of the parties at the time of marriage is not warranted by proof of occasional spells of insanity before marriage and ultimate and permanent insanity several years afterwards to which with evidence of hereditary taint in the family. *Smith v. Smith*, 47 Miss. 211.

And occasional paroxysms of hereditary insanity ? 4 L. R. A.

upon the part of a wife before marriage and thereafter, unknown to the husband until after marriage, is not a ground for a divorce or a decree of nullity on account of fraud, mistake, or inadequacy. *Hamaker v. Hamaker*, 18 Ill. 137, 65 Am. Dec. 705.

II. Insanity as affecting adultery.

a. As a ground for divorce.

The general and almost universal rule is that adultery committed while insane and not during a lucid interval is not a ground for a divorce. *Wray v. Wray*, 19 Ala. 522; *Nichols v. Nichols*, 31 Vt. 331, 78 Am. Dec. 362; *Yarrow v. Yarrow* [1892] P. 92.

And an action for divorce will be dismissed on proof to the satisfaction of the court of the insanity of the defendant. *Broadstreet v. Broadstreet*, 7 Mass. 474.

And where the evidence upon the part of a petitioner for a dissolution of marriage by reason of cruelty and adultery discloses facts from which the respondent's insanity may be inferred, the court will require to be satisfied that such facts admit of a different explanation before it will make a decree in favor of the petitioner, though such question was not raised on the pleadings. *Hall v. Hall*, 38 Swab. & T. 849.

In *Matchin v. Matchin*, 6 Pa. 332, 47 Am. Dec. 466, however, it was held that a wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defense to a libel for divorce for adultery.

This ruling was based on the paramount purpose of marriage, the protection of legitimate children, the institution of families, and the creation of natural relations among mankind from which proceed all civilization, virtue, and happiness to be found in the world.

But in *Nichols v. Nichols*, *supra*, the court criticised *Matchin v. Matchin*, *supra*, saying that the reason for the decision in that case is one which will have no application to similar acts committed by the husband, and as applied to a wife seems utterly revolting to all just sense of propriety and decency.

And in *Hansell v. Hansell*, 3 Pa. Dist. R. 724, which was an action for divorce for cruelty, the court in distinguishing *Matchin v. Matchin*, *supra*, avoided the expression of an opinion "whether that decision would be sustained by the spirit and tendency of later jurisprudence."

Evidence of depravity of character and aban-

of the subject-matter of the suit, for the reason that the alleged adultery occurred after the plaintiff became insane, and that a guardian could not procure a divorce for an insane person. The demurrer was duly submitted to the circuit court, and was overruled. The defendant excepted to the ruling, and elected to stand on her demurrer. A default was entered against her, for want of an answer, and evidence was introduced, and a decree of divorce was entered of record. Before the decree was entered, the parties to that suit made and signed the following agreement:

Anthony Shank, by Guardian
vs.

Mary A. Shank.

Action for Divorce.

The parties hereto agree as follows: (1) That if said court, or the supreme court on appeal, shall hold or decree that plaintiff, Anthony Shank, is entitled to a decree of divorce from the bonds of matrimony between the said An-

thony Shank and Mary A. Shank, then the plaintiff shall immediately pay to the defendant \$400, and shall also pay off and discharge the bills of Mohler, Brown, & Co., for \$331, and H. Roberts & Son, for \$70, against said Mary A. Shank, and shall fully release and discharge defendant and her bondsmen by reason of all acts of the defendant; and during the pendency of this action in this court, or the supreme court, the said judgment in circuit court against defendant and her bondsmen shall bear no interest, and a final decree in this case in favor of plaintiff shall cancel said judgment, of itself. (2) Said payments so made shall be in full of any and all claims, of any and every kind, for alimony, both temporary and permanent, and said decree of divorce, and the decree for said payments aforesaid, shall be a bar absolute against defendant, barring and estopping defendant from ever claiming any dower or other interest in the property or estate of Anthony Shank, either while he is living, or after his decease, and shall also fully settle all allowances made by

done habits, however, is not sufficient to establish insanity as a defense in a divorce case. *Hill v. Hill*, 2 N. J. Eq. 214.

And a divorce will be granted where the evidence satisfactorily shows that the defendant was sane at the time she committed the adultery, notwithstanding the fact that she had been adjudicated a lunatic some two or three years before, which adjudication remained unreversed. *Cook v. Cook*, 53 Barb. 180.

So, insanity is no defense to an action for a divorce upon the ground of adultery where at the time of the commission of the act the party was capable of appreciating the nature of the act and its probable consequences. *Yarrow v. Yarrow* [1882] P. 92.

And a wife who leaves her home under a delusion that her husband was administering or attempting to administer poison to her, and who commits adultery with the idea that it might probably be the means of bringing about a divorce, is responsible therefor, the fact furnishing a good ground for divorce. *Ibid.*

In *Yarrow v. Yarrow*, *supra*, it was suggested, but not decided, that insanity which will entitle an accused to an acquittal on an indictment for a crime would constitute a valid defense to a suit for a divorce on the ground of adultery.

The question of insanity at the time of the commission of an act of adultery should be put in issue, but a divorce will not be denied where this is not done and evidence is received satisfactorily showing sanity at that time. *Cook v. Cook*, *supra*.

But a record adjudicating the defendant in a divorce case a lunatic some two or three years before the act for which the divorce was demanded, establishes the fact, and cannot be contradicted, and such insanity is presumed to have continued until the time of such act, but the presumption of continuance may be rebutted by showing that she was sane at the time of the adultery, the burden of proving sanity at the time of its commission being thereby cast upon the party alleging it. *Ibid.*

So, it is thought that nymphomania, consisting of a morbid, uncontrollable, sexual desire, would not be deemed such insanity as would excuse adultery as a ground for divorce.

Thus, in *Hill v. Hill*, *supra*, insanity as an excuse for adultery as a ground for divorce was held not to have been established though the evidence showed that the mind of the accused was weak, and that her disposition to licentiousness was pronounced and notorious, and that she was unrestrained and

shameless in her abandonment to the gratification of her sensuality, and that she did not seem to know what morality meant, and was lost to shame, and her vicious tastes and inclinations were too powerful to be controlled by the demands of duty or the restraints of society.

So, by some of the earlier English decisions, insanity after an act of adultery was held to be a defense to an action for divorce on that ground on the theory that the alleged guilty party was thereby incapacitated to make a defense.

This was so held in *Bawden v. Bawden*, 2 Swab. & T. 417, 51 L. J. Mat. N. S. 94, 5 Jur. N. S. 157, 6 L. T. N. S. 27, 10 Week. Rep. 202.

And in *King v. King*, set forth in L. R. 2 Prob. & Div. 125, a doubt was expressed by the court as to whether a decree *a mensa et thoro* could be made against a lunatic respondent, taking time to consider, and no judgment is known to have been given, nor is there any trace of any such decrees having been made.

So in *Mordaunt v. Mordaunt*, L. R. 2 Prob. & Div. 120, 13 Week. Rep. 845, an order was made to stay a suit against an insane wife for prior adultery so long as a reasonable hope remained that she might recover.

But two years after (20 Week. Rep. 553) on the ground that there was no hope of her recovery the husband got the petition dismissed without prejudice to an appeal, and appealed.

And in *Mordaunt v. Moncrieffe*, 42 L. J. Mat. N. S. 49, 30 L. T. N. S. 649, 23 Week. Rep. 12, L. R. 3 H. L. (Sc.) 374, it was held that the lunacy of a wife after the commission of adultery is no ground for staying proceedings brought by her husband against her for divorce, under 23 Viet. chap. 85, § 31, absolutely entitling the husband to a decree dissolving the marriage upon adultery, unless certain acts mentioned therein are proved against him, reversing *Mordaunt v. Mordaunt*, *supra*.

In *Mordaunt v. Moncrieffe*, *supra*, the court recognized and admitted the weight of the opinion of Sir C. Cresswell in *Bawden v. Bawden*, *supra*, but refused to follow that decision.

And *Parnell v. Parnell*, 2 Hagg. Consist. Rep. 109, *infra*, VI., was distinguished upon the ground that it was a suit for judicial separation before the act was passed, and could have no application to a proceeding for dissolution of marriage, which is altogether the creation of the statute.

The doctrine of the later English decisions seems to have been adopted in America.

this court heretofore to Mary A. Shank or her attorneys, and the same shall be canceled. (8) This case shall be prosecuted with the utmost diligence to a conclusion, and, if said decree of divorce shall be denied, then this agreement shall be void. Witness our hands, January 30, 1884.

[Signed.] Anthony Shank,
by T. H. Alexander, Guardian.
Mary A. Shank.

The decree of divorce recognized this agreement, and it contained the following provisions in reference to the property rights of the parties: "It is further decreed that the defendant is hereby forever barred and estopped and cut off from having or claiming any right to dower or other estate, or to any part of the property, either real or personal, of the said Anthony Shank, that he now has or may hereafter acquire, or to his said estate or property, or any part thereof, that he may own at the time of his death; that plaintiff has all the rights of an unmarried man. It is further ordered

that, as alimony, both temporary and permanent, in full therefor, that plaintiff pay in cash to defendant \$400; that plaintiff pay a bill contracted by defendant with Mohler, Brown, & Co., of \$383, and a like bill, of \$70, to H. Roberts & Son, and that a judgment of \$211 rendered by this court at late January, 1884, term, in a case wherein T. H. Alexander, guardian of Anthony Shank, was plaintiff, and Mary A. Shank, E. Temple, William Painter, and William Archer were defendants, be, and the same is hereby, satisfied in full, and canceled, and all other claims of defendant for support are hereby barred; and that execution issue therefor." The amounts provided for in the agreement and decree were promptly paid to the defendant, and the judgment satisfied in full, so that the defendant was allowed and received something more than \$1,000. There is no claim made that there was not sufficient cause for a divorce. On the contrary, it is conceded that Mrs. Shank (now Mrs. Mohler) was delivered of a bastard child on the 7th day of August, 1881, more than two years before the

Thus, adultery committed by a party to a marriage while of sound mind is a ground for divorce though he subsequently becomes insane and continues to be so until the time of the commencement of the action and the granting of the decree. *Rathbun v. Rathbun*, 40 How. Pr. 323.

And subsequent insanity of a permanent and incurable character on the part of the wife will not deprive the husband of his right to have the marriage relation dissolved for an act of adultery committed by the wife when sane and responsible for her acts. *Stratford v. Stratford*, 32 N. C. 297.

In *Rathbun v. Rathbun*, *supra*, *Broadstreet v. Broadstreet*, 7 Mass. 474, was distinguished upon the ground that in that case the defendant was insane at the time of the alleged adultery, and so continued.

And *Mordaunt v. Mordaunt*, L. R. 2 Prob. & Div. 103, was criticised and distinguished, the court saying that the opinion was based mainly upon the analogy of the case to a criminal proceeding, and that the law of divorce in England is very different from the law on that subject in this state, and that it is not authority here, nor applicable to the system of law touching divorce existing in this state.

b. As a defense to a claim for alimony.

Adultery committed by a wife while insane is no bar to her claim against her husband for alimony upon the ground that he had abandoned her. *Mims v. Mims*, 33 Ala. 98; *Wray v. Wray*, Id. 187.

And the insanity of the wife, proved to have existed at the time of the commission of an act of adultery by her, will be presumed in an action by her for alimony to continue until the contrary is proved. *Wray v. Wray*, *supra*.

And where a wife suing by her next friend files her bill for alimony against her husband, alleging insanity on her part and cruelty and abandonment on the part of her husband and the husband answers denying all of the allegations of the bill but failing to object to its form, he cannot procure a reversal of the decree rendered therein on the ground that the wife if insane should have sued by committee and not by next friend. *Mims v. Mims*, *supra*.

III. Insanity as affecting abandonment and failure to support.

Failure to provide for and support a wife by her husband is not a ground for divorce, though made 34 L. R. A.

so by statute, where such failure arises from insanity. *Baker v. Baker*, 32 Ind. 146.

But a husband who wilfully deserts his wife while sane, and remains away for the statutory period required to warrant a divorce in her favor, cannot excuse himself on the ground that before the expiration of the statutory period he became insane. *Douglass v. Douglass*, 31 Iowa. 421.

So, the failure of a husband to provide a sufficient maintenance and support for his wife, suitable to her condition and circumstances, while she is separated from him without her fault and confined in a lunatic asylum, entitles her to a decree for alimony. *Wray v. Wray*, 33 Ala. 187.

And the fact that the wife was confined in an asylum for lunatics by her husband's consent and direction does not establish an abandonment of the husband which will entitle him to a divorce. *Pile v. Pile*, 94 Ky. 308.

The shortcomings of the wife, who had been insane but had at least partially recovered, and erratic acts on her part, are to be viewed charitably by the court in determining whether her subsequent abandonment of her husband is a sufficient ground for divorce. *Franklin v. Franklin*, 53 Kan. 143.

And a divorce will not be granted a husband against his wife for her abandonment on account of a quarrel growing out of his punishing one of the children, where she had been insane but had been at least partially cured, and he was not at all times as considerate as he might have been in view of his wife's infirmity and weakness. *Ibid*.

IV. Insanity as affecting cruelty.

Cruel and inhuman treatment do not warrant a divorce when such treatment is the result of insanity. *Tiffany v. Tiffany*, 34 Iowa, 122; *Powell v. Powell*, 18 Kan. 371, 25 Am. Rep. 774.

Where an insane man is dangerous to his wife's personal safety the remedy lies in the restraint of the husband and not in a release of the wife. *Hall v. Hall*, 3 Swab. & T. 349.

And a divorce granted against a wife for acts of cruelty which were the result of a diseased mind on her part culminating in her insanity, in which condition she remained at the time of the service of the summons upon her, will be set aside on motion of her guardian. *Cohn v. Cohn*, 85 Cal. 108.

And cruelty and inhuman treatment by a wife of her husband endangering his life is not a ground for a divorce where the inhuman treatment relied

action for divorce was commenced; and on the 22d day of July, 1884, a marriage license was duly issued to Mary A. Shank and J. L. Mohler, and they were married on the same day. Mrs. Shank-Mohler testified as a witness, in part, as follows: "There were no children born to Anthony Shank and me. There was a child born August 7, 1881. That child was not Anthony Shank's child. This child that I have just spoken of was the child of my present husband, J. L. Mohler."

2. The appellee founds her claim to a distributive share of the estate upon the ground that when Anthony Shank died she was his lawful widow. In other words, the contention in her behalf is that the decree of divorce is absolutely void, because the circuit court had no jurisdiction to entertain the divorce proceeding and enter a decree; the husband in whose behalf the jurisdiction of the court was invoked being at the time insane, and his guardian having no lawful power or authority to commence or maintain the action for divorce. It is conceded that the suit was commenced in

the proper county, that service of the original notice was duly had, and that the defendant therein appeared. No question is made as to the form of the decree, and as to the reasonableness of the amount of alimony allowed the defendant; and, although the defendant entered into marital relations with Mohler long before the death of Shank, she insists that she is the widow of Shank. She does not attack the decree directly, and demand that it be set aside and vacated; but she insists that it is void, and should be disregarded by the court, because no right can be predicated thereon by the lawful heirs of Shank. The heirs of Shank maintain that the decree is not void, that there was no defect as to the party plaintiff, and that the guardian had the legal right to maintain the action for divorce. The statutes of this state on the subject of divorce and guardianship are referred to in argument as sustaining this view. It is unnecessary to cite the sections of the Code relied upon by counsel. They contain no such authority, neither expressly nor by implication. On the contrary, we think

upon occurred while the defendant was insane and mentally incapable of knowing what she did. *Wertz v. Wertz*, 43 Iowa, 534.

In *Wertz v. Wertz*, *supra*, *Douglas v. Douglas*, 31 Iowa, 423, *supra*, III., was distinguished upon the ground that there the cause for divorce was desertion which commenced during the time the defendant was sane.

The intent and motive of a party are a necessary ingredient of the offense of cruelty and barbarous treatment and indignities to the person endangering life or health as a ground for divorce, and such intent cannot be held to exist where legal insanity is established. *Hansell v. Hansell*, 3 Pa. Dist. R. 724.

And proof of insanity at the time of the commission of the acts is admissible as a defense to an action for divorce by a wife against her husband for cruelty and barbarous treatment and indignities to the person. *Ibid*.

In *Hansell v. Hansell*, *supra*, *Matchin v. Matchin*, 3 Pa. 332, *supra*, II., a, was distinguished upon the ground that in that case the divorce was sought for adultery of the wife and the relief granted was based solely upon the nature of the offense and the public necessity of preserving the purity of issue.

So, the fact that the wife is insane and intends to do bodily violence to her husband furnishes no answer to a claim on her part for a restitution of conjugal rights, as the husband is not entitled to turn her out of doors because insane, but is rather bound to place her in proper custody and under proper care. *Hayward v. Hayward*, 18 Wash. & T. 81.

And a responsive allegation on the part of a wife in a proceeding for restitution of conjugal rights, admitting that she had been insane but asserting her recovery, and denying the facts upon which the husband relied to show continuance of insanity, may be admitted to proof where the husband alleges the wife's insanity and a morbid hatred toward him which rendered cohabitation unsafe. *Ibid*.

And a divorce will not be granted against a wife on the ground of cruel treatment because of the charge against her husband that he was attempting to poison her where there was no evidence that the charge was prompted by any desire to injure him, and from the evidence the theory that the fears of poisoning expressed by her were the result of a temporary aberration of the mind produced by sickness was as reasonable as any other. *Sapp v. Sapp*, 71 Tex. 348.

So, acts of violence committed by a husband to-

ward his wife, provoked by and consisting mainly of resistance on his part of attempts by her to take morphine from him while he was in a state of total or partial delirium produced by its use, does not constitute extreme or repeated cruelty within 1 Ill. Rev. Stat. chap. 40, § 1, making it a ground for divorce, especially where the divorce was originally sought on the ground of habitual drunkenness and specific charges of cruelty were added only when it became apparent that the divorce would not be granted on the ground of drunkenness. *Youngs v. Youngs*, 120 Ill. 280, 6 L. R. A. 548.

And in *Avery v. Avery*, 33 Kan. 1, 33 Am. Rep. 523, a divorce granted for extreme cruelty of the husband was upheld upon the ground that there was no excuse for his conduct unless he was *non compos mentis*, and that the trial court from the findings must have considered him of sound mind.

But to establish insanity as a defense in an action for divorce for cruel and barbarous treatment and indignities to the person endangering life or health, the defendant must have been in such a mental condition as to deprive him of the use of his reason to the extent that he did not know right from wrong and was incapable of willing the one or the other. *Hansell v. Hansell*, 3 Pa. Dist. R. 724.

And violent acts upon the part of a husband toward his wife while laboring under a state of cerebral excitement arising from the fatigues and anxieties of business while he was not an irresponsible agent, attended with a liability of a recurrence of ungovernable passion and cerebral excitement, which would render cohabitation unsafe for his wife, is a ground for a decree of judicial separation. *Martin v. Martin*, 6 Week. Rep. 367.

The existence of a mere insane delusion would not appear to be sufficient as an excuse for cruelty as a ground of divorce.

Thus, a wife is entitled to alimony and a separate support out of the estate of her husband where he maltreats her because of an insane delusion as to her, rendering living with him insupportable and unsafe, where he is capable of managing his estate and discharging all of his duties towards everyone else. *Smith v. Smith*, 33 N. J. Eq. 458.

And the accusation by a husband that his wife had been guilty of the crime of incest, together, with slight acts of violence though not very hurtful, is sufficient to constitute cruelty and inhuman treatment which will justify a divorce, and the fact that the accusation was prompted by an insane delusion on his part is no defense. *Ibid*.

So, in *Booland v. Booland*, 4 Wash. 118, a divorce

that they plainly imply that such a proceeding is not authorized. Section 2222 of the Code requires that the petition for divorce "must be verified by the oath of the plaintiff." It is true that this requirement is not jurisdictional. See *McCraney v. McCraney*, 5 Iowa, 282, 68 Am. Dec. 702; *Ellis v. White*, 61 Iowa, 644. But the fact that the statute requires the oath of the plaintiff, and provides for no substituted verification, as in other cases, tends strongly to show that the legislative intent was that an action for divorce should be prosecuted by the injured party, in his or her personal capacity. Other features of the statute are called to our attention, which, it is urged, indicate the legislative intent that the guardian of an insane person may maintain an action for divorce. We do not regard it as necessary to discuss that

line of argument. We think that the want of such authority is so apparent as to leave no reasonable ground for debate. It was held in *Douglass v. Douglass*, 31 Iowa, 421, that, where a husband wilfully deserted his wife while he was sane, she was entitled to a divorce, notwithstanding he became insane during the statutory period of two years. And in *Wertz v. Wertz*, 43 Iowa, 537, it was held that insanity occurring after marriage does not constitute ground for divorce. These cases do not control the question now under consideration. It is true that in the *Douglass Case* a divorce was allowed against a party who was insane when the decree was entered. But the cause for divorce had its inception while the party was sane. It may further be said that the question whether the action may be maintained where the defend-

was sustained on a charge against a husband of cruelty in maliciously and publicly charging his wife with adultery and other offenses, notwithstanding that the court had the impression from his actions and testimony that he was perhaps unbalanced in his mind on the two subjects of religion and the unfaithfulness of his wife.

The question whether the insanity of a husband will excuse acts of cruelty for which a divorce is asked depends upon whether he is capable of understanding the nature and consequences of the acts charged, at the time when they were committed, and whether he committed them in a fit of mental aberration not directly or immediately caused by drink. *Hanbury v. Hanbury* [1892] P. 233.

V. The defense.

The rule was adopted by some of the early English cases that an action for divorce could not be allowed to proceed against an insane person. See *Bawden v. Bawden*, *Mordaunt v. Mordaunt*, and *King v. King*, *supra*, II., a. But these cases were either reversed or overruled, and the practice would now seem to be universal to permit the action to proceed under proper restrictions, leaving the defense to the guardian committee or the next friend of the lunatic respondent.

Thus, an action for a divorce or separation is a civil action, and not a criminal suit or proceeding which cannot be instituted or carried on while the accused is a lunatic. *Mordaunt v. Monoreiffe*, 43 L. J. Mat. N. S. 49, 30 L. T. N. S. 649, 22 Week. Rep. 12, L. R. 2 H. L. (Sc.) 374.

And the fact that insanity may preclude an effectual defense in an action for divorce must be regarded as a misfortune resulting from the respondent's condition, and not as affecting the petitioner's right to sue. *Baker v. Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 43 L. T. N. S. 332, 28 Week. Rep. 630.

See also *Rathbun v. Rathbun*, and *Stratford v. Stratford*, *supra*, II., a.

Defense by guardian is provided for by statute in Massachusetts and Rhode Island.

Thus, if at any time during the pendency of a suit for divorce the respondent is insane, whether such insanity began before or since the filing of the libel, the defense may be conducted by a guardian appointed by the probate court under the Massachusetts statute, or if there is no such guardian by one appointed by the court in which the libel is pending, and if upon the hearing a sufficient cause is shown a divorce may be decreed. *Garnett v. Garnett*, 114 Mass. 379, 19 Am. Rep. 309.

And the appointment of a guardian *ad litem* to appear and answer for the respondent in a divorce case, under Mass. Rev. Stat. chap. 70, § 18, providing, that if the respondent is insane at any time 34 L. R. A.

during the pendency of the suit the court shall appoint some suitable person as a guardian, is in the nature of an interlocutory decree or judgment, and is *prima facie* evidence of the fact of insanity in any subsequent stage of the case. *Little v. Little*, 13 Gray, 264.

And the complainant in a divorce case is rendered incompetent as a witness under the exception to Mass. Stat. 1867, chap. 305, § 1, providing that when one of the original parties to a cause of action is shown to be insane the other shall not be admitted to testify in his own favor where a guardian has been appointed for the other party and there is no proof to rebut the *prima facie* case of insanity thereby established. *Ibid*.

So, the counsel for the defendant in an action for divorce may be admitted to plead in her name upon his suggestion that she was insane. *Broadstreet v. Broadstreet*, 7 Mass. 474.

As to the Rhode Island statute, see *Thayer v. Thayer*, 9 R. I. 377, *infra*, VI.

An action for divorce should not be tried, however, against one whose reason has been dethroned, and who is thus rendered incapable of making answer to a charge or aiding counsel in the conduct of her defense, until at least a reasonable time is allowed for her recovery and restoration. *Stratford v. Stratford*, 32 N. C. 397.

And a default in an action for divorce on the ground of adultery will be opened and further proceedings stayed on suggestion that since the commission of the offense the defendant had become insane, unless the appointment of a guardian for him is procured, who might appear for him in the action. *Mansfield v. Mansfield*, 13 Mass. 412.

Parol evidence to establish that the wife was never ascertained to be a lunatic by judicial finding, and that she was confined in an asylum by her husband in a state other than that of his residence, and that she was there in obedience to his command and subject to his control at the time of the institution of the action for divorce by him and when the judgment was rendered, is admissible in a collateral proceeding for the purpose of avoiding the effect of the judgment. *Newcomb v. Newcomb*, 13 Bush, 544, 25 Am. Rep. 222.

VI. Actions on behalf of insane persons.

The rule adopted by the American cases in which the question is not affected by statutes is that of the principal case, that the marriage relation depends on the free and voluntary consent and the active and affirmative will of the parties, and a guardian of an insane person has no more right to maintain an action to dissolve the marriage relation of his ward than he has to manage and control his will in the matter of entering into the relation.

Thus, the right to sue for a divorce is strictly a personal one of the party aggrieved, and the guar-

ant is insane involves materially different considerations than in a case where the person in whose behalf the action is sought to be maintained is a guardian of an insane person. The marriage contract, by which two persons assume the relation of husband and wife for their joint lives, is a personal status or condition entered into by the parties alone. No guardian or parent or next friend can, by any means known to the law, effectuate a marriage between his ward or child and another. The relation depends upon the free and voluntary consent, and the active and affirmative will, of the parties. And it appears to us that a guardian of an insane person has no more right to maintain an action to dissolve the marriage relation of his ward than he has to manage and

control his will in the matter of entering into the relation. The wrongs which may be committed by a husband or wife are not, of themselves, sufficient to dissolve the bonds of matrimony. The injured party, if insane, may, upon recovering his or her reason, condone the wrong, or continue the marriage relation notwithstanding the delinquencies of the other party. If Anthony Shank had recovered his reason, and upon returning to his home found that his wife had committed adultery, and was the mother of an illegitimate child, it would have been his right to condone the wrong, or put her away by an action for divorce. In the absence of some statutory authority, no other person could exercise that right for him. As he was insane, and never restored to sanity,

dian or next friend of the insane wife without lucid intervals cannot of his own will institute such a suit which can only be maintained by the exercise of her intelligent will. *Worthy v. Worthy*, 38 Ga. 45, 91 Am. Dec. 753.

A divorce will not be granted on a bill filed against the husband in the name of his wife by another, where she was insane at the time and incapable of giving any consent to the filing of the bill, whether it was advised and done by friends, relatives, or others. *Bradford v. Abend*, 89 Ill. 73, 31 Am. Rep. 67.

And an action for divorce and alimony or for alimony alone cannot be brought and maintained by the guardian of an insane woman against her husband. *Birdzell v. Birdzell*, 38 Kan. 453, 52 Am. Rep. 539.

Whether a party who is entitled to a divorce shall commence proceedings to procure it or not is a personal matter resting solely with the injured party, and it requires an intelligent recollection on the part of such party to commence the proceedings, which cannot be had from an insane person. *Ibid.*

An insane wife having lucid intervals, who during such an interval directs suit for a divorce to be brought, should bring it in her own name without appearance by next friend. *Worthy v. Worthy*, *supra*.

And evidence that a woman was an inmate of an insane asylum for nearly two years, when she was discharged in an improved condition but not well, does not establish that she was so insane as to be incompetent to maintain an action for divorce commenced nearly four years after. *Ellis v. White*, 61 Iowa, 644.

So, the rule that the question of insanity can only be raised by a plea in abatement in the original suit does not apply in proceedings brought by another in the name of the wife against her husband for divorce where there were grounds upon which fraud would be presumed and her mental condition was such that she could not know that the bill had been exhibited in her name. *Bradford v. Abend*, *supra*.

And fraud will be presumed where a bill was filed for divorce in the name of the wife by a person claimed to be her next friend when she was insane and incapable of giving consent to the filing of the bill and confined in an asylum in another state and on the same day the defendant entered his appearance and his answer was filed and the cause tried and a decree of divorce pronounced, whether there was any fraud in fact or not. *Ibid.*

Under Mass. Rev. Stat. chap. 76, § 12, however, a libel for divorce may be filed and prosecuted in behalf of an insane person, either by the guardian of the party or by a next friend appointed by the court for that purpose. *Garnett v. Garnett*, 114 Mass. 379, 69 Am. Rep. 369.

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And the court may properly grant a divorce on a petition of the guardian of an insane person in a case of desertion, where there is no suggestion that the insanity of the plaintiff is temporary or that she is likely at any time to be in such a condition of mind that her wishes and feelings can be ascertained, and there are no children, and the defendant does not appear. *Cowan v. Cowan*, 139 Mass. 377.

The court, upon a representation made to it in a divorce case either by a party thereto or another, that the plaintiff is insane, may take notice of such representation, and make the necessary preliminary examination as to such fact in such manner as it may deem proper, and decide in its discretion whether a preliminary inquiry as to sanity is required, with a view to secure a proper administration of justice and the rights of all the parties, and direct what mode shall be adopted to ascertain the facts as to the alleged incapacity, and if such incapacity is established to the satisfaction of the court it will appoint a guardian *ad litem* to conduct the case. *Denny v. Denny*, 8 Allen, 811.

And no person should be selected as guardian *ad litem* for an insane person in an action for divorce who may be adverse in feeling or interest to the party, but one should be selected who will faithfully protect such party's rights and interests. *Ibid.*

But the difficulty of ascertaining the real facts in a divorce case when either party is incapable of testifying or of instructing counsel because of insanity requires the court to proceed with the utmost caution, especially when the object of the suit is to obtain a complete dissolution of the marriage without the intelligent consent of the complainant. *Garnett v. Garnett*, *supra*.

And the agreement of guardians or of counsel in a divorce case in which the parties are insane to submit the case for a final determination upon an imperfect statement of the facts cannot relieve the court of the responsibility of considering what course public policy and the best interests of the parties require to be pursued. *Ibid.*

And the fact that while both parties were of sound mind a divorce *in et*, which is substantially equivalent to a divorce from bed and board, was obtained, does not require the court as a matter of course to enter an absolute decree of divorce from the bonds of matrimony after either or both of the parties have become insane. *Ibid.*

And the fact that a married woman consulted counsel with reference to a divorce previous to her commitment to an insane asylum by her husband, and afterwards brought an action therefor, does not entitle her to a discharge on habeas corpus, where it appears that the asylum was well managed and that she was subject to no unnecessary or unusual restraint or improper treatment, and her remaining there would tend to promote her recovery. *Denny v. Tyler*, 3 Allen, 225.

the circuit court had no jurisdiction to entertain an action for divorce, commenced in his behalf by his guardian. *Birdzell v. Birdzell*, 33 Kan. 433, 52 Am. Rep. 539; *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; *Bradford v. Abend*, 89 Ill. 78, 81 Am. Rep. 67; 2 Bishop, Mar. & Div. § 806a.

Counsel for appellants, so far as the question of jurisdiction depends on authority, rely mainly on the case of *Baker v. Baker*, L. R. 6 Prob. Div. 12. It is to be conceded that the English law of divorce is much like our own statute, and that in the cited case it was held that a guardian of an insane person might maintain an action for divorce in behalf of his ward. We have given the case a careful examination, and have to say that we can not bring ourselves to approve the rule therein announced.

8. We come now to a consideration of the question as to the effect or force of the decree for divorce, under the admitted facts of the case. We have found that the decree was void. It has often been said that a void judgment is no judgment; that it may be attacked directly or collaterally. Freeman, in his work on Judgments, uses this language: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally

worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void." This is true, in a general sense; yet, notwithstanding, a party to such a judgment may voluntarily perform it, by paying the amount adjudged against him, and, when paid, no inquiry will be made as to the validity of the judgment; or he may perform the acts required by a void decree, or accept its benefits, and thereby estop himself from questioning the decree. In other words, a party to a void judgment or decree may be estopped from attacking it either directly or indirectly. Suppose a judgment is for a money demand, justly due, and the record shows that it was rendered without having jurisdiction of the person of the defendant by the service of process upon him, and he voluntarily satisfies the judgment. That is an end of the controversy. In the case of *Arthur v. Israel*, 15 Colo. 147, 10 L. R. A. 683, the wife, without cause, deserted her husband and home, and lived for years in adultery, and afterwards learned that a divorce had been procured by her deserted husband; and she caused a marriage ceremony to be performed with her paramour, and continually lived and cohabited with him until the death of her husband. It was held that she could not take advantage of the fact that the decree of divorce was void for want of service of process, and successfully

An action for divorce cannot be maintained by the guardian of a spendthrift on his behalf, however, against the spendthrift's wife. *Winslow v. Winslow*, 7 Mass. 96.

So, under the Rhode Island statute a lunatic or a person *non compos mentis* is duly represented in a petition for divorce by the person who being authorized by statute petitions in his behalf, and personal notice to him of the pendency of the petition, though sometimes expedient, is not necessary where he is a minor without means and the petition is preferred by his father. *Thayer v. Thayer*, 9 R. I. 377.

And an application for an order, in an action for divorce prosecuted by a next friend of the lunatic, to produce such lunatic in court at the time of the trial of the petition, will be refused, at least until the court can determine upon the trial whether his presence is desirable or necessary. *Ibid*.

And an allowance, under R. I. Rev. Stat. chap. 157, § 16, empowering the supreme court to make an allowance to the wife out of the estate of the husband to prosecute or defend a petition for divorce or separate maintenance where she has no property of her own, must be made out of the estate of the husband, and not out of that of his next friend, where he is insane and prosecutes his petition by next friend. *Ibid*.

In England the contrary rule has been adopted irrespective of statutory provisions.

Thus, proceedings for divorce are civil, and though no provision for the case of lunatics is contained in the statute, recourse must be had in such case to the ordinary forms of civil courts where lunatics are litigants. *Baker v. Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630.

There is no difference between cases of lunatic petitioners and lunatic respondents in actions for divorce, on the question of the right to prosecute or defend by committee. *Ibid*.

And the argument that the right to sue for divorce is personal and cannot be exercised by anyone but the person wronged is equally applicable to suits for judicial separation, which it is conceded

may be maintained on behalf of lunatics. *Ibid*, *dictum*.

And the insanity of a husband or wife is not a bar to a suit by the committee of one of them who is a lunatic for the dissolution of the marriage. *Baker v. Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630, Affirmed in L. R. 6 Prob. Div. 12, 49 L. J. Prob. N. S. 83.

It is not necessary to resort to a lord chancellor for the purposes of permission to institute proceedings by the committee of a lunatic on his behalf against the lunatic's wife for divorce in the consistory court which is bound to entertain the suit when the committee has determined to bring it. *Parnell v. Parnell*, 2 Phillim. 158.

And an allegation in an action for divorce brought by the committee of a lunatic, that there is no present prospect of his recovery, is sufficient, though it was not alleged that he was incurably insane or that he could not recover within a reasonable time. *Baker v. Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630.

So, the committee of a lunatic may institute proceedings on his behalf against his wife for divorce for adultery. *Parnell v. Parnell*, *supra*; *Woodgate v. Taylor*, 2 Swab. & T. 512, 30 L. J. Mat. N. S. 197, 5 L. T. N. S. 112.

And the committee of a lunatic plaintiff may sue for adultery though the wife might in such suit plead recrimination by way of defense, thus putting the lunatic husband in the condition of the respondent. *Parnell v. Parnell*, 2 Hagg. Consist. Rep. 169.

The question whether an action for divorce on behalf of the lunatic should be brought by the committee of his estate or the committee of his person is within the discretion of the lords justices, and as the litigation involves the liability to costs the suit may well be instituted by the committee of the estate. *Baker v. Baker*, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630, Affirmed in L. R. 6 Prob. Div. 12, 49 L. J. Prob. N. S. 83.

F. H. B.

assert against the heirs her right under the statute to the estate of the deceased husband, as his widow. The case at bar presents more cogent reasons for the application of the doctrine of estoppel. In this case the wife was not ignorant of the application for divorce, when it was made. She was made a party, and appeared in the action; and after the decree was entered she accepted the alimony which she agreed to receive, and procured a license, and married her paramour, long before the death of Anthony Shank. She accepted all the benefits of the decree, without reserve, and recognized its validity by contracting and consummating a marriage with Mohler. There could have been no more complete acceptance of the benefit of the decree. In the cited case, the court said: "We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage with Israel during Arthur's lifetime, she accepted so far as was within her power the benefits or privileges of the divorce decreed. The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance, in this respect, of one who, knowingly in all other particulars receives the fruits of an ordinary void judgment at law. That at the time of her marriage with Israel she understood the decrees to be valid, is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow. Besides, had she believed them void, her obliquity would be even deeper than it is; because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage." In *Ellis v. White*, 61 Iowa, 644, where plaintiff procured a divorce and alimony upon a petition which she afterwards claimed did not give the court jurisdiction, it was held that, whether the court had or had not jurisdiction, she, having accepted the benefits of the decree, could not be heard to question the jurisdiction of the court to render it. The same principle is announced in *Prater*

v. Prater, 87 Tenn. 78, and in *Odiorno's Appeal*, 54 Pa. 175, 93 Am. Dec. 688. And a like rule is to be found in the cases of *Stephens v. Stephens*, 51 Ind. 542; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Richeson v. Simmons*, 47 Mo. 20; *Baily v. Baily*, 44 Pa. 274; *Bourne v. Simpson*, 9 B. Mon. 454.

This exception to the doctrine that a judgment or decree entered without jurisdiction is absolutely void is founded upon the plainest principles of justice. As applied to the case at bar, it is but the enforcement of the legal maxim that the law will not permit a person to take advantage of his own wrong. We can discover no reason why Mrs. Mohler should be allowed to masquerade in a court of justice as the widow of Anthony Shank, and at the same time claim that she was the wife of Mohler for about eight years before Shank died. Both the law and good morals forbid it. Having accepted the divorce as valid, in the way she did, she should be held to be estopped from maintaining any claim to any part of the estate of her former husband. The conclusion we have reached in this case on the question of estoppel is not directly supported by decisions of this court, but it appears to us that it is in harmony with modern legislation upon the relation of husband and wife. See chap. 2, title 15, of the Code. The rights of a wife in her property, and her capacity to contract with reference thereto, are plainly conferred upon her. Section 2218 is as follows: "Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried." She cannot enter into a contract to divorce herself from her husband. But we discover no reason why the law of estoppel may not be applied to her acts in a case like this.

The decree in the suit in equity, and the order sustaining the claim for a distributive share in the estate, are reversed.

Deemer, J., took no part in the decision of this case.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

J. Z. LONG *et al.*

v.

H. L. HARVEY *et al.*, *Appts.*

(177 Pa. 478.)

1. A majority of the members of an absolutely independent congregation cannot exercise the authority to remove officers whose terms are indefinite, except by acting in compliance with the rules and discipline of the church.
2. A meeting held by a majority of the

members of an independent congregation of the "Disciples of Christ," which was presided over by a clergyman of another congregation and held under a call directed by a tribunal of the elders of sister congregations to whom the majority appealed, and which was held in front of the church because the elders belonging to the minority had closed and locked its doors, when the laws or rules of the church do not provide for such proceeding, was wholly without authority to depose the old officers or elect new ones, but their remedy is by assertion of their rights as members of the congregation.

NOTE.—As to the power of a local church society to withdraw from the general body of a church, see *Fuchs v. Meisel* (Mich.) 32 L. R. A. 92.

34 L. R. A.

(October 5, 1894.)

A PPEAL by defendants from a judgment of the Court of Common Pleas for Centre County in favor of plaintiffs in an action brought to enjoin defendants from exercising the offices of trustees and elders of the Church of the Disciples of Christ at Howard and from interfering with plaintiffs' right to control the property. *Reversed.*

The facts are stated in the opinion.

Messrs. Ira C. Mitchell and C. P. Hewes, for appellants:

The laws of the ecclesiastical body will be recognized and enforced by the civil courts when not in conflict with the Constitution and laws of the state.

Twigg v. Treacy, 104 Pa. 498; *Krecker v. Shirey*, 168 Pa. 551, 29 L. R. A. 476.

In church organizations those who adhere and submit to the regular order of the church are the true congregation.

Winebrenner v. Colder, 48 Pa. 244; *Schnorr's Appeal*, 67 Pa. 188, 5 Am. Rep. 415; *Kerr v. Trego*, 47 Pa. 292; *Roshi's Appeal*, 69 Pa. 462, 8 Am. Rep. 275.

The power of the majority, as well as that of the minority, is bound by the discipline.

Krecker v. Shirey, 168 Pa. 547, 29 L. R. A. 476; *McAuley's Appeal*, 77 Pa. 397; *Landis's Appeal*, 102 Pa. 467; *O'Hara v. Stack*, 90 Pa. 477; *Schlichter v. Keiter*, 156 Pa. 119, 22 L. R. A. 161.

The right of possession of church property is joint only.

Liederkrane Singing Soc. v. Germania Turnverein, 168 Pa. 265.

Mr. Wilbur F. Reeder, for appellees:

In a church or other unincorporated association where a meeting is duly announced for a certain purpose, and the congregation assembled in their associate capacity in pursuance of such an announcement, a majority of those present may act and the action or decision of those present by a majority vote shall be binding and conclusive on the society or association.

Trustees of a church hold their possession as a fiduciary possession for the benefit of all the members, and they may be dispossessed by the election of others in their places.

Where there is no rule or by-law fixing the term of office the tenure thereof is subject to the will, control, and discretion of the appointing power, and the power that appoints or elects may depose or remove at will.

Shortz v. Unangst, 8 Watts & S. 45; *Unangst v. Shortz*, 5 Whart. 506; *Henry v. Deitrich*, 84 Pa. 286; *Craig v. First Presby. Church*, 88 Pa. 42, 32 Am. Rep. 417.

Those who remain away cannot complain.

Shortz v. Unangst, 8 Watts & S. 52.

A majority may control and direct any other matters consistently with the particular and general laws of the organism or denomination to which they belong.

McGinnis v. Watson, 41 Pa. 9; *Suttler v. First Reformed Dutch Church*, 42 Pa. 503.

The members in good standing before the difficulty arose who are desirous of adhering to the congregation and order are entitled to vote.

Winebrenner v. Colder, 48 Pa. 244.

The only constitutional method by which a 34 L. R. A.

congregation can express itself is by congregational meetings regularly held.

McAuley's Appeal, 77 Pa. 397.

There is a distinction between a corporate act to be done by a definite or indefinite number of persons. In the former a majority of the whole body must be present to act; in the second a majority of those who appear may act.

Craig v. First Presby. Church, 88 Pa. 42, 32 Am. Rep. 417.

The decision of ecclesiastical tribunals in all cases on doctrine, order, and discipline are conclusive on the common-law courts.

Skilton v. Webster, Brighly (Pa.) 203; *German Reformed Dutch Church v. Com., Seibert*, 3 Pa. 282; *Henderson v. Hunter*, 59 Pa. 335; *Watson v. Jones*, 80 U. S. 18 Wall. 679, 20 L. ed. 666; *McGinnis v. Watson, supra*; *Bouldin v. Alexander*, 82 U. S. 15 Wall. 181, 21 L. ed. 69.

Where a charter of a society provides for an offense it directs the mode of proceeding and authorizes the society on conviction of a member to expel him; this expulsion if the proceedings are not irregular is conclusive and cannot be inquired into collaterally by mandamus action or other mode.

Com., Bryan, v. Pike Beneficial Soc. 8 Watts & S. 247.

Dean, J., delivered the opinion of the court:

The plaintiffs' bill in this case avers as follows: In 1832 a religious association or congregation was organized at Howard, Centre County, Pennsylvania, denominated "Disciples of Christ." At the commencement of these proceedings, it numbered sixty persons, and was not incorporated. One R. C. Leathers made a report to the Pennsylvania conference for the year 1889, that there were but fifteen members in good standing composing the congregation. That this report dropped from the rolls of the congregation a majority of its members, without notice or hearing, and without warrant. On February 7, 1890, the majority appealed to an impartial tribunal (not named), and asked the elders to join in choosing said tribunal, which they (the elders) refused to do. Then a majority of the congregation, acting through a committee, appealed to the elders of a sister church at Eagleville, to hear and determine the complaint which created schism. The elders of the Eagleville church entertained the appeal, and called in elders of the sister congregations of Lock Haven and Williamsport, and together they heard the complaint on June 13, 1890, and rendered a decision, recommending the calling of a meeting of the congregation at Howard on June 25, 1890, following: Due notice of the meeting was given. On the day named, defendants closed and locked the doors of the church, and prevented a meeting in the church. Those members who had complained and appealed then organized a meeting outside and in front of the church, presided over by Rev. Ryan, of Williamsport. At this meeting, J. Z. Long, one of plaintiffs, was elected trustee in place of H. L. Harvey, then a trustee and one of these defendants. N. G. Fletcher,

theretofore and then a trustee, and one of plaintiffs, was approved, as was also A. J. Gardner, one of defendants. A. J. Gardner, and R. C. Leathers were deposed as elders, and the congregation, for the time being, was placed under the supervision and jurisdiction of the elders at Eagleville and Lock Haven. Notwithstanding their deposition, the old board of trustees continued to act, and the old board of elders persisted in holding on to their offices, and by force and violent demeanor, prevented the elders of Eagleville and Lock Haven churches from assuming and exercising the jurisdiction and supervision conferred upon them by the 25th of June meeting, and persisted, by force and threats, to debar a majority of the congregation from engaging in worship in the church. That the 25th of June meeting was constituted and held by competent authority of the denomination, and all its proceedings were regular under the usages of the church, and that the exercise of authority by defendants was wrongful. The prayers for relief were that Harvey, the two Gardners, and Leathers be enjoined from acting as trustees or elders, and from preventing Long and Pletcher from assuming the offices to which they had been elected, and that they be further enjoined from preventing the elders of Eagleville and Lock Haven from assuming supervision of the congregation; and, further, that they and each of them be enjoined from excluding a majority of the congregation from worshipping in the church. The answer of defendants denies that those who appealed, called on the elders of the Eagleville and Lock Haven churches, and held the meeting of 25th of June, are a majority of the congregation; on the contrary, they aver that they compose but a small minority; that O. T. Noble and A. M. De Haas, neither of them members of the congregation, but acting as a committee for the meeting, attempted to take possession of the church property, and turn it over to the minority composing the meeting thus ousting the regular organization, and putting a wholly irregular one in control. They admit they resisted this unauthorized interference. They further aver that one Rev. W. L. Hayden, of Bellefonte, came with the sheriff at the hour of public worship, on the 10th of August following the meeting, and read a lecture or proclamation to them, commanding them to surrender possession of the church to the minority, which they refused to do. They further aver that the action of the 25th of June meeting, with the elders of the churches of Eagleville and Lock Haven, and clergymen from other congregations, was wholly unauthorized, and unknown to the rules and discipline of the church; that there exists no other power to adjust differences in a Disciples congregation than the elders and the congregation, and the congregation alone can depose officers duly elected; that this was a regular and fully organized congregation, with a duly elected pastor, Rev. G. W. Headley; that the defendants, the duly elected officers, representing a majority of the congregation, do not exclude any, but invite all the members to worship in said church. They therefore pray that the bill be dismissed, at plaintiff's costs. The court appointed the late D. S. Keller, Esq.,

master to report facts and suggest a decree. He took much testimony, and heard full argument by counsel, but died before reporting to the court. Clement Dale, Esq., was appointed in his stead, who, without hearing the argument, made report. He suggested for decree that defendants be enjoined from acting as officers, or otherwise interfering with the occupation of the church, and that some person be appointed to give two weeks' notice of a congregational meeting of the members now in good standing, for the purpose of electing two elders, three deacons, and three trustees, to serve for two years, and thereafter the elections to be conducted according to the usages of the church; the same person appointed to give notice to preside at the election, after the election, the terms of present incumbents' office to end. The president judge approved the report of the master, made in substance the decree suggested by him, and appointed one A. M. De Haas, one who sided with plaintiffs, to give notice and preside at the meeting of the congregation. The two associate judges filed a dissenting opinion, dismissing the bill, at the costs of plaintiffs. We have before us now the appeal from the decree of the president judge awarding the injunction.

Our power of adjudication in disputes between warring church parties is limited. In such cases we can look into the rules of a church organization only to ascertain the church law, and, if that be not in conflict with the law of the land, all we can do is to protect the rights of parties under the law they have made for themselves. Our Brother Williams has so fully discussed this subject, and so clearly stated the rules that must govern courts in such litigation, in the late case of *Krecker v. Shirley*, 163 Pa. 551, 29 L. R. A. 476, that we need not repeat them.

Each party here claims to be a majority. When this trouble arose, the defendants were in office. Presumably, they were put there by a majority, and there is no evidence even offered to rebut this presumption. It is admitted that their term of office was indefinite, and they could only be deposed by a majority of the members. Assuming that a majority of the members demand the removal of these officers, what method should they legally adopt to effect their purpose? The law is settled that it must be done in compliance with the rules and discipline of the church. "A majority of the church organization may direct and control church matters consistently with the particular and general laws of the organism or denomination to which it belongs, but not in violation of them." *Sutter v. First Reformed Dutch Church*, 42 Pa. 503. The master finds as a fact that every Disciples congregation is practically independent. Other congregations of the same denomination may advise, but there is no superior tribunal of appeal. Both parties concede that they recognize no rule of conduct in cases of dispute except the New Testament. Alexander Campbell, the Disciples' greatest preacher, if not their founder, says: "It [the church] knows nothing of superior or inferior church judicatures, and acknowledges no laws, no canons or government, other than that of the Monarch of the universe and its laws." Daniel Sommer

an authority in the church, discusses the whole subject; and while he favors an appeal to other churches for advice and aid in allaying church dissensions, he comes to this conclusion: "The question is often asked, Have we no right to appeal from the decision of a church?" Certainly the right of appeal is as free as the air we breathe. For our own justification, we may appeal to one church or a dozen, to one man or a hundred. But among religious people who are strictly congregational in their church government, there is no authority in any tribunal that may be thus selected, especially a tribunal chosen by only one party. The decision of such a tribunal may have a moral weight, but it has no legal authority. There is nothing official about committees, even if mutually chosen. . . . As each family is a separate government by itself, so is each congregation. No other family on earth has a right to come in and dictate to me and my family, and no other congregation on earth has the right to come in and dictate with reference to the affairs of the congregation where I hold my membership." Many other authorities were put in evidence before the master. The decided weight of them tends to establish the rule in this particular denomination that each congregation is absolutely independent of any legal control by any other congregation, or by the clergy or officers of such other congregation. What are the admitted facts here? Against the protests of defendants, delegations from the Eagleville and Lock Haven churches, two ministers, one from Bellefonte and one from Williamsport, met with members of this congregation outside the church, and, by a vote, deposed these defendants, and elected in their places part of these plaintiffs, and approved and continued in office part of them. Where, in the rules of the church organization, exists the semblance of authority for this proceeding? The master does not point it out, and we have failed to find it in the evidence. It is said that Leathers and one of the Gardeners were present at one of the hearings before the 25th of June, and had notice of the meeting. This is denied. But assume it to be true; both objected to the meeting when held, and refused to take part. We decline to consider the arguments bearing on the fairness and desire for peace displayed by the respective parties. Discussion of this subject would neither determine the existence of authority in the meeting, nor the want of it. In the exercise of such a high authority as was attempted here, parties must point us to a clear, "Thus saith our church law." We are of opinion that the meeting of 25th of June was wholly without authority to depose the old officers, or to elect new ones.

But it is asked: "If the members represented by these plaintiffs be in a majority, how shall they obtain the rights of a majority?" We reply: "By exercising them as members of the congregation, and as the majority for more than sixty years has exercised them." The reply to this, perhaps, is: "Those in possession will exclude us from lawful participation in congregational government." We are adverse to assuming that any of the members of this congregation, now that their lawful course of action is pointed out to them, will act with

lawlessness; but, if peace among members of a Christian church be impossible, then the courts are open to the wronged members, as members, and such remedy as the law warrants will be afforded. But the courts cannot sustain wholly unlawful attempts to right even wrongs.

The decree of the court below is reversed and set aside, and the bill is dismissed, at costs of plaintiffs.

P. C. WIEST COMPANY

William H. WEEKS *et al.*, Appts.

(177 Pa. 412.)

1. The letters "W. H. W.," printed in script, in white, in a horizontal line, upon a red background, on boxes of confectionery, do not infringe a trademark which, as registered in the United States patent office, is described as the letters "P. C. W." generally arranged to appear as script printed in a horizontal line upon a background of "any suitable color," distinctly stating that other forms of letters may be employed or that they may be differently arranged, and that the essential features are the letters "P. C. W."
2. Similarity in the size and shape of boxes for confectionery, which are obtained from box manufacturers and are sold to the trade without discrimination and known as "stock boxes," will not justify a finding in a trademark case that they were selected for an improper or fraudulent purpose.
3. The use of the same names for varieties of candy, by one who is charged with infringing a trademark, on the boxes of which such names do not form a part, does not sustain a charge of infringement of such trademark, but it can be complained of only as an attempt to represent the goods as those of the other party.

(*Mitchell, Dean, and Fell, JJ., dissent.*)

(October 5, 1896.)

APPEAL by defendants from a decree of the Court of Common Pleas for Luzerne County in favor of complainant in a suit brought to enjoin defendants from alleged infringement of a trademark alleged to belong to plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. G. L. Halsey, Alexander Farnham, and Strawbridge & Taylor for appellants.

Messrs. H. W. Palmer and Niles & Noll, for appellee:

The facts found by the master are briefly:

(a) The labels were calculated to deceive; (b) people were in fact deceived; (c) the defendant's design was to deceive buyers and purchasers, and to enable them to sell their manufactures on the strength of the popularity of the goods of the plaintiffs.

The resemblance between two trademarks must be such that an ordinary purchaser of the goods would be deceived by the similarity between them.

Gilman v. Hunnewell, 123 Mass. 139; *Desmond's Appeal*, 108 Pa. 126, 49 Am. Rep. 118;

NOTE.—For infringement of trademarks by similarity of the names of articles, see *note to Munroe v. Tousey* (N. Y.) 14 L. R. A. 245.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 629; *Tillot v. Moore*, 6 Hun, 106; *Popham v. Cole*, 66 N. Y. 60, 23 Am. Rep. 92; *Merrimack Mfg. Co. v. Garner*, 4 E. D. Smith, 387; *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408; *Heinz v. Brueckmann*, 184 Pa. 495; *Morse v. Worrell*, 10 Phila. 168.

It is no answer to a suit on a label of this description to assert that the individual parts of the design when separately considered are old or of common right to use.

McLean v. Fleming, *supra*; *Sawyer v. Horn*, 1 Fed. Rep. 24; *Dixon Crucible Co. v. Guggenheim*, 7 Phila. 408, 2 Brewst. (Pa.) 831; *Carbolite Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Leclanche Battery Co. v. Western Electric Co.* 23 Fed. Rep. 276; *Press v. Bachof*, 14 Blatchf. 482, Price & S. Trademark Cas. 31; *Landreth v. Landreth*, 23 Fed. Rep. 41; *Wellman & D. Tobacco Co. v. Ware Tobacco Works*, 46 Fed. Rep. 280; *Shaw Stocking Co. v. Mack*, 21 Blatchf. 1; *American Solid Leather Button Co. v. Anthony*, 15 R. I. 388.

The test of infringement is similarity in general appearance such as would be likely to mislead one in the ordinary course of purchasing the goods.

McLean v. Fleming, *supra*; *Atlantic Mill Co. v. Robinson*, 20 Fed. Rep. 217; *Gillott v. Esterbrook*, 48 N. Y. 874, 8 Am. Rep. 558; *Dixon Crucible Co. v. Guggenheim*, *supra*; *Liggett & M. Tobacco Co. v. Hynes*, 20 Fed. Rep. 883.

A defendant cannot avoid infringement by using different words and names (*Dixon Crucible Co. v. Guggenheim*, and *Sawyer v. Horn*, *supra*; *Hegeman v. O'Byrne*, 9 Daly, 264); or by substituting his own name for that of the plaintiff.

Pratt's Appeal, 117 Pa. 401; *Menendes v. Holt*, 128 U. S. 531, 32 L. ed. 528; *Leonard v. White's Golden Lubricator Co.* 38 Fed. Rep. 932.

Defendant will be adjudged an infringer if the general effect has been copied, even though the particular trade symbol or trademark be omitted and the defendant's own mark or symbol be substituted.

Royal Baking Powder Co. v. Davis, 26 Fed. Rep. 248; *Mozie Nerve Food Co. v. Beach*, 38 Fed. Rep. 248; *Heinz v. Brueckmann*, 184 Pa. 495; *Conrad v. Joseph Uhrig Brewing Co.* 8 Mo. App. 277; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Wellman & D. Tobacco Co. v. Ware Tobacco Works*, *supra*.

It need not be shown that there has been any actual intent to deceive (*McLean v. Fleming*, *supra*); or that there has been any actual deception.

Dixon Crucible Co. v. Guggenheim, *supra*; *Johnston v. Orr Ewing*, L. R. 7 App. Cas. 219.

Williams, J., delivered the opinion of the court:

Monopolies of any sort have never been favorites with the law. They were held by the common law to be against public policy because against common right. The grants, charters, letters-patent, or other form of device or assurance by the sovereign for their creation were declared by the act of Parliament of 21 Jac. I., chap. 8, to be "utterly void and of none effect, and in no wise to be put in use and opera-

tion." Nothing short of the "omnipotence of Parliament" is able to exclude a subject from trade in England. 7 Bacon, Abr. p. 38. Two exceptions to this general rule were given by the early text-writers: First, "It seemeth clear that the King may, for a reasonable time, make a good grant to anyone of the sole use of any art invented or first brought into the realm by the grantee." Second. The King may grant to particular persons the sole use of some particular employments, as "of printing the Holy Scriptures and law books," etc. The somewhat curious reason given for the second exception is that an unrestrained liberty to print the books to which it relates might be "of dangerous consequences to the public." To these exceptions a third must now be added, *vis.*, the right of a tradesman to the exclusive use of such signs, words, or symbols as he may have adopted and used in his business to distinguish articles of his own production from all similar articles produced by other persons. These exceptions do not impair the force of the general rule, *Exceptio probat regulam de rebus non exceptis*. The rule is unrestricted liberty in the practice of all arts and trades, and in the use of the methods by which they are conducted. He who asserts the right to an exclusive privilege in any department of business must bring himself under the protection of some recognized exception to the rule. The plaintiff in this case claims an exclusive privilege under the third exception, *vis.*, the right to the sole use of a certain trademark adopted, used, and registered by them; and they allege that the defendants have adopted and are now using a trademark which is an imitation of, and an infringement upon, their own. It becomes important, therefore, to learn just what the plaintiffs' trademark is, and then to determine whether it has been improperly imitated by the defendants.

In the bill filed in this case the plaintiffs' trademark is fully described, and the precise form in which it is registered in the United States patent office is given as follows: "Our trademark consists of the letters 'P. C. W.' These letters have generally been arranged as shown in the accompanying fac simile, in which they appear as script, printed in a horizontal line, upon a background of any suitable color; but other forms of letters may be employed, or they may be differently arranged, without materially altering the character of our trademark, the essential features of which are the letters 'P. C. W.'" The business of the plaintiffs was the manufacture of confectionery goods, and particularly of that kind of confectionery known as "caramels." The caramels, when finished, were put up in boxes of various sizes and forms, which are manufactured by box makers and sold to the public generally. The plaintiffs had no exclusive right to their use. They were what is known as "stock boxes." When the boxes were filled the particular kind of caramel they contained was indicated by printed slips or labels pasted upon them in some suitable position, and another slip or label was placed on each box having the trademark "P. C. W.," which indicated that the caramels were the genuine production of the plaintiffs' factory. These letters were the initials of the name of P. C. Wiest, and no one but the owner

of the name could rightfully use them without authority from him. The trademark of the defendants consisted also of the initials of the founder of the business done by them, W. H. Weeks, and it is described in the answer and in the statement registered in the United States patent office as consisting of the letters "W. H. W.," made in script, in white, on a dark ground." The defendants are engaged in the manufacture of confectionery, and state in answer that their goods include stick candies, toy forms, caramels, and plain confections, candied fruits, leaves, nuts, and the like. These, when prepared for use, are packed in boxes of various sizes and forms, each of which bears a slip or label indicating the variety of confectionery it contains, and another slip or label displaying the trademark, which affords to the purchaser an assurance that the goods one is about to buy are the genuine product of the defendants' establishment.

As a general proposition, the right of W. H. Weeks to the use of his name or initials as a trademark is as clear as that of P. C. Wiest to the use of his name or initials. *Hoyt v. Hoyt*, 148 Pa. 628, 13 L. R. A. 848. They are not the same. They do not even bear a close resemblance to each other. And the master reached the correct conclusion that there was neither imitation nor infringement shown by the evidence. If the initials had been the same, we do not see how the defendants could have been restrained from using his own; although in that case, we think, there should have been something in the manner of use to distinguish, and enable the public to distinguish, the product of the rival establishments from each other; and it is probable that without it a court of equity would have restrained the second comer. But in a recent case in New York (*Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42), it was held that the prior use of one's name by other persons in the same business does not destroy the right of him whose name it is to use it. The right to use one's name seems to have been held to be a personal right, as clear in business as in personal correspondence. We have, however, no such question here. The master has recommended, and the court below has issued, an injunction against the defendants restraining them from the use of the letters "W. H. W.," printed in script, in white, in a horizontal line, upon a red background." This decree says to the defendant, "You have a right to your trademark, and may lawfully use it;" but going beyond the claim of the plaintiffs as stated in the bill, it adds, "You must not use the same kind of letters or mode of arrangement or colors used by the plaintiffs." Now, these accessions constitute no part of the plaintiffs' trademark. The description filed in the United States patent office states that the letters are generally used in script, but may be used in any other way. They are put upon a background of "any suitable color," no color whatever being named. If this injunction can be sustained on the ground on which it was put in the court below, there is no style of letter, no mode of arrangement, no color in the solar spectrum, to which the plaintiffs cannot lay equal claim. But, as the plaintiffs themselves say in the description from which we have quoted, "the essential characteristic of

our trademark is the letters 'P. C. W.'" Those are what indicate the ownership and origin of the goods, and they carry their assurance to the public without regard to their own shape, arrangement, or color. A tradesman can have no exclusive right to mathematical lines, to styles of printing, or colors.

The master finds that the defendants have adopted boxes and packages quite like those used by the plaintiffs. The same is no doubt true of most of the confectioners in the commonwealth. The boxes and packages are made by box manufacturers to contain an even number of pounds, or fractions of a pound, and are necessarily uniform in size and general appearance. They are made for the trade, and are sold to the trade, without discrimination. The plaintiffs and the defendants have an equal right to buy from the manufacturers, and they must buy boxes of the sizes and shapes made for, and in use by, confectioners generally. The similarity in size and shape of the boxes does not, therefore, justify the master in finding that they were selected for an improper or fraudulent purpose; for the size and shape of the boxes are determined by the makers, and fixed upon with a view to the accommodation of the largest number of purchasers.

The other circumstance to which the master refers as justifying his decree is the use of the same names for varieties of candies that the plaintiffs had previously used, and perhaps devised. But one who invents a machine or a new combination, or devises a new article, contributes the result of his skill and his inventive powers to the public if he does not take the necessary step to secure himself an exclusive right to use and vend his invention. If he does not do this, he must not complain if his neighbor appropriates his invention or device to his own use, and enters into competition with him in its production and sale. The ground on which the courts will interfere in such cases is to protect the inventor from the attempt of his neighbor to sell his own work as and for the work of the inventor. This would be enjoined as a fraud upon both the inventor and the public; but, so long as he sells his own work as his own, any man may imitate the unprotected work of any other man as closely as he is able. We think the injunction awarded in this case cannot be sustained upon the findings of the learned master, and should be set aside. If the defendants are really attempting to sell their own confectionery by representing it to the public as the production of the plaintiffs, this, and not an imitation or infringement of the trademark, should be charged in the bill as the ground of relief.

The decree is reversed.

No order is made in relation to costs.

Mitchell, J., dissenting:

This is a perfectly clear case of fraudulent effort of appellants to get a part of plaintiff's trade, by such imitation of his boxes, labels, lettering, coloring, etc., as will deceive and mislead intending purchasers. It is an effort which equity ought to, and usually does, enjoin, without reference to the strict doctrine of trademarks. For this reason I would affirm the decree.

Dean and Fell, JJ., concur.

NEW YORK COURT OF APPEALS.

Clara H. SPENCER, *Appt.*,
v.

Peter B. MYERS, *Impleaded, etc., Resp't.*

(150 N. Y. 202.)

1. The right of a wife to assign a policy of insurance on the life of her husband, under Laws 1879, chap. 248, when the policy is issued for her benefit and the husband gives his written consent, is not limited to policies issued or delivered within the state, but extends to those issued by a foreign company in another state.

2. Stipulations in an insurance policy against assignments cannot avail an assignor when the insurer declines to take advantage of them and pays the money into court.

(October 13, 1898.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, reversing a judgment of the Oneida County Circuit in favor of plaintiff in an action brought to recover the proceeds of a life insurance policy which defendant claimed under an assignment. *Affirmed.*

The facts are stated in the opinion.

Mr. S. M. Lindale, for appellant:

The foundation for the assignment of the policy was the agreement made October 24, 1887, between the husband and wife, that the wife would upon demand execute a transfer of the policy.

That agreement being a contract directly between husband and wife was void.

Hendricks v. Isaacs, 117 N. Y. 411, 6 L. R. A. 559.

Prior to the legislative acts (Laws 1878, chap. 821, and Laws 1879, chap. 248), a married woman was incapable of assigning a policy of insurance issued upon the life of her husband for her benefit.

Eadie v. Skimmon, 26 N. Y. 9, 82 Am. Dec. 395; *Brick v. Campbell*, 123 N. Y. 843, 10 L. R. A. 259; *Romasie v. Chauncey*, 129 N. Y. 574, 14 L. R. A. 712; *Miller v. Campbell*, 140 N. Y. 457.

Laws of 1878, chap. 821, which provided that a married woman might dispose of such policy "in case she have no child or children born of her body," has no application here, because this plaintiff has a child born of her body yet living.

Laws 1879, chap. 248, is by its express terms applicable to no policies of insurance except those and those only which were "issued within the state of New York."

This policy was not "issued within the state of New York." It was issued at the office of the company in Hartford, Connecticut, and immediately became an effective and binding contract.

Cooper v. Pacific Mut. Ins. Co. 7 Nev. 116, 8 Am. Rep. 705.

By its own terms it is a Connecticut con-

tract, executed, delivered, and to be performed in that state.

3 Herman, Estoppel, 710; 7 Am. & Eng. Enc. Law, p. 7; *MacTier v. Frith*, 6 Wend 103; *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268; *Southern L. Ins. Co. v. Kempton*, 56 Ga. 339; *Yonge v. Equitable L. Assur. Co.* 80 Fed. Rep. 902; *Shattuck v. Mutual L. Ins. Co.* 4 Cliff. 598; *Cooper v. Pacific Mut. Ins. Co.* 7 Nev. 116, 8 Am. Rep. 705; *Lorscher v. Supreme Lodge K. of H.* 72 Mich. 316, 2 L. R. A. 206; *Hyde v. Goodnow*, 8 N. Y. 286; *Western v. Genesee Mut. Ins. Co.* 12 N. Y. 258; *Milhouse v. Johnson*, 21 N. Y. S. R. 882; 1 May, Ins. 3d ed. § 66; *Cooke, Life Ins.* 43; 1 Bacon, Ben. Soc. & Life Ins. new ed. 538; *Bliss, Life Ins.* § 370; 1 Biddle, Ins. § 149; *Niblack, Acc. Ins. & Ben. Soc.* 2d ed. §§ 138, 139.

The statute (Laws 1879, chap. 248), which provides for assignment by wives of policies of insurance for their benefit upon the lives of their husbands, covers by its terms none but policies "issued within the state of New York," and it should be strictly construed.

Brick v. Campbell, 123 N. Y. 843, 10 L. R. A. 259; *Miller v. Campbell*, 140 N. Y. 460; *Travelers' Ins. Co. v. Healey*, 86 Hun, 530.

Statutes conferring powers and rights upon married women are in derogation of common law, and are to be construed strictly.

23 Am. & Eng. Enc. Law, p. 389; *Bertles v. Nunan*, 92 N. Y. 157, 44 Am. Rep. 361; *Fitzgerald v. Quann*, 109 N. Y. 441.

The courts have strictly limited the scope of the act of 1878 to its precise wording.

Smillis v. Quinn, 90 N. Y. 497; *Brick v. Campbell*, 123 N. Y. 843, 10 L. R. A. 259; *Brummer v. Cohn*, 86 N. Y. 17, 40 Am. Rep. 503.

The laws of Connecticut have nothing to do with the assignment which was executed in this state.

Miller v. Campbell, 140 N. Y. 457.

The policy was created without any assignable quality.

Bacon, Ben. Soc. & Life Ins. § 295; *Unity Mut. L. Assur. Asso. v. Dugan*, 118 Mass. 219; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157; *Sterens v. Warren*, 101 Mass. 564; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Fitzpatrick v. Hartford Life & A. Ins. Co.* 56 Conn. 138.

Restrictions in policies as to transfers or assignments are always upheld.

New York L. Ins. Co. v. Flack, 56 Am. Dec. 749, note, citing 1 Phillips, Ins. §§ 107, 207; *Smith v. Saratoga County Mut. F. Ins. Co.* 1 Hill, 497, 3 Hill, 508; *Ferree v. Oxford F. & L. Ins. Co.* 67 Pa. 378, 5 Am. Rep. 436; *Waterhouse v. Gloucester F. Ins. Co.* 69 Me. 409; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; *Stolle v. Aetna F. & M. Ins. Co.* 10 W. Va. 546, 27 Am. Rep. 593; *Lynde v. Newark F. Ins. Co.* 139 Mass. 57.

Equitable considerations are of no moment.

Milhouse v. Johnson, 21 N. Y. S. R. 382

NOTE.—As to assignments of life insurance policies made payable to a wife, see a considerable number of cases in a note to *Johnson v. Alexander* 34 L. R. A.

(Ind.) 9 L. R. A. 663; also *Brick v. Campbell* (N. Y. 10 L. R. A. 259, and note.

Frank v. Mutual L. Ins. Co. 102 N. Y. 266, 55 Am. Rep. 807; *Drummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 508; *Brick v. Campbell*, 123 N. Y. 887, 10 L. R. A. 259; *Champlin v. Layton*, 18 Wend. 412, 31 Am. Dec. 882; *Wood v. Wood*, 94 N. Y. 248.

Mr. William Kernan, for respondent:

The assignment of the policy by the plaintiff, with the written consent of her husband, to the defendant, Myers, was valid, and the defendant, Myers, was entitled to the policy and is entitled to the proceeds thereof.

Laws 1879, chap. 248, § 1.

In the interpretation of statutes the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances.

People, Wood, v. Lacombe, 99 N. Y. 48; *People, Westchester F. Ins. Co., v. Davenport*, 91 N. Y. 574; *People, Commonwealth Ins. Co., v. Coleman*, 121 N. Y. 542.

The policy was issued within the meaning of the act of 1879, "within the state of New York, upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of the state."

So far as our courts have discussed and passed upon this question, they have sustained such assignment of policies issued by companies of other states and assigned in this state.

Wilson v. Lawrence, 13 Hun, 288, 76 N. Y. 585; *Brick v. Campbell*, 123 N. Y. 887, 10 L. R. A. 259; *Connecticut Mut. L. Ins. Co. v. Van Campen*, 32 N. Y. S. R. 1125; *Miller v. Campbell*, 140 N. Y. 457.

Our courts have not held that outside of the act of 1840 such policies are not assignable. They have held that their nonassignability was due to the act itself, that the designs of the act were to provide for widowhood, and the intention was that the wife could not frustrate that design by assignment.

Eadie v. Skimmon, 26 N. Y. 9, 82 Am. Dec. 895; *Living v. Domett*, 26 Hun, 151; *Wilson v. Lawrence*, 13 Hun, 288; *Barry v. Equitable L. Assur. Soc.* 59 N. Y. 587; *Drummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 508; *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 55 Am. Rep. 807.

If the plaintiff claims the benefit of the act of 1840 making the policy nonassignable, then she must submit to the act of 1879, which did away with the nonassignability of the policy under the act of 1840 and rendered it assignable.

The assignment of such policy by the wife was allowed by the law of Connecticut and is valid, and the defendant is entitled to the proceeds under such law.

Continental L. Ins. Co. v. Palmer, 42 Conn. 66, 19 Am. Rep. 580; *Connecticut Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 586; *Barry v. Equitable L. Assur. Soc.* 59 N. Y. 587.

The fact that the husband and wife had a child to whom the insurance was payable in case the wife did not survive the husband did not affect the validity of the assignment. The contingent interest of the child did not arise, and by the assignment the defendant Myers became vested with the whole interest in the policy.

Anderson v. Goldsmidt, 103 N. Y. 618.

84 L. R. A.

The provision in the policy "that no assignment of this policy shall be valid" does not affect the assignment to the defendant Myers. *Leinkauf v. Calman*, 110 N. Y. 50.

O'Brien, J., delivered the opinion of the court:

The plaintiff claimed to be entitled to the proceeds of a policy of insurance upon the life of her husband, and the learned trial judge sustained her claim. The general term reversed the judgment, having arrived at a different conclusion, upon what seems to us to be a very reasonable construction of a statute which is involved. On the 28th of October, 1880, the plaintiff's husband insured his life for her benefit in the Connecticut Mutual Life Insurance Company. The policy was issued at Hartford, and sent by mail to one of the agents of the company in this state, to be delivered to the husband, who had made the written application upon which it was issued. The insured died in January, 1890, with the policy in force. The plaintiff claimed the money payable under the policy amounting to \$2,000, as widow of the insured, and the payee named therein. The defendant also claimed it under a written assignment from the plaintiff, to which her husband, the deceased, had consented in writing executed in due form. Both parties claiming the money, the company refused to pay either, and the plaintiff brought the action against it alone. Subsequently it paid the money into court, and the assignee was made a party. The controversy is, therefore, between the widow and her assignee, and turns upon the validity of the assignment. It is quite true, as urged by the learned counsel for the plaintiff, that prior to the statutes (Laws 1873, chap. 821; Laws 1879, chap. 248) a married woman was incapable of assigning a policy of insurance for her benefit upon the life of her husband. *Miller v. Campbell*, 140 N. Y. 457; *Romains v. Chauncey*, 129 N. Y. 574, 14 L. R. A. 712; *Brick v. Campbell*, 122 N. Y. 848, 10 L. R. A. 259; *Eadie v. Skimmon*, 26 N. Y. 9, 82 Am. Dec. 895. But the obvious purpose of these statutes was to remove this disability, and it is not contended that the incapacity still exists in general, but only in particular cases. The learned counsel for the plaintiff has devoted a considerable part of his argument to establish the proposition that the policy was issued and delivered in the state of Connecticut, and not in this state, and therefore is a Connecticut contract. For the purposes of this case we will assume that he is correct in this contention. But we think that is not a material circumstance in the determination of the rights of the parties in a controversy between them with respect to the right to receive the money. Such a policy is assignable by the wife under the laws of Connecticut. *Continental L. Ins. Co. v. Palmer*, 42 Conn. 66, 19 Am. Rep. 580; *Connecticut Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 586; *Barry v. Equitable L. Assur. Soc.* 59 N. Y. 587. The law of the place where the contract is made is sometimes important when questions concerning its validity or construction are involved. But in this case no such questions arise. The sole question is whether it was transferable, and whether the defendant, by the assignment, has acquired

the right and title to the proceeds. Nor is there any question made with respect to the sufficiency of the instrument of assignment, in form and substance, to pass the beneficial interest, if, by the laws of this state, the policy could be transferred under any circumstances. In whatever state or jurisdiction the obligation had its legal origin, it was held within this state as property, and was subject, in all respects, to the laws of this state. The plaintiff's contention must rest entirely upon the proposition that by the laws of this state she was incapable of making a valid assignment, and this we understand to be the ground upon which she relies to sustain this appeal. The act of 1879 (chap. 248) is entitled "An Act for the Relief of Policy Holders in Life Insurance Companies," and the 1st section reads as follows: "All policies of insurance heretofore or hereafter issued within the state of New York upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of this state, shall be, from and after the passage of this act, assignable by said wife with the written consent of her husband; or, in case of her death, by her legal representatives, with the written consent of her husband, to any person whomsoever, or be surrendered to the company issuing such policy, with the written consent of the husband." That this statute has removed the disabilities of married women to assign insurance policies upon the lives of their husbands, at least to some extent, is not, and of course cannot be, denied. But the learned counsel for the plaintiff insists that it applies only to policies "issued within the state of New York;" that is to say, that it extends no further than to enable them to assign policies issued by our domestic companies; and that, since the policy in question was issued by a foreign company, and in another state, the disability to assign still exists, and existed when the plaintiff made the assignment in question. We think that such a construction of the statute is altogether too narrow. It rests entirely upon a close adherence to the literal meaning of words, and fails to take into consideration the policy and general purpose of the statute. Of course, it was passed for the purpose, as indicated by the title, of relieving married women from the disability referred to. But what good reason is there for saying that the legislature intended, in a case where two policies were issued upon the husband's life for the benefit of the wife, one by a foreign and the other by a domestic company, that the latter was to be transferable and the former not? At the time of the passage of the act probably one half the policies for the benefit of married women within the state had been issued by foreign companies, and they were being constantly issued in the same proportion. It is difficult to suppose any practical or rational purpose that the legislature could have had in view if it intended to remove the disability to assign as to one half these policies and retain it as to the other half. Nor can the purpose of discriminating against foreign companies and favoring our own be imputed to the lawmaking power with any more reason. It must be assumed that the intention of the statute was to make obligations of this character held in this state, wherever

created, assignable. It is scarcely possible that the question as to which side of the boundary line of the state the policy was made or delivered could have been present to the legislative mind.

It is said that statutes changing the common law with respect to the rights and disabilities of married women must be strictly construed. That, of course, is a well-settled principle, but is hardly applicable here. That the common law has been changed by the statute, there is no dispute, and can be none. It is admitted that the intention was to remove the incapacity of a married woman to assign an insurance policy issued for her benefit on the husband's life. What is claimed is that the power thus conferred is not generally applicable to all such policies, but special, depending entirely on the place where they were issued,—a circumstance that cannot be supposed to have had any influence upon the legislation or the choice of language for the expression of the thought in the legislative mind. The rule does not require courts in any case to seize upon some word or expression in a statute, and, by giving to them a narrow or literal meaning, defeat the general purpose and manifest policy intended to be promoted. It being conceded that the intention was to enable a married woman to transfer her interest in certain property, we are not required to resort to strict construction for the purpose of limiting the power to obligations created in this state, when we can see that its convenience and necessity are equally applicable to contracts made elsewhere. In such a case we should be guided by the general and well-settled principles for the construction of statutes. They were well stated in the case of *People, Wood, v. Lacombe*, 99 N. Y. 43, in this language: "In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers. These general rules are upheld by numerous authorities." *People, Westchester F. Ins. Co., v. Davenport*, 91 N. Y. 574; *People, Commonwealth Ins. Co., v. Coleman*, 121 N. Y. 542; *Smith v. People*, 47 N. Y. 380. The stipulations in the policy against an assignment do not affect the question as to the defendant's rights. Whatever force these clauses had, the company alone can take advantage of them, and, as it has declined to, and paid the money into court, they do not concern the plaintiff. We think that the assignment of the policy to the

defendant is valid under the act of 1879, and he is entitled to the proceeds paid into court.

The judgment should be affirmed, and judg-

ment absolute rendered against the plaintiff, with costs.

All concur, except Martin, J., not sitting.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Resp't*,

v.

John R. HOWARD, *Appt.*

(.....Minn.....)

***1. Neither a misnomer of a crime, nor the omission to give it any name, in the caption of an indictment, affects the validity of the indictment.**

2. An indictment for a statutory offense is sufficient if it alleges the commission of the crime in the words of the statute, if by that means all that is essential to constitute the offense is directly charged. But if the statute does not set forth all of the elements necessary to constitute the offense intended to be punished, an indictment which simply follows the words of the statute is not sufficient. It must in such case allege the particular facts necessary to bring the case within the intent and meaning of the statute.

3. An indictment for the crime of offering a bribe to a juror, under the provisions of Gen. Stat. 1894, § 6348, must directly allege that the person to whom the bribe was offered was a juror, that the defendant knew it, also what was offered, naming it, and the fact that it was of value, and that it was offered with intent to influence the action of the juror as such.

4. Held, that the indictment in this case, which is for offering a bribe to a juror, is not sufficient because it does not directly allege the *scienter*, or any fact showing that the thing offered to the juror was of value.

(November 23, 1894.)

A PPEAL by defendant from an order of the District Court for Wright County overruling his demurrer to an indictment charging him with bribery. *Reversed.*

The facts are stated in the opinion.

Messrs. Rome G. Brown and W. E. Culkin, for appellant:

The indictment is so drawn that on its face it shows that there were no facts or circumstances constituting the crime of bribery of a judicial officer, or bribery of any kind, whereby the indictment is contradictory and false upon its face and insufficient.

It is expressly provided by statute: "The indictment shall be direct and certain as it regards: (1) the party charged; (2) the offense charged; (3) the particular circumstances of

the offense charged, when they are necessary to constitute a complete offense."

Minn. Stat. 1894, § 7241.

Bribery is only committed where the thing offered as a bribe is accepted by the person to whom it is offered.

2 Bishop, Crim. L. § 85; *State v. Walls*, 54 Ind. 561.

An indictment which charges defendant with a criminal offense and fails to set out the acts, facts, and circumstances constituting such offense, or sets out acts, facts, and circumstances consistent with his innocence of the offense charged, is bad.

State v. McIntyre, 19 Minn. 98.

The official character and authority of the person to whom the bribe was offered is not sufficiently stated.

State v. Freeman, 15 Vt. 732; *State v. Brown*, 12 Minn. 490; *State v. Farrington*, 59 Minn. 149, 28 L. R. A. 895; *State v. Crooker*, 95 Mo. 889; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482; *State v. Burt*, 25 Vt. 378.

To hold this indictment good (to hold that it contains a definite and certain statement of the following facts which are necessary to be true in order to make the act complained of a public offense) it must state:

(1) That Ernest Otto was then and there a regularly impaneled and authorized juror.

(2) That he was such a juror of said court and of the said term of said court.

(3) That he was duly impaneled and was sitting as a part of said court as one of the triors of said cases, and that as such juror the said cases were being tried by and before the said twelve jurors of which he was one.

(4) And that, as such juror so impaneled and sitting as a trior of said cases, he had or was to have under the authority of law some action, vote, opinion, or decision in the determination of the facts and verdict in said cases.

The facts and circumstances connected with the alleged offer are not stated.

Brown v. State, 13 Tex. App. 858.

The statement as to what was caused to be offered and was offered to Otto is insufficient.

Designating the thing offered as a bribe is an insufficient statement of the thing which is offered.

ibid.; *People v. Ward*, 110 Cal. 369.

The fact of value must be shown on the face of the indictment by proper allegations as to the character of the thing offered.

NOTE.—The decision in the above case as to the insufficiency of the averment of knowledge as to the fact that the person to whom a bribe was offered was a juror, and that the money offered him was of value, is one that has few direct precedents. A 84 L. R. A.

considerable number of decisions on the form of an indictment for a statutory offense are found in a note to Com., Allegheny County, v. Weiss (Pa.), 11 L. R. A. 590.

The question of value is an essential element of the crime.

Bishop, Crim. L. § 85; *Baker v. Rusk*, 15 Q. B. 870; *Davy v. Baker*, 4 Burr. 2471; 2 Bishop, Crim. Proc. § 126.

The general principle in regard to pleadings supports the rule which we contend for.

People v. Ward, 110 Cal. 369; *State v. Hinckley*, 4 Minn. 845; *State v. Tilney*, 38 Kan. 714; *Barton v. State*, 29 Ark. 68; *State v. McAnulty*, 26 Kan. 588; *State v. Anderson*, 25 Minn. 66, 33 Am. Rep. 455; *Boyle v. State*, 37 Tex. 359; *United States v. Bornemann*, 36 Fed. Rep. 257; *Williams v. State*, 5 Tex. App. 116; *Com. v. McDowell*, 1 Browne (Pa.) 360; *Markle v. State*, 3 Ind. 535.

Knowledge on the part of those offering the bribe is not sufficiently averred.

In bribery cases knowledge is an essential fact which must be expressly alleged and proved.

Whart. Crim. Pl. & Pr. § 164; Bishop, Crim. L. § 85; 2 Bishop, Crim. Proc. § 126; Bishop, Directions & Forms, § 246; 2 Whart. Precedents of Indictments & Pleas, 1012, 1013.

Both the knowledge and intent should be specifically stated.

United States v. Carll, 105 U. S. 612, 26 L. ed. 1135; *Pettibone v. United States*, 148 U. S. 202, 37 L. ed. 422; *Birney v. State*, 8 Ohio, 230; *Com. v. Stout*, 7 B. Mon. 247; *Anderson v. State*, 7 Ohio, pt. 2, p. 250; *State v. McIntyre*, 19 Minn. 95; *State v. Maloney*, 12 R. I. 251; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482; *State v. Carpenter*, 54 Vt. 551; *Com. v. Israel*, 4 Leigh, 675; *Horan v. State*, 7 Tex. App. 183; *State v. Hilton*, 26 Mo. 199; *Coyne v. People*, 124 Ill. 17; *United States v. O'Neill*, 3 Sawy. 481; *Com. v. Kirby*, 2 Cush. 577; *Com. v. Boynton*, 12 Cush. 499; *Schmidt v. State*, 78 Ind. 41; 1 Whart. Crim. L. 8th ed. § 648.

In all offenses touching the official capacity or authority of the person upon or with whom the offense is committed knowledge on the part of the accused of that capacity and authority is an essential element of the offense. Knowledge must be alleged with directness and certainty. Courts will not speculate as to whether some other allegation—as that of intent or purpose—implies the element of knowledge.

State v. Cody, recently decided by this court, 67 N. W. 798.

Where a statutory offense is defined in general statutory terms it is not sufficient in every case to allege the facts and circumstances of an offense merely in the terms of the statute. Where the statutory definition is in general terms the statement of the facts and circumstances of the particular offense must be stated in particular terms in accordance with the particular facts in the case, and where any particular ingredient is under the common law or under the rule of law applicable to that offense an essential part of such an offense, the statement of the particular facts and circumstances must go beyond the words of the statute and allege such fact particularly.

United States v. Carll, 105 U. S. 611, 26 L. ed. 1135; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819; *Com. v. Clifford*, 8 Cush. 215; *Com. v. Bean*, 11 Cush. 414, 14 Gray, 52; *Com. v. Pitburn*, 34 L. R. A.

119 Mass. 297; *Reans v. United States* (No. 1), 153 U. S. 584, 38 L. ed. 830; *United States v. Cook*, 84 U. S. 17 Wall. 164, 21 L. ed. 588; *United States v. Bittinger* (Mo.) 15 Am. L. Reg. N. S. 49; *Pettibone v. United States*, 148 U. S. 202, 37 L. ed. 422; *Birney v. State*, 8 Ohio, 238; *Com. v. Stout*, 7 B. Mon. 248; *State v. Krueger* (Mo.) 35 S. W. 604; *State v. McIntyre*, 19 Minn. 95; *State v. Farrington*, 59 Minn. 149, 28 L. R. A. 395; *Sarah v. State*, 28 Miss. 267, 61 Am. Dec. 544; *Com. v. Barrett*, 108 Mass. 302; 1 Bishop, Crim. Proc. 624; *Schmidt v. State*, 78 Ind. 41; *Ender v. People*, 20 Mich. 233.

Messrs. H. W. Childs, George B. Edgerton, and J. T. Alley, for respondent:

The name given to the crime with which the pleader sought to charge the defendant in the indictment is an irregularity and not fatal. The charging part of the indictment must be looked to to determine the character of the offense.

State v. Jarvis, 18 Or. 360; *People v. Cuddehi*, 54 Cal. 53; *People v. Phipps*, 39 Cal. 331; *State v. Coon*, 18 Minn. 518; *State v. Munch*, 22 Minn. 70; *State v. Garvey*, 11 Minn. 154; *State v. Eno*, 8 Minn. 220; *State v. Hinckley*, 4 Minn. 845.

That an erroneous name was given to the crime by the grand jury is immaterial if in the charging part which follows the appellant is charged with the commission of a crime. The indictment is not one for an attempt to commit a crime but for a completed offense.

State v. McGinnis, 30 Minn. 52; 2 Bishop, Crim. L. § 88; *State v. Gray*, 29 Minn. 142; 1 Bishop, Crim. Proc. § 436.

Under the allegations in the indictment the presumption is that the jury was duly and regularly impaneled and sworn.

Clague v. Hodgson, 16 Minn. 829; *Leyde v. Martin*, Id. 88; *State v. Ryan*, 13 Minn. 370.

It is stated in this indictment that a bribe of money of value was offered, and this is in the statutory language, and is all that is necessary.

2 Bishop, Crim. Proc. § 75; *Com. v. Chapman*, 1 Va. Cas. 138; 1 Bishop, Crim. Proc. §§ 488, 579; *State v. Ellis*, 83 N. J. L. 103; *State v. Perley*, 86 Me. 427; *People v. Ward*, 110 Cal. 369.

Money being the measure of value, the allegation in the indictment is sufficient.

State v. Brown, 118 N. C. 645.

Start, Ch. J., delivered the opinion of the court:

The defendant demurred to the indictment returned against him by the grand jury of the county of Wright and filed in the district court of such county on the 16th day of June, 1896. The court overruled the demurrer and certified the case to this court. Omitting the title the indictment is in these words:

"John R. Howard is accused by the grand jury of the county of Wright and state of Minnesota, by this indictment, of the crime of bribery of a judicial officer committed as follows:

"On the 9th day of December, A. D. 1895, there was pending for trial in the district court in and for the county of Wright and state of Minnesota, two certain civil cases and actions entitled respectively as follows, to wit: Mat-

threw Czech, plaintiff, against the Great Northern Railway Company, defendant, and Susie Czech, plaintiff, against the Great Northern Railway Company, defendant, and at said time in said county of Wright, the regular general December, 1895 term of said court was in session, and each and both of said civil cases and actions were regularly upon the said term calendar for trial, and at said time and place and in said court, each and both of said cases and actions were upon trial together before one of the regular judges of said court and a jury of twelve men, and the name of one of the said jurymen of the said twelve jurymen was then and there one Ernest Otto. That the trial of said cases and actions before said judge and jury began December the 5th, A. D. 1895, and was continued and held during and over December the 9th, 1895, and until December the 10th, A. D. 1895, and that in the matter of the trial of the said cases and actions the said court had full and complete jurisdiction.

"That the said John R. Howard on the said 9th day of December, A. D. 1895, at the village of Buffalo, in the said county of Wright and state of Minnesota, did wrongfully, unlawfully, and feloniously hire, procure, and cause one O. L. Billings to offer a bribe and money of value to the said jurymen, Ernest Otto, then and there serving on the said jury as aforesaid, with the intent on the part of him, the said John R. Howard, and him, the said O. L. Billings, to influence the action, vote, opinion, and decision of him, the said jurymen, Ernest Otto, as a jurymen in said cases and actions, and to cause him, the said jurymen, Ernest Otto, to hang the said jury, and regardless of his, the said Ernest Otto's, convictions in the matters involved in said cases and actions, prevent a verdict being rendered in said cases and actions against said defendant, and that the said O. L. Billings did then and there unlawfully and feloniously offer the said bribe and money to the said jurymen, Ernest Otto, for the purpose aforesaid and with the intent aforesaid, solely by reason of his being hired, procured, and caused to do so by the said John R. Howard, as aforesaid, the said John R. Howard being then and there in the employ of the said defendant in the cases and actions, and at the said time and place engaged in assisting the said defendant in and about the trial of said cases and actions, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Minnesota."

The section of the Penal Code upon which the indictment is based reads thus:—

"*Bribery of a Judicial Officer.* A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a judicial officer, juror, referee, arbitrator, appraiser, or assessor, or any person authorized by law to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion, or decision thereupon, is punishable by imprisonment in the state prison for not more than ten years or by fine of not more than \$5,000, or both."

Penal Code, § 64, Gen. Stat. 1894, § 6848.

1. The crime attempted to be charged in the 34 L. R. A.

indictment is "offering a bribe to a juror," or, strictly speaking, causing a bribe to be offered to a juror. In the caption of the indictment the crime is designated as "bribery of a judicial officer." This discrepancy is the first objection to the indictment urged by the defendant. An error in designating the name of the crime in the caption of the indictment is an irregularity only. The charging part of the indictment must be alone considered in determining whether the indictment charges a public offense. If it states facts showing the commission of a crime by the defendant, the law determines its name and nature, and neither a misnomer of the crime nor the omission to give it a name affects the validity of the indictment. *State v. Hinckley*, 4 Minn. 345; *State v. Garvey*, 11 Minn. 155; *State v. Coon*, 18 Minn. 518; *State v. Munch*, 22 Minn. 67.

It is further urged that the indictment is insufficient because it does not charge that the person to whom the bribe was offered, was a juror. The allegations of the indictment in this respect are sufficient.

2. Two other objections to the indictment are assigned in support of the demurrer meriting more serious consideration. They are (a) that the indictment does not contain any direct and certain allegation of fact as to the amount, kind, or value of the thing offered as a bribe; (b) that it is not alleged that the defendant knew that the person to whom the offer was made was then a juror. It is claimed by the state that the indictment substantially follows the statute in alleging what was offered to the juror, and that it is sufficient in all other respects when tested by the requirements of the statute, which, so far as here material, are: The indictment shall be direct and certain as regards the offense charged and the particular circumstances thereof when they are necessary to constitute a complete offense. The indictment is sufficient if it can be understood therefrom that the act charged as the offense is clearly set forth in ordinary and concise language, and that the act constituting the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

No indictment is insufficient by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Gen. Stat. 1894, §§ 7241, 7247, 7248.

These are wholesome and sensible provisions which should be liberally construed and indictments sustained where the objection is as to matters of form and not of substance. But they were not intended to encourage laxity in criminal pleading in matters of substance, but simply to cure "a disease of the law" resulting from the over-nicety of courts and their lack of practical sense in giving effect to formal defects in indictments. The statute dispenses with mere formality and technicality, but the requirement that the indictment must be direct and certain as regards the offense and the particular circumstances thereof is imperative. *State v. Brown*, 12 Minn. 490; *State v. McIntyre*, 19 Minn. 93.

The rule that the charge must be laid positively, and not inferentially by way of recital merely, is not abrogated by the statute. It is

true as claimed by the state, that an indictment may charge the commission of a statutory offense in the language of the statute without greater particularity when by that means all that is essential to constitute the offense is stated fully and directly.

State v. Comfort, 23 Minn. 271; *State v. Abriah*, 41 Minn. 41.

But if the statute does not set forth all of the elements necessary to constitute the offense intended to be punished, an indictment which simply follows the words of the statute is not sufficient. It must in such case go further and allege with certainty all of the particular facts necessary to bring the case within the intent and meaning of the statute. If the statute simply names the offense and provides for its punishment, or defines a crime by its legal result, an indictment which simply follows the words of the statute is not sufficient. It must go further and state directly the facts whence the result comes.

1 Bishop, Crim. Proc. §§ 626-628; *Com. v. Bean*, 11 Cush. 414.

It is apparent from the reading of the statute upon which the indictment in this case is based, that it defines the crime of bribing or offering a bribe to a juror by its legal result, and does not contain all of the essential elements of such crime. The essential elements of the crime of offering a bribe to a juror or judicial officer, as necessarily inferred from the statute, include knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered was something of value, and that it was offered with the intent to influence his official action. It is not sufficient to follow the words of the statute and allege that the defendant offered a bribe to the juror, naming him, with intent (following the words of the statute), or offered him property of value or money of value with such intent. On the contrary it is necessary to allege directly, and not by way of recital or argument, the official character or capacity of the person to whom the offer was made, knowledge that he was such juror or officer by the defendant, the name of the thing offered (if known), the fact that it was of value, and that it was offered with intent to influence the official action of such person. 2 Bishop, Crim. Proc. § 126; *People v. Ward*, 110 Cal. 369; *United States v. Kessel*, 62 Fed. Rep. 57; *Brown v. State*, 18 Tex. App. 358; *United States v. O'Neill*, 2 Sawy. 481; *Com. v. Boynton*, 19 Cush. 499; *Schmidt v. State*, 78 Ind. 41; *State v. Carpenter*, 54 Vt. 551; *Pettibone v. United States*, 148 U. S. 202, 37 L. ed. 422.

Not all of the cases cited are bribery cases, but they all show the necessity of alleging the *scienter* in similar cases, although the statute does not expressly make it an element of the offense.

The forms of indictments for bribery or offering a bribe, of or to judicial or public officers or jurors, from Chitty to Bishop, contain direct allegations as to the knowledge of the defendant in the premises, the thing given or offered and its value and the intent with which the act was done. 3 Chitty, Crim. L. 696; Bishop, Directions & Forms, § 247.

The usual form of the allegation of knowledge is that the defendant, "well knowing the premises" or some equivalent, and as to the particular thing (if it was money) given or offered, the allegation is either "a large sum of money to wit, the sum of \$5" as the case may be, or "the sum of \$5 in money." The latter seems to be the better form. In every case of bribery or offering a bribe to which we have been referred, or which we have found, the indictment contained substantially both of these allegations as to knowledge of the defendant and the thing given or offered, save two. The exceptions are the cases of *Com. v. Chapman*, 1 Va. Cas. 188, and *State v. Ribusch*, 33 Mo. 276. In the first case the sufficiency of the indictment was not involved. In the second case cited the indictment was for an attempt to induce by bribery a witness to absent himself from the trial of a cause. It contained an allegation of knowledge on the part of the defendant that the person whom he attempted to bribe was a witness, but it contained no allegations as to the facts constituting the attempt, or as to the money, property, or thing offered as a bribe. The indictment in this respect followed the words of the statute, and it was held to be sufficient on the ground that the crime consisted of the attempt, and the kind or amount of the bribe need not be alleged. The case turned on the construction of the statute and is not here in point. Tested by the rules of law which we have stated, it is apparent that the indictment in question is insufficient as to the allegations of knowledge on the part of the defendant and as to the particular thing offered to the juror.

As to the first it is urged that the allegations in the indictment to the effect that the defendant was employed in the trial of the cases in which the person to whom the offer was made was a juror, and that he caused the offer to be made with intent to influence his action as such juror, is a sufficient allegation of knowledge on the part of the defendant. But both knowledge and intent are essential elements of the crime, and both should be directly charged and not argumentatively or by way of recital. *State v. Cody* (Minn.) 67 N. W. 798.

It is not necessary in this case to allege a description of the money offered to the juror, or that a description thereof was unknown, or that it was current money of the United States, but it was necessary to allege directly some fact, not a conclusion or a result, showing that the money offered was of value. As already stated, the simple allegation that the offer was a given sum of money is all that is necessary. From such an allegation of fact the court can draw the conclusion that the thing offered was of value. A variance between the sum named in the indictment and that proved on the trial would not be material.

We are not to be understood as holding that this indictment would be held insufficient if the objections thereto were made for the first time after verdict. In such case we would be inclined to resort to all permissible intendments to sustain it.

The order overruling the demurrer must be reversed, and the case remanded to the District Court, with direction to enter an order sustain-

ing the demurrer and resubmitting the case to another grand jury or discharging the defendant, as the court shall be advised.

Canty, J., concurring:

I am of the opinion that the indictment suf-

ficiently charges that the accused knew Otis was a juror in the particular cases on trial, and sufficiently alleges the intent of the accused. In other respects I concur in the foregoing opinion.

MICHIGAN SUPREME COURT.

John MITCHELL

v.

Charles PRANGE et al., *Piffs. in Err.*

(.....Mich.....)

1. A verdict for plaintiff in an action to recover for injuries caused by negligence cannot be found upon grounds not alleged in the declaration.
2. A provision in a contract for excavating a sewer trench, that blasts are to be carefully covered to effectually prevent injury to persons or property, refers to injury from flying debris, and not from noise of the explosion.
3. Failure to give warning of an intended blast in an excavation in which blasting had been going on for several weeks will not render the person discharging the blast liable for injury to a blacksmith injured by the starting, in consequence of the noise, of a horse which he was shoeing at a place several hundred feet distant from the excavation.

(July 8, 1898.)

ERROR to the Superior Court of Grand Rapids to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Birney Hoyt, for plaintiffs in error:

A person doing work in a public place for the benefit of the public, under legislative and municipal authority, cannot be held for negligence if the work is carefully done, although the work is dangerous in its character.

Booth v. Rome, W. & O. T. R. Co. 140 N. Y. 267, 24 L. R. A. 105; *Benner v. Atlantic Dredging Co.* 184 N. Y. 156, 17 L. R. A. 220; *Murphy v. Lovell*, 128 Mass. 396, 35 Am. Rep. 381; *Dodge v. Essex County Comrs.* 8 Met. 380; *Tiedeman, Mun. Corp.* 329, and cases cited.

In such cases the damage is termed consequential.

Detroit v. Beckman, 84 Mich. 125, 22 Am. Rep. 507; *Pontiac v. Carter*, 82 Mich. 164; *Larned v. Briscoe*, 62 Mich. 393.

The defendants, under the authority shown in this case, had as much right to proceed with the blasting as a railroad company has to run its locomotives and trains along its road. Such company is not bound to give special notice to every person in houses and shops

near its line when its trains are coming or when its whistles are to be sounded or bells rung; and are liable for injury caused by sounding its whistles only when sounded unnecessarily and with actual knowledge that there is imminent danger.

Ochs tree v. Chicago & N. W. R. Co. (Iowa) 62 N. W. 7; *Heininger v. Great Northern R. Co.* 59 Minn. 458; *Barron v. Chicago, St. P. M. & O. R. Co.* 89 Wis. 79; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L. R. A. 154; *Id.* 58 Mich. 195; *Omaha & R. V. R. Co. v. Clarke*, 85 Neb. 867, 23 L. R. A. 504.

The blasting was not the proximate cause of the injury which plaintiff received.

A person cannot recover for the conjunction of defendant's fault with circumstances of an extraordinary nature and which could not have been foreseen.

Allegheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649; *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 658; *Phillips v. Dickerson*, 83 Ill. 11, 28 Am. Rep. 607; *Benner v. Canfield*, 86 Minn. 90.

Mr. Charles A. Watt, with **Mr. Peter Doran**, for defendant in error:

The defendants were engaged in firing large and heavy blasts of dynamite, causing loud and sudden detonations, in one of the most populous and thickly settled streets in the city of Grand Rapids. The noise occasioned by these blasts was an actionable nuisance *per se*, and any damage produced by such noise would render the person causing it liable without any showing of negligence or want of care on his part whatever.

Bishop, Non-Cont. L. §§ 411, 412, 416.

The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury.

Booth v. Rome, W. & O. T. R. Co. 140 N. Y. 267, 24 L. R. A. 105.

There is a question of fact raised on this record whether this blast was unnecessarily loud, and whether defendants have taken the proper precautions to reduce the sound of the blast to the proper extent. This question should properly be left to the jury.

Beauchamp v. Saginaw Min. Co. 50 Mich. 163, 45 Am. Rep. 80.

The accident must be caused by the negli-

NOTE.—As to the duty of those engaged in blasting with respect to the safety of others, see *Blackwell v. Moorman* (N. C.) 17 L. R. A. 729, 84 L. R. A.

As to injuries to land and buildings from blasting, see note to *Benner v. Atlantic Dredging Co.* (N. Y.) 17 L. R. A. 220.

gent acts of the defendants, but it is not necessary that the consequences of the negligent acts of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or defendants should be able to foresee the consequences of the negligence of the defendants, in order to make the defendants liable.

Billman v. Indianapolis, O. & L. R. Co. 76 Ind. 175, 40 Am. Rep. 230; *La Duke v. Elzeter Twp.* 97 Mich. 450; *Bleil v. Detroit Street R. Co.* 98 Mich. 228; *Noble v. St. Joseph & B. Harbor R. Co.* 99 Mich. 250; *Bishop, Non-Cont. L.* §§ 450, 451, 456.

It is a question for the jury to say whether the cause is proximate or not.

Bishop, Non-Cont. L. § 455.

The city cannot authorize negligence in the performance of its public contracts any more than it can authorize the commission of a crime.

Kendrick v. Towle, 60 Mich. 367.

Hooker, J., delivered the opinion of the court:

The plaintiff was injured by the kick of a horse which he was shoeing, and recovered a judgment against the defendants, who were engaged in excavating a trench for a sewer, some hundreds of feet distant from his shop. The plaintiff's claim is that the horse was frightened by an explosion in the trench, caused by the defendants for the purpose of excavating rock. Counsel for the plaintiff admitted upon the trial that blasting was necessary. The first count of the declaration alleges the explosion as wrongful; the second alleges that it was the duty of the defendants to give notice, by ringing a bell or otherwise, to people in the vicinity, that a blast was to be made, which duty was neglected. Upon the trial it was claimed that defendant's negligence consisted in using an excessive charge, in failing to properly cover it, and in failing to give the proper notice of the intended blast; and the case was allowed to go to the jury upon such theories. It was improper to allow the jury to find a verdict upon the ground that the charge was excessive, or that it was not properly covered, as neither was alleged in the declaration. Furthermore, there was no evidence that the charge was an improper one, or that any usual method of covering would have obviated the danger. It was urged that filling the trench with dirt would have lessened the noise, but it was not shown to be a proper or usual or reasonable thing to do, to excavate and refill a trench each time they put in and explode a blast. The specifications under which the work was done, required that: "When rock is found in the bottom of a

trench, it is to be taken out to a depth of 6 inches below the bottom of the sewer, and replaced by a strong gravel, well rammed. Ledge rock that cannot be removed by pick or bar, will be paid for as extra work at a price named in the proposal for such excavation. Should the contractor fail to name a price for such rock excavation, no extra allowance will be made therefor. The estimate of the quantity of rock excavated will be based upon the bottom width of trench required for laying the different dimensions of sewers, as used in the original estimate of quantity of excavation, with side slopes of $\frac{1}{2}$ of a foot horizontal to 1 foot vertical. In all cases where blasting is necessary, the blast is to be carefully covered with brush or timber sufficient to effectually prevent injury to persons or property." The provision for covering was evidently to protect persons and property from injury by fragments which might otherwise be thrown from the trench, and it was error to instruct the jury as follows: "The contract with the city requires that in all cases where blasting is necessary that the blast is to be carefully covered with brush or timber, sufficiently to effectually prevent injury to persons or property. Now, was this blast so carefully covered with brush or timber as to sufficiently and effectually prevent injury to persons or property; or, in other words, did these defendants use all the precautions, notices, and warnings, and cover that blast of dynamite in such a manner, as prudent men ought, under like circumstances, to have exercised?—is a question for you to determine." Nor do we think the defendants negligent in not taking measures to apprise the plaintiff of the intended blast. It appears that they did take precautions to warn passers-by within a reasonable distance, but it would hardly be reasonable to expect them to give notice to everyone who resided or worked within a radius of 500 feet, especially after the business had been going on to the knowledge of such persons for several weeks. The plaintiff knew that blasting was a common occurrence, and to be expected at any minute. This did not deter him from attempting to shoe the horse. He did not know when the blast was coming, and, if the defendants knew that he had a blacksmith shop in the vicinity, they did not know that he would have the foot of a spirited horse in his lap. Both were engaged in lawful acts, and upon this record the injury appears to be a casualty, which is not ascribable to the defendants' neglect of duty.

Judgment reversed, and a new trial ordered.

Long, Ch. J., did not sit. The other Justices concurred.

MINNESOTA SUPREME COURT.

City of ST. PAUL, *Resp't.*,

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Appt.*

(.....Minn.....)

***1. Evidence held sufficient to justify a finding that in 1879 there was such a recognition on the part of defendant's grantor (St. Paul, M. & M. R. Co.) of the rights of the public and of the city in the premises in controversy as to interrupt the continuity of its adverse claim; and hence that defendant had not acquired title by twenty years' adverse possession before the commencement of this action.**

2. City Ordinance No. 286, passed April 21, 1882, construed as a mere revocable license to defendant to erect certain structures on the premises referred to.

3. Special Laws 1872, chap. 93, construed as granting the defendant the right, as against the public and the city, to occupy the premises in controversy (a part of the public levee) with its railroad tracks to the extent necessary to make and maintain a continuous connection through the city between its two lines of railway formerly known, respectively, as the St. Paul & Chicago Railroad and the Minnesota Central Railroad.

On Rehearing.

4. A municipal corporation has no proprietary rights in the streets, levees, or other public grounds within its territorial limits. Whatever rights it has in them it holds merely in trust for the public.

5. A municipality has no authority over such public grounds, except such as is delegated to it by the legislature. The "care, supervision, and control" of all public highways, streets, etc., within the city limits, given to the common council of the city of St. Paul by the city charter (Special Laws 1874, chap. 1, subchap. 4, § 7), did not authorize the council to grant to a railway company the right to construct and maintain a freight house on a "public levee" for its own exclusive use.

6. Section 11 of the same subchapter, providing that "the common council shall have power and authority . . . to grant the right of way upon, over, and through any of the public streets, highways, alleys, public grounds, or levees of said city, to any steam or horse railway company or corporation, upon such limitations or conditions as they may prescribe by ordinance," only authorized the common council to grant the right of trackage; that is, the right to construct and operate railroad tracks on and over the public grounds within the city, but not to occupy and use such grounds as a site for depots, freight houses, or other buildings.

7. Gen. Stat. 1878, chap. 34, § 47 (Gen. Stat. 1894, § 2042), provides that "if it becomes

*Headnotes by MITCHELL, J.

NOTE.—That the state is a trustee for the people in respect to the title of the soil under navigable waters, is declared in *Miller v. Mendenhall* (Minn.) 8 L. R. A. 89, and other cases cited in note thereto.

That city waterworks are held in trust for the people, see *Huron Waterworks Co. v. Huron* (S. D.) 20 L. R. A. 848.

34 L. R. A.

necessary in the location of any part of a railroad to occupy any road, street, alley, or public way or any part thereof, it shall be competent for the municipal . . . or other public authorities owning or having charge thereof and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied." *Heid*, that this only authorizes municipal or other public authorities to agree or arrange with a railroad company as to the manner or terms upon which it may occupy public streets or ways with its railroad tracks, but does not authorize them to grant to the railroad company the right to occupy them as sites for its depots, freight houses, or other like structures.

8. Ordinance No. 286 of the city of St. Paul, by which the common council assumed to grant to the defendant the right to occupy a part of the public levee as a site for a permanent freight house, was invalid because in excess of the powers of the common council.

On Second Rehearing.

9. Where land has been dedicated to a specific, limited, and definite public use, the legislature has no power to destroy the trust, or divert the property to any other purpose inconsistent with the particular use to which it was dedicated. The state holds such property, not in a proprietary, but in a sovereign, capacity, in trust for the use to which it was dedicated. While much must be left to the discretion of the legislature as to the best manner of regulating that use, yet its power of control over such property must be exercised in conformity with the purpose of the dedication.

10. The erection of a warehouse on land dedicated to public use as a levee is not necessarily a misuse of the property, as such structures may be in aid of the use for which it was dedicated.

11. The legislature may also grant, or authorize the granting, to any person or corporation having traffic with craft navigating the contiguous waters, the exclusive use of so much of a public levee as is reasonably necessary for his or its business with such craft, provided, and so long as, it does not unreasonably interfere with the use of the levee by the public. But to give a public levee, or any part of it, to a railway company, as a permanent site for its general freight warehouse, without reference to its traffic with craft navigating the contiguous waters, would constitute a diversion of the property to a use foreign to, and inconsistent with, that to which it was dedicated.

12. While the language of Gen. Stat. 1894, § 2680, is broad enough to authorize a city to divert lands held in trust for a specific and particular use to another and inconsistent one, and while the language of Ordinance 286 of the city of St. Paul may be equally broad, it does not follow that either is void *in toto*.

13. The operation of the statute may be restricted by construction to a grant of

That a wharf is owned by a city in trust for the public, see *Roberts v. Louisville* (Ky.) 13 L. R. A. 844.

That a street is held in trust for the public, see *Schopp v. St. Louis* (Mo.) 20 L. R. A. 783; also *Eddy v. Granger* (R. L.) 28 L. R. A. 517, and cases cited in footnote thereto.

authority to municipalities to grant to railway companies such rights in public grounds as the legislature itself might have granted, and the ordinance, although too broad, will be valid to the extent of such granted rights as the city was authorized to grant.

14. A grant of special privileges on land dedicated to a particular public use is always subject to the implied condition that it may be revoked whenever the needs of the public require, and the state or municipality has a large discretion in determining when such a condition has arisen; but such a grant, rightfully made, is not revocable at the mere arbitrary pleasure of the state or municipality. When such a grant has been acted on, the licensee has vested rights in the license which are subject only to the paramount interests of the public.

15. Cause remanded to the court below to try and determine the issue whether the privileges granted to the defendant by Ordinance 286 constitute, either in whole or in part, an unlawful misuse of the property, and to modify, if necessary, its order for judgment accordingly.

(Start, Ch. J., and Buck, J., dissent.)

(May 10, 1895.)

APPEAL by defendant from a judgment of the District Court for Ramsey County in favor of plaintiff in an action brought to recover possession of certain real estate. *Modified.*

The facts are stated in the opinions.

Messrs. W. H. Norris and Flandrau, Squires, & Cutcheon for appellant.

Messrs. Edward J. Darragh, Herman W. Phillips, and Henry J. Horn for respondent.

Mitchell, J., delivered the opinion of the court:

The first trial of this case resulted in a decision in favor of the defendant, which was affirmed on appeal to this court. 45 Minn. 387. A second trial, to which the plaintiff was entitled under the statute (49 Minn. 88), resulted in a decision in favor of the plaintiff, and from an order denying a new trial the defendant appeals. The facts are fully stated in the opinion on the first appeal, and need not be repeated. Suffice it to say that the premises in dispute are a part of what has been called "Island 11," another portion of which was the subject of litigation in *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 83 (Gil. 59), and 74 U. S. 7 Wall. 272, 19 L. ed. 74. The city of St. Paul claims the premises as a public levee, under a dedication in 1854 by one Hopkins, the grantee of Louis Roberts. On the other hand, the defendant railway company contends (1) that Hopkins never owned the land, but that its predecessors and grantors acquired title to the whole of Island 11 as part of the Federal railroad land grant of March 3, 1857; (2) that, even if Hopkins owned it, he never dedicated it to the public; (3) that, even if he owned and dedicated the land, yet it has since acquired title to it by twenty years' adverse possession by itself and its grantors; and (4) that, even if the public has an easement in the land for levee purposes, yet defendant has a right to maintain certain tracks and structures upon it under the legislative act of February 28, 1872 (Special 34 L. R. A.

Laws 1872, chap. 93), and also under Ordinance No. 286 of the plaintiff city, passed April 21, 1883.

The *Schurmeier Case* is decisive that Louis Roberts, Hopkins' grantor, acquired title to the land in question under patent from the United States; and the evidence is plenary that Hopkins dedicated it to the public for levee purposes. This disposes of defendant's first and second contentions. Therefore, aside from defendant's claim to the limited right of use of the premises under the legislative act and the city ordinance referred to, the case comes down to the single question whether the defendant had, before the commencement of this action, acquired title by twenty years' adverse possession. Upon the last trial, as upon the first, the greater part of the evidence and of the arguments of counsel was directed to this issue. The possession of those under whom defendant claims commenced not earlier than the winter of 1862-63. It may be assumed for present purposes that up to September, 1879, this possession was hostile, exclusive, notorious, and continuous; so that, if not thereafter interrupted, it would have ripened into title in the winter of 1882-83. The main and pivotal question in the case is whether the evidence justified the trial court in finding, as we must presume it did, that the continuity of this adverse possession was interrupted before the statute of limitations had run, by a recognition by the occupant (either the defendant itself or its grantor, the St. Paul, Minneapolis, & Manitoba Railway Company) of the title and right of the public and the plaintiff city. The evidence tending to prove such recognition was in several respects stronger than on the first trial, and, in our opinion, was amply sufficient to justify the finding of the court.

It is familiar law that, in order that adverse possession may ripen into title, there must be continuity of adverse possession for the statutory period. Hence a recognition by the occupant of the title of the owner will break the continuity of claim, as well as the continuity of possession, although the occupant continues in possession of the premises; and in such case he must begin *de novo* if he would claim the benefit of the statute of limitations. If he continues in possession of the premises after such break in the continuity of claim, the benefit which he might have obtained from his prior adverse possession is, nevertheless, determined, and if, after such break, the occupant should again attempt to hold adversely to the title of the real owner, such adverse possession will be held to commence from that time, and the occupant will not be permitted to tack his former possession. One alleged act of recognition of the public right in the land in controversy by the then occupant, the Manitoba Company, is the petition presented to the city council September 16, 1879, asking for the vacation of parts of certain designated streets and a part of this same public levee, in order to enable the Union Depot Company to erect a union depot and secure railroad track communication therewith. The tenor of this petition and the subsequent action of the city council in granting, in part, its prayer, on the 8th of January, 1880, are quite fully stated in the opinion

on the former appeal. 45 Minn. 394, 395. The nature of the scheme then on foot to provide a union depot and terminal facilities for all railroads coming into St. Paul is too familiar as a matter of local history to require to be related at length. It is enough for present purposes to say that the contemplated site for this depot, and the one subsequently used for that purpose, consisted of certain lots (and the intervening streets and a part of the levee abutting these lots) then owned by the Manitoba Company, and which that company proposed to convey, and afterwards did convey, to the Union Depot Company, in which the Manitoba Company was itself a shareholder. The effect of the act of the city council was that the title of the land vacated was in the Manitoba Company relieved of the burden of any public easement, and thus to enable it to subsequently convey an unencumbered title to the entire tract to the Union Depot Company, which it did for the sum of \$75,000. As was said on the former appeal, the part of the levee asked to be vacated did not include the land in controversy; but, if it was a public levee, it would necessarily follow that the land in controversy was also, for the color or claim of title on the part of the Manitoba Company and the title of the public and the city were precisely the same as to both. Hence, assuming that Mr. Hill had authority to act in the premises for the Manitoba Company, the petition was, on its face, a recognition of the right of the public and the city in the land in controversy, and that the possession of the Manitoba Company was subordinate to that right.

It is contended, however, (1) that Mr. Hill never intended to recognize any such right, because he did not know, when he signed the petition, that it asked for the vacation of any part of the levee east of Sibley street, which included all of the levee to which the Manitoba Company ever asserted an adverse claim; (2) that he had no authority to act in the premises for the Manitoba Company; and (3) that that company never ratified his act. We are of opinion that the evidence would justify a finding on each and all of these questions adversely to the defendant. The presumption is that a person knows the contents of an instrument which he signs. Mr. Hill was the general manager of the Manitoba Company, and as such was, according to his own testimony, invested with very large powers. He was one, at least, of the chief promoters of the union depot scheme. He was the representative of his company in all matters pertaining to that enterprise. He must have been entirely familiar with the condition of the title to the premises, and hence must be presumed to have known that the passage of this ordinance of vacation by the city council was necessary to the successful consummation of the proposed scheme to provide a union depot. It must also be kept in mind that the claim of the Manitoba Company to Island 11 had been judicially determined to be unfounded; also, that at the date of this petition the adverse possession, if any, of the railway company, had not yet ripened into title, and could not do so, in any event, for more than three years. With these facts Mr. Hill must have been familiar. Hence, had he known the exact contents of

the petition, there was every reason why he should sign it, and no conceivable reason why he should not. As against this array of circumstantial evidence, the mere recollection or memory of Mr. Hill, after the lapse of a number of years, and after the situation of affairs had wholly changed, was by no means conclusive; and, in considering the evidence as to Mr. Hill's authority to act in the premises for the Manitoba Company, it must be recollected that, as that company's possession had not yet ripened into title, the fact, if fact it was, that he had no authority to make contracts affecting the title of its real estate, is not controlling. The evidence of adverse possession, on the one side, and of disclaimer, on the other side, all consisted of what may be termed "*matters in pais*,"—of what certain persons from time to time did as representing the defendant or its predecessors. What Mr. Hill did, as general manager of the Manitoba Company, by way of asserting a claim to the premises in its behalf, would have been competent evidence for the defendant to establish its claim; and, if so, then certainly the same character of evidence would be competent in behalf of the plaintiff to establish a disclaimer by it. The fact that the Manitoba Company has never repudiated or disaffirmed Mr. Hill's act, but accepted and has all these years retained the benefits of it, is competent evidence tending to prove both prior authority and subsequent ratification. The evidence already considered was of itself sufficient to justify the court in finding that there was such a recognition by the Manitoba Company in 1879 of the right of the public and the city as interrupted the continuity of the prior adverse possession. It therefore becomes unnecessary to consider the subsequent action of the defendant itself in petitioning the city council in June, 1881, for leave to construct the "lower warehouse," and in April, 1882, for approval of the plan of its proposed new "freight house," and for leave to extend the river front of the same a certain distance further out than the river front of the old building.

It only remains to consider what rights, if any, the defendant has under City Ordinance No. 286 and under the legislative act of February 28, 1872. An examination of the ordinance satisfies us that it amounts to nothing more than a revocable license. Its language is that of a license or permit, and not of a grant. By the terms of Special Laws 1872, chap. 98, the defendant was required to make and maintain a continuous connection, through the city of St. Paul, between the St. Paul & Chicago Railway (river road), which it had just purchased, and its line formerly known as the Minnesota Central Railway; and to that end it was authorized, among other things, "to the extent that was reasonably necessary to the establishment and maintenance of such connection, to enter upon and cross over or under the tracks, roadbed, and lands of any other railroad corporation, and any other lands, street, and highways, with its own tracks necessary to maintain such connection, condemning the same to its own use in the same manner and upon like terms and conditions as the St. Paul & Chicago Railway Company or the St. Paul & Pacific Railroad Company is au-

thorized to condemn land for right of way and railroad purposes, but the right to condemn and occupy any other street in the city of St. Paul shall not be exercised so long as said company has the right to use the public levee for such connection, and can accomplish such connection by the use of such levee. It is apparent that this act gave to the defendant the same rights to enter upon and cross over streets and highways with its tracks, necessary to the maintenance of this connection, which were possessed by the St. Paul & Pacific Railroad Company in like cases. The rights of the latter company in that respect are defined in Laws 1857 (Ex. Sess.) chap. 1, subchap. 1, § 7. It is also apparent that the act was designed to give them these rights in the public levee as well as in "other streets." By virtue of its paramount authority over all highways, the state had the power to confer this privilege or right so far as the public easement was concerned. But this could not affect the private property rights of abutting owners (*Gray v. First Div. of St. Paul & P. R. Co.* 18 Minn. 315, Gil. 289); hence the necessity for authorizing the defendant to exercise the right of eminent domain whenever necessary. It is contended by plaintiff that, under the provisions of this act, the defendant could only acquire the right of way over and across streets and the levee by condemning the public easements as well as the private property rights of abutting owners. The statute is somewhat awkwardly worded, but we do not think that this is its proper construction. The city, in its corporate capacity, has no proprietary interest in a public street or a public levee. It holds the title merely in trust for the general public. If the public was to be condemned, how could its value be estimated, and to whom would the compensation be payable? Our construction of the statute is that it is a grant of the privilege or right of use so far as the public easement is concerned, but that if such use amounts to an additional servitude upon the street or levee, which affects the private property rights of individuals, the defendant may acquire such rights by the exercise of the right of eminent domain. Our conclusion, therefore, is that, under the provisions of this statute, the defendant has the right, as against the public and the city, to occupy this levee with its tracks so far as necessary to make and maintain a continuous connection through the city between its two lines referred to in the act.

The court found that defendant's two north-erly tracks across the premises in controversy constitute a section of the line constructed by defendant to make and maintain a continuous connection, through the city, between these two lines, and that these two tracks, with their continuations east and west of the premises in controversy, furnish and afford the defendant the only practical means of making and maintaining this connection. The conclusions of law and order for judgment must therefore be modified so as to permit defendant to maintain these two tracks.

The defendant assigns as error the rulings of the court in admitting various items of evidence, but we find no substantial merit in any of them, and nothing of sufficient importance to require special notice. Cause remanded, 34 L. R. A.

with directions to the court below to modify its conclusions of law and order for judgment in accordance with this opinion.

A rehearing having been had, Mitchell, J., on January 7, 1896, delivered the following opinion:

This appeal has once before been considered by this court. The record and briefs were very voluminous, and the main issue was whether the defendant had acquired absolute title to the premises in controversy by adverse possession. The oral arguments were wholly, and the briefs mainly, devoted to a discussion of that question. The natural result was that other and less important issues received but little attention from either court or counsel. The defendant's claim of certain rights under City Ordinance No. 286 was disposed of in our opinion by merely saying that the ordinance amounted to nothing more than a revocable license; that its language was that of a license or permit, and not of grant. Upon an application for a reargument of this question, we became satisfied that sufficient consideration had not been given to it, and that there was at least grave doubt whether the ordinance, if valid, did not constitute an irrevocable contract between the city and defendant. We therefore ordered a reargument of the question as to the force and effect of this ordinance, and the rights of the defendant under it. This involves two questions: First, the authority of the city council of St. Paul to pass the ordinance; and, second, if they had the power to pass it, its force and effect. These questions should be considered in the order named; for, if the ordinance is held invalid, it will be unnecessary to consider the second question at all.

The land in question fronts on the Mississippi river, and was dedicated by the original proprietor to public use as a "levee." Defendant's grantor, being in possession of the premises and claiming adversely to the city, had erected thereon a wooden freight house, fronting on the river, and some 400 or 450 feet long. In 1881, after defendant took possession, it presented a petition to the common council of the city of St. Paul, stating that it contemplated taking down this freight house, and replacing it with a large and permanent one, and asking permission in the meantime to erect a temporary wooden structure. This permit was granted, the limit of the permit being two years. In March, 1883, the defendant presented a further petition to the common council, stating "that it was then ready to construct its new freight house, which was described as to be a large, elegant, and permanent structure, plans of which were submitted. The petition further stated that, in order to carry out the plan of the structure as demanded by the growing commerce of the city, it would be necessary to extend the river front of the building out into the river from 7 to 10 feet further than the front of the old one; and requested the council to approve the plan of the proposed building, and to grant permission to extend it out into the river to the limit above mentioned. The plan proposed was of a building about 600 feet long and 50 feet wide, of brick, with stone foundation and a slate roof. In response to this petition the council, in

April, 1882, by a unanimous vote, passed the ordinance in question (No. 286), which is as follows:

"Section 1. That permission be, and the same is hereby, given to the Chicago, Milwaukee, & St. Paul Railway Company to take down and remove the old freight house, which is owned and used by said company, standing next below Sibley street on the levee, and to erect a new freight building upon the site now occupied by said old freight house, provided that the new structure may be extended a distance of 10 feet nearer the Mississippi river than the old one, if the city engineer shall be of the opinion that the same shall in no manner interfere with the navigation of said river. And provided further, that said new freight house shall be built substantially in accordance with the plans on file in the office of the city clerk. And provided that the basement or lower story fronting on the river shall be laid with substantial floor, and said lower story, together with the platform on the river front, and the railway track along the said river front shall be open and subject to the use of the public for all wharfage and transfer purposes without charge, and a sufficient platform and entrance for drays shall be provided for said lower story at the end of said building.

"Sec. 2. Nothing in this ordinance contained shall be construed as waiving any of the rights of the city of St. Paul in and to the real property proposed to be occupied by said building.

"Sec. 3. This ordinance shall be in force from and after its passage."

Thereupon the defendant proceeded and erected, and has ever since maintained, the freight house, in accordance with the provisions of the ordinance.

It may be here suggested that the authority of defendant's grantor, the St. Paul, Minneapolis, & Manitoba Railroad Company, under its charter (Laws 1857, Ex. Sess., chap. 1), "to construct its railroad upon and along, across or over any public or private highway," etc., "if the same shall be necessary," does not extend to or contemplate the construction upon a highway of stations, depots, freight houses, or other buildings, but applies only to railroad tracks, where the use of the highway by the railroad company will be concurrent with that of the general public, and not exclusive. *Wayzata v. Great Northern R. Co.* 50 Minn. 488. It is elementary law that a municipal corporation has no proprietary rights in the streets, levees, or other public grounds within its limits. Whatever rights it has it holds merely in trust for the public. It is equally elementary that all its powers over such public grounds are derived from the legislature. It can exercise no power over them, except such as is given it by the legislature, either expressly or by necessary implication. It is also well settled that a grant of power to a city to grant any privileges or rights in streets or other public grounds is to be strictly construed, and not enlarged by construction; and, if there is a fair or reasonable doubt as to the existence of its power, it will be resolved against the municipality. *Dill. Mun. Corp. § 705; St. Louis v. Bell Teleph. Co.* 96 Mo. 628, 2 L. R. A. 278.

With these general principles in mind, we come to the consideration of the provisions of 34 L. R. A.

the charter of the city of St. Paul relating to the powers of the city council over public grounds within its limits, and which were in force in 1882, when Ordinance No. 286 was passed. The charter then in force was Spec. Laws 1874, chap. 1, and amendments. Subchapter 4, § 7, of that act, provided that "the common council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and grounds, and parks and sewers, and all other public improvements and public property within the limits of said city." The able counsel for the defendant seems to rely with confidence on this as giving authority to the common council to pass the ordinance in question. He says: "Statutory provisions of this kind have uniformly been held to confer upon city councils authority to grant the railway companies the right to occupy public streets; at least, as against the city and the public." We have examined all the authorities cited by counsel, and submit, with all deference to him, that none of them support his contention. Some of these cases merely hold that a certain use of a street, as by erecting telephone poles and wires, or constructing a horse railroad, is a proper "street use," and imposes no additional servitude on the street; while others are merely to the effect that, under a general grant of power to regulate the use of streets, the city council has the power to prescribe the manner in which, or the conditions upon which, streets may be occupied for a legitimate "street use." In *Gregsten v. Chicago*, 145 Ill. 451, the city had an express grant of authority to do what it did. In *St. Louis v. Western U. Teleph. Co.* 149 U. S. 465, 37 L. ed. 810, the only thing decided was that the city was authorized by the Consultation and laws of Missouri to impose upon a telegraph company putting its poles in the streets of the city a charge in the nature of rental for the use of the streets for that purpose. Neither party was in position to question the authority of the city to permit the company to place its poles in the streets, for it was by virtue of the exercise of this power that the city claimed the right to make the charge, and the permit granted by the city in the exercise of this assumed power constituted the only right on part of the company to put its poles in the street. We are of the opinion that the "care, supervision, and control" of streets and public grounds, and the power to regulate their use, which is the usual and ordinary grant of power to municipal corporations, and which is certainly as broad as the power granted by the section above quoted, is not sufficient to empower them to authorize the use of such grounds for the purpose even of constructing and operating thereon a commercial railway, much less of erecting thereon depots, freight houses, or other buildings which exclude the general public from the concurrent use of a part of the street or other public ground. *Dill. Mun. Corp. § 705*, and cases cited; *Lackland v. North Missouri R. Co.* 31 Mo. 180. In this state these would not be proper "street uses," but the imposition of an additional servitude upon the street. Section 8 of the same subchapter of the city charter gives the common council power to vacate and discontinue public grounds, etc., upon certain

conditions, but it will not be claimed that this section has any application to the case in hand.

The only other provision relating to the power of the common council in the premises is § 11 of the same subchapter, which reads as follows: "The common council shall have power and authority by a vote of three fourths of all the members elect of said council to grant the right of way upon, over, and through any of the public streets, highways, alleys, public grounds, or levees, of said city to any steam railway or horse railway company or corporation upon such limitations or conditions as they may prescribe by ordinance." We may consider this in connection with Gen. Stat. 1878, chap. 84, § 47 (Gen. Stat. 1894, § 2643), cited by counsel for defendant, and which reads as follows: "If it became necessary in the location of any part of a railroad, to occupy any road, street, alley, or public way, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals." Section 11 of the chapter quoted above clearly refers only to "trackage"; that is, to the right to construct and operate railroad tracks on the streets or other public grounds. This is conclusively shown by the term "right of way". It does not give the common council any authority to barter away, or transfer to a railroad company, the right to use any part of the streets or public grounds as a site for depots or freight houses to the entire exclusion of the public therefrom. This seems to us too plain to require argument. It also seems to us that the provision of the General Statutes cited is subject to the same limitation. The phrase, "in the location of any part of a railroad," clearly indicates to our minds that this also refers only to "trackage," and that it is but the counterpart and equivalent of § 11 of the city charter. It was never intended to authorize municipal authorities to sell or give away to railroad companies, as sites for depots and other buildings, lands in which they had no proprietary interest, and which they held merely as trustees for the public. Any such power would be an exceedingly dangerous one to vest in municipal authorities, and it would require very clear language to that effect to warrant a court in holding that the legislature intended to grant them any such power. Whether the authority of railway corporations to acquire rights in streets and other public lands by the exercise of the right of eminent domain is limited to "trackage" or "right of way," it is not necessary now to consider. If there is any other provision of statute containing any grant of power to the common council of St. Paul over public grounds within its limits, our attention has not been called to it by counsel, neither have we found it. Nowhere do we find any grant of power authorizing the common council to give the defendant the right to use and occupy any part of the public

levee as a site for its freight house. It follows that this ordinance is invalid because not within the granted powers of the common council.

We have not overlooked the difference between a "street" and a "levee." A street is designed exclusively for the purpose of travel and intercommunication. The word "levee," as used in the West and South, means a landing place for vessels, and for the delivery of merchandise to and from such vessels, and, as incident to that, for the temporary storage of the merchandise. Hence, some things might be a proper use of a public levee which would constitute a misuser of a street. For example, the erection and maintenance of a warehouse as a place for the receipt and delivery and temporary storage of goods while in transit would probably be a proper use of a levee, provided it was open to the common use of all on the same terms. This would be in aid of and necessary to the main object for which a levee is designed. But this is a very different thing from giving to a particular person or corporation the right to occupy a levee as a site for its warehouse solely for its own business, and to the exclusion of the general public, as was attempted by the ordinance in question. The fact that the common council stipulated that a small part of the structure might be used by the public for wharfrage and transfer purposes does not alter the case.

It can hardly be necessary to say that the fact that the defendant may have expended its money on the faith of this ordinance creates no equitable estoppel against the public, whose mere trustee the city is in prosecuting this suit. The defendant was bound to take notice of the extent of the powers of the common council from which it obtained the ordinance. The result is that the former decision is adhered to, although, as to the point now considered, upon a different ground.

On January 20, 1896, the following order was made:

It appearing from the petition of the defendant that its counsel overlooked and failed to call the attention of the court to Gen. Stat. 1894, § 2680, it is ordered that further argument be allowed, but only as to the force and effect of said section, the same to be submitted on printed briefs either on or before the last day of the present term, or on the first day of the next term of this court, at the election of counsel for the plaintiff.

The second rehearing having been had, Mitchell, J., on September 28, 1896, delivered the following opinion:

It is somewhat unfortunate that the questions involved in this case have been presented and considered piecemeal. On the trial in the court below the main issue was whether the defendant had acquired title to the premises by adverse possession, and very little attention seems to have been paid to the rights, if any, of the defendant under City Ordinance 286; that question having apparently been brought into the case only incidentally and almost accidentally. On the first argument of the appeal in this court, the discussion was almost wholly devoted to what had been the main issue in the court below. The result was that we

disposed of the ordinance, without much consideration, by merely saying that it amounted to nothing more than a revocable license. Upon the reargument of this question the main point discussed, and the only point considered, was whether the state had delegated to the city authority to enact the ordinance in question. We held that the ordinance was invalid, because in excess of the granted powers of the city. After this opinion was filed, counsel for the defendant applied for further reargument, on the ground that they had overlooked, and failed to call the attention of the court to, Gen. Stat. 1894, § 2680. A further reargument was thereupon granted as to the force and effect of this section. Upon an examination of the case after it was submitted on this last reargument, it occurred to us that there might be a serious question as to the power of the state itself to grant any such authority to the city over public grounds dedicated to a specific public use. As this question was only briefly discussed by counsel for the defendant, and not at all by counsel for the plaintiff, we, on our own motion, requested additional briefs on that point. After an examination of the additional briefs filed in response to this request, we are inclined to think that perhaps a more important question was whether the purposes for which a portion of this levee was granted to the defendant by this ordinance constituted a diversion of it from the particular and specific public use to which it was dedicated. In order that the precise questions involved may be clearly in mind, we shall again quote in full the statute now relied on, and also the ordinance enacted in pursuance of it, and which defendant claims constitutes a binding contract between it and the city, an impairment of the obligation of which is forbidden by the Federal Constitution.

"The common council, board of aldermen, trustees, commissioners, or other corporate authorities of any city, town, village, or other municipal corporation, are hereby authorized and empowered to grant, sell, convey, or lease any public grounds or place within their corporate limits to any railroad corporation, subject nevertheless to all the rights of the original proprietors on such grounds." Gen. Stat. 1894, § 2680. This statute was enacted over thirty years ago. Gen. Laws 1866, chap. 41.

Ordinance 286 reads as follows:

"Sec. 1. That permission be and the same is hereby given to the Chicago, Milwaukee, & St. Paul Railway Company to take down and remove the old freight house, which is owned and used by said company, standing next below Sibley street on the levee, and to erect a new freight building upon the site now occupied by said old freight house, provided that the new structure may be extended a distance of 10 feet nearer the Mississippi river than the old one, if the city engineer shall be of the opinion that the same shall in no manner interfere with the navigation of said river. And provided further that said new freight house shall be built substantially in accordance with the plans on file in the office of the city clerk. And provided, that the basement or lower story fronting on the river shall be laid with substantial floor, and said lower story, together

with the platform on the river front, and the railway track along the said river front, shall be open and subject to the use of the public for all wharfage and transfer purposes, without charge, and a sufficient platform and entrance for drays shall be provided for said lower story at the end of said building.

"Sec. 2. Nothing in this ordinance contained shall be construed as waiving any of the rights of the city of St. Paul in and to the real property proposed to be occupied by said building."

We shall, without further discussion, take as settled that the premises in question were dedicated by the owner, Hopkins, to public use, as a "levee" or "landing." The word "levee" has a well-understood meaning in the West and South. It is a place, on a river or other navigable water, for lading or unlading goods, or for the reception and delivery of passengers. It is either the bank, or the wharf, to or from which persons or things may go from or to some vessel in the contiguous waters. *State v. Randall*, 1 Strobb. L. 111, 47 Am. Dec. 548; *State v. Graham*, 15 Rich. L. 310; *Coffin v. Portland*, 27 Fed. Rep. 418. It means the land contiguous to a river or other navigable water, used as a landing place for water craft, and for the transfer of freight and passengers to and from such craft. In a general way, this is at once the definition and limitation of the particular and specific public use to which this land was dedicated by the owner. It is elementary and fundamental law that, if a grant is made for a specific, limited, and definite public use, the subject of the grant cannot be used for another and different use. Its use must be restricted to that for which it was dedicated. Even the legislature itself has no power to destroy the trust, or to divert, or to authorize a municipality to divert, its subject to any other purpose, either public or private, inconsistent with the particular use to which it was granted. Neither the state nor the municipality within which the property is situated has any proprietary interest in it which either of them can sell or divert to any use inconsistent with the purpose of the dedication or grant. The state holds such lands merely in its sovereign capacity, in trust for the public for the purposes for which it was dedicated. If the legislature should attempt to divert it, or to authorize its diversion, the property would not revert to the donor, or the public easement be extinguished. The act of the legislature would be a mere nullity. The cases relied on by defendant's counsel decide nothing inconsistent with these propositions. See *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299; *Illinois & St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 70. It is frequently stated that the power of the legislature in the absence of special restrictions, over public places held for the use and benefit of the public, is unlimited; but we think that in every well-considered case it will be found that this general proposition is qualified by the statement, in substance, that this power must be exercised in subordination to, and in conformity with, the purposes of the dedication. However, no narrow or unreasonable definition should be placed upon the nature of the use to which the

property has been dedicated, nor any unreasonable limitation imposed upon the discretion of the legislature in regulating that use. Much must necessarily be left to the discretion of the legislature as to the best manner of regulating that use, and of improving the property for that purpose; and the mode or manner of exercising that use must be allowed to keep pace with changed conditions and consequent new necessities of the public. It is only when there has been a clear diversion of the property to a use inconsistent with that for which it was dedicated that courts would feel warranted in interfering; and this will usually be largely a question of fact, depending upon the facts and circumstances of each particular case. No doubt the legislature, as the representative of the public, has the power, either directly or indirectly, through the municipality, or even through a private corporation or person, to improve these premises for "levee purposes." It might construct, or authorize the construction and maintenance of, wharves or warehouses thereon as aids to and conveniences for public travel and traffic to and from craft navigating the river, and to impose, or to authorize the imposition of, charges for the use of such structures sufficient to defray the cost of their construction and maintenance. This would not only be consistent with, but in aid of, the principal use for which the land was dedicated. The legislature might also grant, or authorize the granting, to any person or corporation having traffic with vessels on the river, the exclusive use of so much of a levee as was reasonably necessary for his or its business with such vessels,—provided it did not unreasonably interfere with the use of the levee by the remainder of the public,—until such time as the needs of the public required the termination of such exclusive use. The construction and maintenance of a permanent structure do not by any means necessarily constitute a misuse of a levee. Like the grain elevator referred to in *Illinois & St. L. R. & Canal Co. v. St. Louis*, *supra*, it might be in aid of the very use for which the public levee is designed. To give a public levee, or any part of it, to a railway company, to be used as a site for its depot, or for its general freight warehouse, without reference to its traffic by way of the transfer of passengers and freight to and from vessels navigating the adjacent river or other navigable water, would, in our opinion, constitute a diversion of the property to a use foreign to and inconsistent with that for which a levee is dedicated.

So much for the general principles of law applicable to the case. The language of § 2680 is broad enough to permit, if not require, a construction which would effect a purpose which the legislature has no power to authorize. It would authorize the absolute sale or gift of any public ground, for whatever purpose dedicated, to any railroad company, to be used for any purpose for which such company might hold or use real estate, and thus wholly extinguish all rights of the public in the premises. The legislature has no such unlimited power over land dedicated to a specific and particular public use, but it does not follow that the statute is wholly void and ineffectual for any purpose. Its op-

eration may be cut down by construction within the limits of the legislative powers, and held effectual to authorize a municipality to grant to a railroad company any rights or privileges in public grounds which the legislature itself might have granted; that is, any rights or privileges consistent and in conformity with the purposes for which such grounds were dedicated. We cannot agree with the contentions of plaintiff's counsel that this general statute has been by implication repealed as to the city of St. Paul by subsequently enacted provisions of the city charter, or that the statute does not apply to public grounds of the character of this levee. We are therefore brought to the consideration of the provisions of the ordinance itself, as to whether the rights and privileges assumed to be granted to the defendant are in conformity with the use for which the land was dedicated, or are so inconsistent with and foreign to that use as to amount to an unauthorized diversion of it. Unfortunately the record furnishes comparatively little light on this question, because, for reasons already suggested, the case was not tried on any such lines. In fact, no such issue seems to have been tried at all. All that the record clearly shows is the provisions of the ordinance itself, and the further fact that this freight house has been constructed and is maintained in accordance with those provisions. It perhaps also fairly appears that there are some 1,400 feet front of public levee, including that situated within the plat of St. Paul proper, and that this building is about 350 feet long on the river front by about 50 feet wide. The ordinance is entirely silent as to the length of time for which the privilege is granted to the defendant, or as to the uses to which the structure may be devoted, except as to the lower story. Neither does it in terms reserve to the city any right to supervise or regulate the manner of its use. The record is also practically silent as to the purposes for which the defendant is actually using this building, or as to the extent or nature of defendant's traffic with vessels or other craft navigating the river. Under the terms of the ordinance, the defendant might devote the whole of the building, except the lower story, to uses wholly foreign to "levee purposes," and entirely disconnected with its exchange traffic with craft navigating the river; and, for anything the record shows, such may be the fact. Neither does it appear whether there exists any present public necessity for the use of this land for levee purposes. This last consideration would, of course, not be controlling, for the fact that the land is not presently needed for levee purposes would not prevent the city or state, as the trustee of the public, from objecting to a diversion of the property to a use wholly foreign to or inconsistent with that to which it was dedicated; but, for reasons to be stated hereafter, it would be material in determining whether the city or state, as such trustee, had a right to recall or revoke a special privilege previously lawfully granted. But the fact, if it be a fact, that the ordinance assumes to grant to the defendant rights and privileges greater than the city was authorized to grant, will not render the ordinance wholly void. It would still be valid to the extent of

such rights and privileges as the city was authorized to grant. We shall not stop to consider upon which party rested the burden of proof on these matters, for, in view of the manner in which the case was tried and submitted, we are satisfied that final judgment for or against either party on these questions ought not to be rendered on the present record. Justice requires that the cause be remanded to the trial court, to determine, in accordance with the rules we have endeavored to lay down, whether the privileges granted by the ordinance do or do not amount to an unlawful diversion of this part of the levee to a purpose inconsistent with that for which it was dedicated. If they do not, either in whole or in part, then the order for judgment in favor of the plaintiff should be further modified so as to make it subject to the right of the defendant to maintain this building in accordance with the terms of the ordinance. If, on the other hand, such privileges, in their entirety, constitute a plain diversion of the premises to an unauthorized use, the trial court should so find, and in such case the present order for judgment would stand unmodified in that regard. If, however, the court should find that within the rules already suggested the privileges granted by the ordinance were in part authorized, but in part unauthorized, then the court should determine how far they were authorized, and how far they were not; that is, how much of the levee is reasonably required as a site for a freight house for the accommodation of defendant's traffic as common carrier, with craft navigating the contiguous river, and cut down the operation of the ordinance to the limits to which its provisions were authorized, and modify the order for judgment accordingly.

If it be objected that this furnishes no definite and exact rule, the answer is that such instances are not infrequent in the law, and one of the most useful functions of the judiciary is the exercise of a sound judgment and common sense in such cases. As already suggested, no such narrow construction of the term "levee purposes" should be adopted as to deprive the defendant of any privileges properly granted to it, or to limit too narrowly the reasonable discretion of the state or city in regulating the use of the property; nor, on the other hand, should so lax a construction be indulged in as to sanction a plain diversion of it to a use foreign to and incompatible with that to which it was devoted by the owner. Any grant of privileges upon lands dedicated to a particular public use is necessarily subject and subordinate to the rights and necessities of the public, and may always be revoked and terminated

whenever required by the needs of the public in the use of it for the purpose for which it was dedicated. This is an implied condition of every such grant, for there can be no irrevocable license, as against the rights of the public to the full enjoyment of its easement in the property; and, as to when a condition of things has arisen that public interests require a revocation of the grant or license, much must be left to the discretion of the state or municipality, as the trustees of the public. But such a license, if lawfully granted, and subsequently acted on by the licensee, is not revocable, in the ordinary sense of the word; that is, it is not revocable at the mere arbitrary pleasure or whim of the state or municipality. The licensee in such a case has vested rights under the license, subject only to the paramount rights of the general public in the property for the use to which it was dedicated. We might also add that, if the privileges granted to the defendant by this ordinance were, in whole or in part, authorized as a legitimate use of the property for "levee purposes," the fact that such privileges, thus authorized, may incidentally benefit the defendant in a way not strictly germane to "levee purposes" would not render the grant a diversion of the property to an unauthorized use. We may be pardoned for adding the suggestion that, inasmuch as the plaintiff has accomplished the main purpose of this suit by establishing its title to the whole of the premises in dispute as a public levee, and also its right of immediate and exclusive possession, subject only, to the right of the defendant, under the act of the legislature, to maintain certain railroad tracks across the property, and to whatever rights it may have, under this city ordinance, to maintain this freight house on a certain portion of the property, and as nothing remains to be determined except the extent of these rights under the ordinance, it would seem that two great and progressive organizations, like the plaintiff city and the defendant railway company, ought to be able, without further prolonging this already protracted litigation, to adjust this matter, on the legal lines suggested in this opinion, on a liberal basis, that will at once protect the rights of the public and the defendant company.

Cause remanded for a new trial, but only of the issue considered in the foregoing opinion, and for such modification of the findings of fact and conclusions of law as may be made necessary by the determination of such issue.

Start, Ch. J.: I dissent.

Buck, J.: I also dissent.

34 L. R. A.

KENTUCKY COURT OF APPEALS.

J. B. BRIGGS, Trustee, etc., *Appt.*,
v.

Town of RUSSELLVILLE

Town of RUSSELLVILLE

J. H. BEALL, *Appt.*

(.....Ky.....)

Land within the limits of a town, although it has never been divided into building lots, is subject to municipal taxation if it is near railroad depots and shops, has convenient access to the highways, and lies only a short distance from the business portion of the town, so that it enjoys the police protection and other benefits of the town.

(June 20, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Logan County refusing to enjoin defendant from proceeding to collect a tax which had been assessed against plaintiff's property. *Affirmed.*

APPEAL by defendant from a judgment of the Circuit Court for Logan County enjoining defendant from proceeding to collect

a tax which had been assessed against plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. Wilbur F. Browder and M. P. Sloss for Briggs and Beall.

Messrs. J. H. Bowden and S. R. Crewdson for town of Russellville.

Landes, J., delivered the opinion of the court:

These two cases originated in the Logan circuit court, involve the same questions and stand upon substantially the same state of facts, except as to the condition, use, and situation of the parcels of land, which it is claimed on the one hand and denied on the other are subject to municipal taxation. On that account they were heard together, both in the court below and in this court. The litigation is friendly, the object being to ascertain whether or not the town of Russellville has the right to impose taxes for municipal purposes on certain land belonging to the appellant J. B. Briggs, trustee, in one case, and to the appellee, J. H. Beall, in the other case, which was originally brought within the limits of the town by an act of the general assembly entitled "An Act to Extend

NOTE—Municipal taxation of rural lands within the limits of the corporation.

- I. Validity of exemption or discrimination in rates.
- II. Construction of statutory exemption or discrimination.
- III. Right to repeal exemptions.
- IV. Validity of taxation of farm lands.
- V. Power of courts.
- VI. What property is taxable.
- VII. Power of municipality to exempt.
- VIII. Original incorporation.
- IX. Assessments.
- X. Method of raising question.

There is much contrariety of opinion among the courts upon all branches of this question.

I. Validity of exemption or discrimination in rates.

Leaving out of consideration for the present the conflict upon the question whether farm property can be constitutionally taxed for municipal purposes, there seems to be a hopeless conflict, in practical application of the rule if not in actual decision, upon the question whether or not an attempted exemption of such property is valid.

It is held that where the Constitution requires that all taxes shall be uniform the legislature cannot provide for the exemption or lower taxation of farm land within the limits of the municipality. *Knowlton v. Rock County Supers.* 9 Wis. 410.

So, where the Constitution provides for the taxation of all property, land within the limits of a municipality cannot be exempted from municipal taxation. *Zanesville v. Richards*, 5 Ohio St. 590.

So, under a constitutional provision that all taxes assessed by cities must be uniform upon all taxable property and persons within the limits of the city, and no property shall be exempted therefrom other than such property as may be exempted from taxation under the Constitution and general laws of the state, a special charter of a city exempting agricultural property from taxation is void. *Hayward v. People*, 145 Ill. 85.

Under a constitutional provision that all taxes must be uniform the owner of agricultural land in 34 L. R. A.

a city cannot have the aid of the courts to relieve him from municipal taxation. *Cary v. Pekin*, 38 Ill. 154, 30 Am. Rep. 548.

Under a constitutional provision that all laws exempting property from taxation other than that provided for in the Constitution shall be void, an exemption of agricultural property from municipal taxation when such property is not provided for in the Constitution is void. *Smith v. Americus*, 30 Ga. 810.

On the other side, it is held that the provision of the Indiana Constitution requiring a uniform and equal rate of assessment and taxation does not apply to municipal taxes. *Hamilton v. Ft. Wayne*, 40 Ind. 491.

So, a provision in a city charter exempting from taxation for fire-department purposes all unplatted land containing 10 or more acres, and used exclusively for farming purposes, is a reasonable and valid provision. *Baldwin v. Hastings*, 33 Mich. 630.

The Michigan Constitution requires a uniform rule of taxation (art. 14, § 11), but the court does not seem to have considered the effect of that requirement upon the question.

The land used for agricultural purposes may be taxed at a lower rate than that used for city purposes. *Gillette v. Hartford*, 31 Conn. 351.

There seems to be no provision in the Connecticut Constitution upon the question.

A law exempting agricultural tracts of more than 10 acres in size, while allowing tracts of less than that size to be taxed, does not violate constitutional provisions requiring the uniform operation of laws and forbidding the granting of special privileges and immunities. *Leicht v. Burlington*, 73 Iowa, 20.

Prescription by the legislature of different rates of taxation for the old and new portions of the city in case of an enlargement of boundaries is not an unjust discrimination. The legislature has power to make two or more taxing districts of the same city in which the rates of taxes shall be different. *Daly v. Morgan*, 60 Md. 460, 1 L. R. A. 757.

A statute exempting agricultural land from taxation in extending the limits of a town is not in conflict with the provisions of a Constitution

and Define the Corporate Limits of the Town of Russellville, Authorize the Election of a Police Judge, and Provide a Sinking Fund for Said Town," approved March 12, 1869 (2 Sess. Acts 1869, p. 236). Previous to the passage of said act, the boundary of the town was in a very irregular and unsatisfactory shape, and while, in 1869, it was a thrifty, though quiet, town, having a population of near 2,000 souls, with a reasonable prospect of growth and of steady improvement, having the advantage of one railroad, with the prospect of the early construction of another, the main object of the extension of the limits seems to have been to correct the irregular shape of the lines defining the limits of the town, and at the same time to extend the jurisdiction of the municipal government over a considerable territory claimed to be actually suburban, although not within the lawful limits of the town. This the act accomplished by describing a perfect square of territory, each of the four sides extending 410 poles, with the county court-house and public square in the center. By a previous act, entitled "An Act to Amend the Charter of the Town of Russellville," approved March 5, 1868 (2 Sess. Acts 1867-68, p. 219), the chairman and board of trustees of the town were authorized and empowered to assess and collect annually an *ad valorem* tax "of not exceeding 50 cents on the \$100 worth of real and personal estate within the corporate limits of said town, and a

poll-tax of not exceeding \$3" on each tithable inhabitant of the town, for municipal purposes. Subsequently another act was passed, entitled "An Act to Amend and Reduce into One the Acts Relating to the Town of Russellville," approved May 1, 1880 (2 Sess. Acts 1879, p. 874), which was substantially a new charter, and under which the municipal affairs of the town were conducted, until the passage of the act for the government of towns of the fifth class, approved July 8, 1893, to which class the town of Russellville now belongs. By the act of 1880 the boundary of the town was continued as fixed by the act of 1869, and the municipal authorities were empowered to assess and collect taxes for municipal purposes annually upon all of the real and other property in the town as of the 10th day of January, upon a list of the "taxable inhabitants and owners of property in said town," and the marshal of the town was invested with "all the powers and authority within the town of Russellville to collect the town tax as sheriffs have in collecting the state tax and county revenue." Notwithstanding the ample power of taxation thus conferred on the municipal authorities to assess and collect taxes on their property within the corporate limits of the town, no effort was made by the said authorities to assess or levy or collect from the appellant Briggs and the appellee Beall taxes upon their land which was brought into the limits of the town by the act of

which prohibit the exemption of private property from taxation and require all property to be taxed in proportion to its value. *Kansas City v. Cooley*, 60 Mo. 127.

The legislature may exempt from city taxation land held for farming purposes. *Lee v. Thomas*, 49 Mo. 112.

But under a new Constitution the Missouri court has changed its rulings.

A statutory provision permitting the assessment of land in a city not laid off into lots and blocks only by the acre as agricultural land is in conflict with a constitutional provision that all property subject to taxation shall be taxed in proportion to its value. *State, Griewold, v. O'Brien*, 89 Mo. 631.

A statute providing that no tract of land in a city over 3 acres in extent shall be subject to taxation so long as it remains undivided and is used for agricultural purposes is in conflict with a constitutional provision requiring taxes to be uniform upon the same class of subjects within the territorial limits of the authority levying the same and forbidding exemptions other than those declared in the Constitution. *Copeland v. St. Joseph*, 126 Mo. 417.

II. Construction of statutory exemption or discrimination.

There are several cases in which statutory exemptions or discriminations have been construed or enforced without any discussion as to their validity.

Under the Indiana act of 1852 a tract of land, less than 20 acres of which were used for farm purposes, was not exempt from city taxation. *Conklin v. Cambridge City*, 68 Ind. 130.

A particular statute exempting farm lands within a certain city from municipal taxation is not repealed by a general statute subsequently passed without negative words, giving a general power of taxation but without necessary conflict between the two. *Blain v. Bailey*, 25 Ind. 165.

The Indiana act of 1877 providing for an exemption of agricultural lands from municipal taxation 34 L. R. A.

was not retroactive in its operation. *Stills v. Indianapolis*, 81 Ind. 532.

Although the land is platted for the purpose of sale in parcels, each of which contains more than 5 acres, it is not within the provision of the Indiana statute taxing platted land if it is vacant and not used for town purposes. *South Bend v. Cushing*, 123 Ind. 290.

In *Henderson v. Lambert*, 8 Bush. 607, it appeared that farm lands had been expressly exempted from city taxation by act of the legislature.

In *St. Louis v. Allen*, 13 Mo. 400, the power to tax the added land was made dependent on the making of certain suggested improvements in the vicinity of the added territory.

But when the improvement was made the land might be taxed at city rates for the remainder of the year. *Benoist v. St. Louis*, 19 Mo. 179.

A requirement that the land shall be assessed by the acre does not require the assessment to be made at the value of the land for farm purposes, but the taxing power may take into consideration the value of the land for any purpose. *Benoist v. St. Louis*, 15 Mo. 668.

In *Serrill v. Philadelphia*, 38 Pa. 355, the court construed certain tax exemptions which were given by statute in favor of rural lands, holding that one covering all rural lands was repealed by a subsequent one covering only marsh lands so as not to give a double exemption to the latter.

The mere fact that the land is held with the expectation of a rise in value will not make it taxable if it is used for farm purposes or is unoccupied, under a charter making farm lands or land vacant or unoccupied taxable at a lower rate than general city property. *Gillette v. Hartford*, 81 Conn. 351.

Under the Louisiana act of 1850 a distinction is made between rural and urban property. *Municipality No. 8 v. Michoud*, 6 La. Ann. 606.

Under the Indiana statutes agricultural land within a city is subject to city school taxes and such special assessments as affect it in the same manner as other property, but it is only subject to general city taxes to an amount equal to the rate

1890, and afterwards by the act of 1890, until the efforts made for that purpose which furnished the occasion for the present litigation. As we take it, the taxes now involved were assessed in 1893; under the authority of acts in force previous to the passage of the said act of July 8, 1893. Action was instituted by each of the parties seeking to enjoin the town and the collector of the town tax from proceeding to collect these taxes, which had been assessed by the municipal authorities on their said respective parcels of land within the limits of the town. The issues having been made up in each case, in the case of the appellant Briggs the court adjudged, in substance, that his land was lawfully assessed, and that he was liable for the tax, and his petition was dismissed; but in the case of the appellee Beall, the court adjudged, in brief, that his land was not lawfully assessed, or subject to the tax, and that he was not liable therefor, and the municipal authorities were perpetually enjoined from proceeding to collect the tax that they were then seeking to collect from him on his said land. These appeals are prosecuted to reverse the judgment in each case.

In the case of Briggs, trustee, it appears that he was living with his family upon 12 acres of land that were included within the limits of the town by the acts of 1869 and 1880, which have been referred to, and that the dwelling house and all other improve-

ments were erected thereon in 1872. The track of the Louisville & Nashville Railroad lies in front of this ground and is the south boundary of it. We do not deem it necessary to go into lengthy detail of the facts material especially in the Briggs case. It is sufficient to say that the facts show that, although there was no public street or alley or sidewalk contiguous to his ground, he and his family had convenient access to the public streets of the town by a driveway out of his lawn across the said railroad track, and thence across a meadow in which Mrs. Briggs had an interest, to the Hopkinsville pike, laid down on the map of the town as "Hopkinsville Street," which leads to the public square and the principal business part of the town, and which is a prolongation of the main center street in the original boundary. His ground is 32 poles from the passenger depot of the said railroad, at which is the nearest sidewalk. The same may be said concerning the land of appellee Beall. Brigg's residence is also something more than 1,000 feet from the electric-light plant which supplied the town, and from which his residence was supplied, over a line erected at his own expense, with light, which was the nearest point in the business part of the town to his house. He had a number of tenement houses situated south of the said railroad track, and somewhat nearer to his ground than the electric-light plant. The facts show further that

assessed in the several townships for general township purposes. *Leeper v. South Bend*, 106 Ind. 373; *Dickerson v. Franklin*, 112 Ind. 173.

III. Right to repeal exemptions.

An exemption from municipal taxation may be repealed at any time. *McCallie v. Chattanooga*, 3 Head, 317.

The limitation of the rate of taxation to be placed on agricultural land may be repealed at any time. *Washburn v. Oshkosh*, 60 Wis. 453.

The legislature may repeal a provision for the exemption or lower taxation of agricultural property at any time. *Powell v. Parkersburg*, 28 W. Va. 603; *Probasco v. Moundsville*, 11 W. Va. 501.

A statute fixing the size of the tract which is exempt from taxation lower than was the rule when certain property was annexed to the city will apply to that property if it is within its provisions. *Winzer v. Burlington*, 68 Iowa, 279.

IV. Validity of taxation of farm lands.

Upon the question of the power to tax farm land there is also direct conflict.

One line of cases holds that—

The taxation of farm property within the limits of a city for city purposes cannot be said to be a taking of property without due process of law however great the hardship or unequal the burden. *Kelly v. Pittsburgh*, 104 U. S. 73, 26 L. ed. 653.

A statute giving a municipal corporation power to tax all land within its limits is not in violation of the Indiana Constitution, cannot be held void because it is unjust, and does not take private property for public use without compensation. *Logansport v. Seybold*, 59 Ind. 225.

The prohibition against taking private property for public use without compensation has no application to the taxation of property. *Groff v. Frederick City*, 44 Md. 67; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

The extension of city limits so as to include farm lands and subject them to taxation, is not unconstitutional. *R. A.*

stitutional. Gliboney v. Cape Girardeau, 58 Mo. 141; *State. Patterson v. McReynolds*, 61 Mo. 303.

The charter may authorize taxation of all the property within the corporate limits. *Barker v. State*, 18 Ohio, 514.

Farm land enjoying no direct advantage from the municipal improvements is not exempt for that reason from payment of municipal taxes. *Hummelstown v. Brunner*, 17 Pa. Co. Ct. 140.

The question of the taxation of rural property within the limits of a municipality rests solely with the legislature, and such taxation is not unconstitutional because not equal and uniform for the reason that the rural property does not receive the same benefit that urban property does, nor because it is a taking of private property for public use without compensation. *Norris v. Waco*, 57 Tex. 635.

The taxation of a dairy farm included in the city limits for general municipal purposes is not an unconstitutional taking of private property without just compensation,—at least where the Constitution requires that taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the tax. *Ferguson v. Snohomish*, 5 Wash. 668, 24 L. R. A. 795.

If the legislature includes the new territory in the municipality without any direction as to its liability for taxation it will be liable to municipal taxation for past debts as well as for current expenses. *Madry v. Cox*, 73 Tex. 533.

If the proceedings to incorporate the land into the city are valid the taxes will be valid. *Lancaster County v. Rush*, 35 Neb. 119.

If the legislature has power to annex the territory to the municipality, when it is annexed the municipality has the right to tax it. *Weeks v. Milwaukee*, 10 Wis. 242.

On the other side it is held that—

Subjecting to municipal taxation farm property which cannot be benefited by municipal expenditures is a taking of private property for public purposes without just compensation. *People v. Daniels*, 6 Utah, 290, 5 L. R. A. 444; *Ellison v. Linford*, 7 Utah, 163.

his ground was not divided up into lots, but that it constituted one lot, upon which, with ample means, he had erected a splendid urban residence, where he and his family were in a position to enjoy, and had the privilege of enjoying, if they chose to avail themselves of it, all of the advantages and conveniences which were to be afforded by or derived from the presence and energy of the municipal government, not only for comfort, but for protection as well. Appellee Beall was the owner of 180 acres of land situated on the western and northwestern boundary of the town as established by the act of 1869, but all of his land, up to the commencement of his action, had always been used as farming lands, and only 77½ acres of it were included in the said town boundary, through which, as shown on the map of the town, the Owensboro & Nashville Railroad track runs from north to south. No part of this land had ever been divided into lots since the act of 1869. His residence was on that part of his farm that lay outside of the limits of the town, and the approach to it was from the Hopkinsville pike, and from a point thereon beyond the west line of the town boundary. That part of his land within the town boundary, as it appears from the map of the town is about equally divided by the track or line of the Owensboro & Nashville Railroad, but no streets or alleys had been laid out through any part of it, but that part of it east of said rail-

road is situated on the Greenville pike, which is a prolongation northward of Main street, and is laid down on the map as "Greenville Street," which the municipal authorities in 1862 and since improved at considerable expense and for some distance out, and in front of Beall's land, but just how far, or to what point, the record does not show with certainty, but probably to a point nearly half way the length of his line fronting on said street or pike. Along this street, and on both sides of it, and adjoining Beall's land on the west side, there are several houses, which were occupied mostly by colored persons, erected on lots which were originally a part of the tract in question, but they were laid off, and sold prior to 1869. The occupants of said houses used the said street as the only way of ingress and egress from the premises, and appellee Beall used it also when going to and from that part of his land which he entered through a gate opening on the said street or pike. That part of this parcel of land lying between the line of the Owensboro & Nashville Railroad and Greenville street is wet, but good meadow land, and water rises on and flows from it under a culvert constructed across the said street at the expense of the town. There is an area of 34 acres of land between appellee Beall's land and the business part of the town, upon which there were not any improved lots, except that of appellant Briggs. Appellee Beall

The extension of the limits of a city over outlying farm lands is in reality nothing more than an attempt to tax land a certain distance outside the limits of the city, and is in effect the taking of private property without compensation. *Morford v. Unger*, 8 Iowa, 82; *Langworthy v. Dubuque*, 13 Iowa, 86.

In *Cheaney v. Hooser*, 9 B. Mon. 380, it is intimated that the extension of the limits of a city over an adjoining farming land simply for the purpose of increasing the revenues of the city without any benefit to the farm would be an unconstitutional taking of private property for public use without compensation. And that intimation was adopted and applied as law in *Covington v. Southgate*, 15 B. Mon. 491.

An uninhabited tract of land nowhere adjoining an existing village, and in which the village has no special interest, cannot be made a part of the village for the mere purpose of increasing the corporate revenues by the exaction of taxes. *Smith v. Sherry*, 50 Wis. 210. This is put upon the ground that such action would be an abuse of the constitutional power that the legislature shall provide for the organization of cities, and incorporated villages.

If the city limits are extended to include agricultural property which is not benefited by the extension and cannot be, but is farming land simply, the attempt to tax is taking private property for public use without compensation contrary to the provisions of the Constitution. *Parkland v. Gaines*, 88 Ky. 562.

But a subjection of land to taxation by the extension of town limits is not unlawful unless the legitimate object of improving the town shall have been palpably perverted to the unauthorized purpose only of lessening the burden of taxation on the inhabitants who would not be otherwise benefited by the extension. *Swift v. Newport*, 7 Bush, 37.

It is no invasion of constitutional rights to require land which enjoys the benefits of a town and is surrounded by buildings and has enjoyed the enhanced price because of the building of the town to be

taxed as city property. *Simms v. Paris* (Ky.) 1 S. W. 543.

Local taxation authorized by law cannot be deemed a taking of private property without just compensation, unless it is palpable that persons or their property are subjected to such burden for benefit of others for purposes in which they have no interest and to which they are therefore not justly bound to contribute. *Elkton Trustees v. Gill*, 94 Ky. 123.

V. Power of courts.

Some of the courts assume that under the departmental system of government the question of municipal taxation, the same as that of the annexation of territory to the municipality (see note to *State, Richards v. Cincinnati*, 27 L. R. A. 787), is purely one for the legislature, and that the courts will not interfere with legislative action.

If the limits of the municipal corporation have been constitutionally extended the courts are powerless to interfere with the taxation of agricultural lands within the extended limits. *Santa Rosa v. Coulter*, 58 Cal. 537; *Dixon v. Mayes*, 73 Cal. 166.

In a case involving validity of a tax on the property of a mining company the court said it would not enter upon an inquiry as to whether the owner of the property is benefited by the tax or not, for the purpose of determining its validity. *Gold Hill v. Caledonia Silver Min. Co.* 5 Sawy. 575.

When the lawmaking department of the government has exercised its judgment in relation to the assessment of taxes, the courts have no power to interfere unless the fundamental law of the land has been violated. *Linton v. Athens*, 53 Ga. 533.

Where agricultural land is not within the exemptions made by the Constitution and statutes of the state, it will not be exempt. *Mendenhall v. Burton*, 42 Kan. 570.

If the property has been included within the limits of the city, the question of the right to tax it is precluded, and the rule is that all property situated within the city must bear its proper portion of taxes and must be assessed as city property. The

had never voted for town officers, or held any office in said town, but was engaged in mercantile and other business in the town, and owned other property in the town. The lands of both Briggs and Beall, the taxes on which are involved in this litigation, are in the vicinity of the passenger and freight depots of the Louisville & Nashville Railroad, and the shops of the Owensboro & Nashville Railroad, as shown by the map of the town, but they are situated on the side of the line or track of the former road opposite to them, which has to be crossed in passing from their lands to the business part of the town, the court-house and the public square.

The foregoing statement contains the principal facts that are material to the questions raised in the two cases. It is contended by counsel for the appellant Briggs, and the appellee Beall that neither parcel of ground was subject to municipal taxation, briefly, because it is not urban property, and had never been used as such, or divided into lots; that the owners had never consented to the extension of the boundary of the town so as to include their land within the town limits; that they had never received any benefits from the municipal government, or consented to be taxed by it; and that to compel them to pay taxes on their said lands to the town for municipal purposes would be the taking of private property without any compensation.

court says: "It would breed unwarrantable confusion with our assessments, and produce endless strife in our taxation, to permit any body of land that has been declared a part of an incorporated city to be taxed as farming land, the same as if it was not embraced within the city limits." *Hurla v. Kansas City*, 46 Kan. 738.

The question whether the benefits resulting from the extension of the limits authorized the burden of contributing to existing debts of the city is for the legislature to determine. *Stoner v. Flournoy*, 28 La. Ann. 850.

The question of the taxation of rural property within the city limits is for the legislature, and not for the courts, and the courts will not interfere although the tax is harsh and oppressive. *New Orleans v. Michoud*, 10 La. Ann. 783.

In *New Orleans v. Cazelar*, 27 La. Ann. 156, where it appeared that complainant's property was several miles distant from the outskirts of the city and consisted in part of original forest, the court held that the power to extend the limits of the city was absolute, and that the Constitution required the taxes within the city limits to be equal and uniform, so that there was no relief to complainant from such taxation.

In *St. Louis v. Russell*, 9 Mo. 507, it is held that the power of the legislature to extend the limits of a municipality are unlimited and it is assumed that the power of taxation accompanies the extension of the limits.

Rural land which lies within the limits of a municipal corporation, and which belongs to a class of property selected for taxation, cannot be relieved from a levy for municipal purposes on the ground that it receives no, or an inadequate, benefit from the expenditure of the money so raised. *State, Bailey, v. Brown*, 53 N. J. L. 162.

In *Manly v. Raleigh*, 4 Jones, Eq. 370, where a suit was brought to enjoin the collection of taxes on the added territory, the court says the power of the legislature to extend the limits of the town is absolute.

If the discretion as to annexation of land to a

On the other hand, it is contended by counsel for the town that the situation of the two properties is such, with reference to the streets of the town, and with reference to other houses and lots within the limits that are subject to municipal burdens, as to make it proper and right that they should be subject to their fair proportion of these burdens, which are necessary to the maintenance of municipal government for the benefit and convenience of the inhabitants of the town, and for the preservation of public order. Numerous cases of a character similar to these cases, and in which the same questions were raised, have been decided by this court, and in no such case has it been held that the general assembly did not have the constitutional power to fix the territorial limits of municipal corporations, either by acts of original incorporation, or by subsequent acts extending their boundary lines. We do not understand counsel here to deny that the general assembly had the constitutional authority to pass the acts of 1869 and 1880 by which the limits of the town of Russellville were extended. Nor do we understand counsel to hold that the municipal power or authority within the limits of the town as defined by those acts is restricted, except in respect of the power to tax the added territory. There were other purposes for which the general assembly had the constitutional power to extend the jurisdiction of municipal govern-

municipality is committed to county commissioners, the court cannot interfere with the exercise of such discretion on the ground that the resulting taxation will bear unjustly on individuals within the annexed territory. *Powers v. Wood County Commrs.* 8 Ohio St. 238; *Blanchard v. Bissell*, 11 Ohio St. 96.

The question of the taxation of rural land for municipal purposes is for the legislature, and not for the courts. *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 633.

The courts are powerless to afford relief if agricultural lands are taxed. *Davis v. Point Pleasant*, 22 W. Va. 239.

In *Land, Log & L. Co. v. Brown*, 73 Wis. 224, 3 L. R. A. 472, the court, in considering the power of the legislature to authorize a village to levy a tax on all the property in the town in which the village was situated, said it is for the legislature to fix the limits of a taxing district, and not for the court.

Under a constitutional provision that all property within the limits of a taxing power shall be equally taxed, a court will not withdraw land from the taxing district after the incurring of indebtedness so that the result would be to throw greater burdens on the remaining land. *Galeburg v. Hawkinson*, 75 Ill. 152.

Conversely, some of the courts assume the power to supervise the action of the legislature, and some others, which have decided that the power rests absolutely in the legislature, have intimated that they would control any abuse of such power. The position of the latter courts seems inconsistent because if the power is absolute in the legislature it would seem that the court would have nothing to say about it, and in the states in which the courts exercise the right to interfere it is because of alleged abuse of power by the legislature. So that the difference between the two rules rests rather upon the degree of abuse than upon the question of power.

The legislature cannot authorize a city to tax for its support land not reasonably considered to be city property. *Bradshaw v. Omaha*, 1 Neb. 16.

But in *Turner v. Althaus*, 6 Neb. 54, that case was

ment over territory contiguous to a town or city by extending its limits, besides that of taxation. This might be done in any case in anticipation of the future growth of the town or city, for the purposes of police protection, and the like. Such an exercise of legislative power was not violative of the constitutional guaranty of private property to the owners, because the land was still their own, and could not be taken or appropriated for any public use, such as for streets or alleys, without their consent, or without just compensation therefor. *Cheaney v. Hooser*, 9 B. Mon. 880; *Swift v. Newport*, 7 Bush, 87. It will be found on investigation, we think, that in most of the states the courts will not interfere in such cases to relieve property owners from taxation by the municipal authorities, because municipal government being an important part of the governmental machinery of the state, it is the peculiar province of the legislative department—the lawmaking power—to define or provide a method of defining the limits of municipal corporations, and to clothe them with the powers of local government, and that the propriety of legislative action in this regard may not be questioned. In this state, however, as well as in several other states, it has long been the established doctrine that the courts will relieve against the burden of municipal taxation, following the extension of the boundary

lines of a town or city, in cases where “the legitimate object of improving the town” has been “palpably perverted to the unauthorized purpose only of lessening the burden of taxation on the inhabitants, who will not be otherwise benefited by the extension.” *Swift v. Newport*, *supra*. In the case of *Elkton Trustees v. Gill*, 94 Ky. 138, following *Cheaney v. Hooser*, *supra*, and *Mallus v. Shields*, 2 Met. (Ky.) 558, the doctrine is stated in the following language: “The protection afforded to, and advantages received by, the citizen from a municipal government are, in the meaning of the Constitution, just compensation for taxation imposed in order to maintain it. And local taxation authorized by law cannot be deemed taking private property without just compensation, unless it is palpable that persons, or their property, are subjected to such burden for benefit of others for purposes in which they have no interest and to which they are therefore not justly bound to contribute.” In that case a parcel of 6 acres of land, embracing the residence and lawn of the owner, which was within the limits of the town, the land being a part of a tract containing 46 acres, which was used for agricultural purposes, the part including the residence being adjacent to two streets of the town, was held to be subject to taxation by the town. In *Mallus v. Shields* it was held that a lot of about 9

acres departed from, and the court held that except in cases where the sole object of the extension of the limits was to increase the revenue of the city, which was not passed upon, the question of the extension of the limits of the city was for the legislature, and that when the limits were extended the taxation upon all the property within the extended limits should be uniform according to its value.

The courts will interfere to restrain municipal taxation where the owner of the property cannot be benefited in a municipal point of view. *Langworthy v. Dubuque*, 16 Iowa, 271.

The courts will limit the line of municipal taxation to the line where it ceases to be for purposes beneficial to the proprietor in a municipal point of view. *Fulton v. Davenport*, 17 Iowa, 404.

In order to justify interference by the court there must be such a flagrant case as authorizes the conclusion at first blush that the taxation is a mere taking of private property for public use. *Sharp v. Dunavan*, 17 B. Mon. 223.

In *Re Little Meadows*, 85 Pa. 335, where an attempt was made to incorporate a village with a great deal of farm land within its limits, the court says it is quite unjust to give a village such an extension, for this puts all the farm lands around it in the power of the real villagers to tax them as they please and expend all the tax for themselves. But the question in the case was the interpretation of the power given by the legislature, and not the question of the power of the legislature.

The wisdom or discretion of the exercise of the power of taxation cannot be interfered with by the courts unless it has been so grossly perverted as to be a manifest violation of the Constitution. *Hewitt's Appeal*, 88 Pa. 55.

If the statute provides that the city council shall discriminate between agricultural lands and city lands the discretion is committed to them to determine which shall be taxed as city lands, and the court will not interfere with that discretion unless it is abused. *Erie v. Reed*, 113 Pa. 468.

When in the judgment of the legislature the interest of a suburban population demands local regulations, and the peace, tranquillity, and order of 34 L. R. A.

the public indicate that such is necessary, there is constitutional power to so enact and tax for such purposes the real estate of the people whether the lands are large or small. There is no power in the courts to control the action of the legislature when the power to tax is conferred in good faith to uphold local government and give police regulations to the people, and not merely to impress taxable property for revenue purposes in order to lighten the burdens of others. *Arbogast v. Louisville*, 2 Bush, 271.

The Federal courts are bound by the decisions of the state upon the question as to restraining collection of taxes upon farm lands within the city limits for city purposes. *Oliver v. Omaha*, 3 Dill. 368; *Kountze v. Omaha*, 5 Dill. 443.

VI. What property is taxable.

Each case must be determined upon its own peculiar facts. *Brooks v. Polk County*, 58 Iowa, 460.

If the land is so situated that the city cannot grade and improve streets, erect its public works, or extend public protection to its citizens proper without at the same time giving the owner of the land the full benefit and greatly enhancing the value of his property, the power to tax arises. *Fulton v. Davenport*, 17 Iowa, 404; *Davis v. Dubuque*, 20 Iowa, 458.

A lot which is benefited by the improvements and current expenditures, as well as permanently enhanced in value, is liable to taxation for municipal purposes; but it is not liable to taxation if it is not accessible by any street leading to the business part of the city and has no additions or improvements near it, while it is surrounded on all sides by land used exclusively for agricultural purposes. *O'Hare v. Dubuque*, 22 Iowa, 144.

In determining whether lands of a rural character situated within the limits of a city are benefited by the municipal government, the purpose for which they are held is a controlling fact to be considered. If held as city property to be put upon the market whenever they reach a value corresponding to the view of the owner, they ought to

acres in the town of West Covington, upon which the owner resided, and a part of which was in cultivation, and part containing evergreens and shrubs and a large number of fruit trees, was constitutionally subject to taxation for municipal purposes. In the case of *Sharp v. Dunavan*, 17 B. Mon. 223, it was held that where a town is extended by improvement, so as to give those living adjacent to the town boundary all the advantages which the citizens enjoy from the local government of the town, the legislature had the constitutional power to extend the limits of the town and subject the owners of the property within the extension to taxation for town purposes, and that the legislative discretion in the location of the lines of the extension could not be questioned or controlled by the courts. In that case 34 acres of land, including the residence of the owner, being a part of a tract of 140 acres which were used for agricultural purposes only, were brought within the limits of the town by the legislative act. The owner's residence was situated 25 poles from the original boundary of the town, and 155 poles from the center of the business part of the town, and near enough to enjoy the advantages of schools, churches, and the business of the town. This case and that of *Cheaney v. Hooser* arose under the act of 1846,

extending the boundaries of the town of Hopkinsville. Another case—that of *Stiles v. Dunavan* (MSS. Opin.)—originated under the same act, in which it was decided that the land of the owner that was brought within the limits of the town by the said act, containing 23 acres, and used as a residence, and for pasturing and other agricultural purposes, was liable to municipal taxation. The foregoing references are sufficient to show the doctrine that has prevailed in this state upon this question, and the manner in which it has been applied. Applying it to these two cases, we find that the facts exhibited by the records before us, fairly viewed, do not make out a case that would authorize the interference of the court in behalf of either appellant Briggs or appellee Beall. Considering the character and location of their property, its proximity to the two railroads, their depots and shops, running through and located in the town, and to the business portion of the town, the actual and prospective growth of the town, and the propriety, under existing conditions, of extending the police jurisdiction of the town over the locality, and the benefits and advantages necessarily afforded to and enjoyed by them, by reason of the very existence and presence of the municipal government, in common with other citizens and property owners on whom the burden of main-

be taxed as other city property. *Durant v. Kauffman*, 34 Iowa, 194.

The mere fact that a city residence consists of 20 acres does not exempt it from city taxation if it is used for residence, lawns, orchards, groves, etc., which make it a fine piece of residence property. *Ibid.*

If the lands are enhanced in value by the proximity of the settled portion of the city and the prospect of its soon becoming good city property it is liable to city taxation. *Brooks v. Polk County*, 53 Iowa, 460.

In order to exempt land within a city from municipal taxation it is not sufficient merely to show that it is used for agricultural purposes, but it must be shown that it is used exclusively for such purposes, and that it does not derive such benefit from the expenditure of city taxes as to make it taxable for city purposes. *Tubbsing v. Burlington*, 68 Iowa, 691.

A tract of 18 acres of land occupied as a homestead surrounded on all sides by platted land and having all the benefits of light, water, streets, and fire protection common to that portion of the city is subject to municipal taxation, although it is not subdivided by streets or alleys nor platted. *Parkins v. Burlington*, 77 Iowa, 563.

In *Ford v. North Des Moines*, 80 Iowa, 623, the claim was made that there was an unreasonable extension of the municipal boundaries thereby making the subjecting of the property to taxation for abutting streets unconstitutional, but the court held that the mere fact that the property was overflowed by high water of the river was no reason why it should not be annexed to the municipality.

Under a statute exempting land in good faith for agricultural purposes land held for speculation is not exempt, although it is at the time used for agricultural purposes and is not laid off into lots or blocks. *Farwell v. Des Moines Brick Mfg. Co.* (Iowa) 66 N. W. 176.

Land abutting on the main street of a city is taxable, although it contains 18 acres, has never been platted in lots and blocks, and a part of it has always been used for agricultural purposes. *Mendenhall v. Burton*, 42 Kan. 370.

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The mere fact that the land is devoted to agricultural purposes is not sufficient to exempt it from taxation. The question to be determined is whether or not the actual condition of the town and its growth authorized it to include the land within its bounds. *Maltus v. Shields*, 2 Met. (Ky.) 563.

In order to render land liable to city taxation, there must be, not only benefits actual or presumed, but also a town or city population on or near the land creating a necessity, or at least rendering it not unreasonable that the municipal government should be extended over it. *Courtney v. Louisville*, 12 Bush, 413.

A tract of 15 acres of which 7 or 8 are used for pasture, 1 for garden, and the remainder for residence, barn, etc., is not land used exclusively for agricultural purposes within a statute exempting such land from taxation. *Simms v. Paris* (Ky.) 1 S. W. 542.

The mere fact that the land is used exclusively for garden purposes is not sufficient to exempt it if it enjoys all the advantages which the corporation affords others. *Elfert v. Central Covington*, 91 Ky. 194.

Where the complainant kept boarders who worked in the town, and stores had been erected near his property, he could not enjoin the collection of the tax on the ground that the limits of the town were extended solely to increase the revenue of the town at his expense. *Beattyville v. Daniels*, 15 Ky. L. Rep. 736.

Where the proportion of the complainant's land which is within the town limits is only 6 acres, and he has sold a portion of his tract at an enhanced value because of the proximity of the town, while the streets are laid out past his property and buildings surround it, he cannot complain if he is taxed for municipal purposes. *Milton Trustees v. Gill*, 94 Ky. 138.

In *State, Paulison, v. Taylor*, 86 N. J. L. 184, the court asks, Can a man keep a farm or a large garden in the midst of a city or within city limits and claim that it shall be valued only according to the uses to which he applies it without regard to its actual market value?

A statute requiring farm land to be assessed by

taining it had been cast, it was, in our opinion, reasonable and just to require them and their property to bear a due proportion of the burden. By forbearing for so many years to assess their property, it is manifest that the municipal authorities were not seeking to foster private interests, or to lighten the burden of

other taxpayers, by extending the boundaries of the town; and when at last they did attempt to subject this property to taxation it was under circumstances and conditions that showed that these parties were to be equal sharers with every other property owner in the town of the benefits of the municipal government.

the acre is no longer applicable if the land has been laid off into lots and blocks. *State, Combes v. Vanhorne*, 30 N. J. L. 444.

A statute exempting property used for farm purposes applies only to land used for the cultivation of crops or the pasturage of stock, and not to dwelling houses and their appurtenances. *Carriger v. Morristown*, 1 Lea, 116.

If the streets are extended to the complainant's property, and he is afforded police protection, he is subject to municipal taxation. *Cook v. Crandall*, 7 Utah, 344.

A lot not used for agricultural purposes, and situated so near the city as to be protected and benefited by the municipal government, is not exempt from city taxation. *Butler v. Muscatine*, 11 Iowa, 438; *Herahey v. Muscatine*, 22 Iowa, 184.

Land adapted to city uses, deriving increased value from the proximity of the city and having a city population near it rendering the city government over it reasonable, is liable to city taxation. But the court says undoubtedly land held for and adapted to agricultural purposes only cannot be subjected to ordinary municipal taxation simply because of proximity to a city, although this fact may afford extra facilities for reaching the city, and render it more valuable; nor merely because of improvements constructed by the municipality. *Torbitt v. Louisville (Ky.)* 4 S. W. 345.

In a territory the district to be taxed for municipal purposes must be confined to the limits indicated by the buildings or public improvements of the city, and such outside district as is so near that it is probable that the protection of the police will be extended to it or that the benefits of the improvements made with municipal taxes will be received by its residents and property. *People v. Daniels*, 6 Utah, 238, 5 L. R. A. 444.

If the property cannot be regarded as town lots, but is used for agricultural purposes alone, while the city improvements do not extend near it and there are only a few houses in its vicinity, it cannot be subjected to municipal taxation. *Covington v. Arthur*, 12 Ky. L. Rep. 163.

Where the land is unplatted and is used for agricultural purposes, and is distinct from the platted portion of the town and from streets and lights, it is exempt, although the dwelling was at one time rented to a person who did not occupy it for agricultural purposes. *Taylor v. Waverly (Iowa)* 68 N. W. 347.

Thirteen acres of land owned by a merchant doing business within the city, 1 acre of which he has improved and uses for a residence, lawn, and outbuildings, is agricultural if the remainder of the tract is used for cultivation and pasture. *Tubbesing v. Burlington*, 68 Iowa, 691.

In a petition to sever certain land from a municipality on the ground that it was agricultural land, the court says it is conceded that it is not liable for municipal taxation. It is further said cities ought not to be permitted to retain lands within their limits which are not needed for city purposes and which are not benefited by being within the corporation, against the will of the owners, for the mere purpose of deriving revenue therefrom. *Evans v. Council Bluffs*, 65 Iowa, 238.

Land used for agricultural purposes, remote from the city proper and not near to any street or alley which has been worked, is not liable to taxa-
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tion for city purposes. *Deeds v. Sanborn*, 28 Iowa, 419; *Deiman v. Fort Madison*, 30 Iowa, 542.

VII. Power of municipality to exempt.

The municipality cannot exempt agricultural property from taxation if the power is not conferred by the legislature. *Third Municipality v. Ursuline Nuns*, 2 La. Ann. 611.

VIII. Original incorporation.

The fact that the land is included within the municipality at its original incorporation, and not by extension of its limits, does not change the rule as to exemption from liability. *Buell v. Ball*, 20 Iowa, 232; *Deeds v. Sanborn*, 28 Iowa, 214.

IX. Assessments.

The principles applying to assessments are somewhat different from those applying to taxation in general, and are set out in *notes to Re Madera Irrig. Dist. Bonds (Cal.)* 14 L. R. A. 755; *Davis v. Litchfield (Ill.)* 21 L. R. A. 563; and *Raleigh v. Pearce (N. C.)* 17 L. R. A. 330. But for the purpose of showing how the conflict of decision runs into even this branch of the subject, attention is called to the following cases:

In Pennsylvania, where the rule of absolute power in the legislature is applied to other cases, it is held that farm lands cannot be charged with the expenses of improving the streets running through them. *Scranton v. Pennsylvania Coal Co.* 105 Pa. 445.

On the other side, Maryland holds that an assessment for benefits may be authorized upon property outside of city limits. There is a strong distinction between such an assessment and regular city taxes. *Brooks v. Baltimore*, 48 Md. 235.

So, special paving and curbing assessments are not taxes for "any city purpose" within the meaning of the Iowa exemption law. *Farwell v. Des Moines Brick Mfg. Co. (Iowa)* 66 N. W. 176.

So, in Indiana an exemption of agricultural property from general city taxation does not apply to assessments for improvements. *Kalbrier v. Leonard*, 34 Ind. 497.

Agricultural land within a city is subject to local assessments for street improvement. *Taber v. Grafmiller*, 109 Ind. 203.

If the property is within the limits of the town, and abuts on a street upon each side of which lots are platted, upon many of which lots houses are built, so that the construction of a highway is reasonable, the abutting lots may be assessed for the work, although a portion of the lots adjoin farm property in the rear and are not built upon. *Hood v. Lebanon*, 12 Ky. L. Rep. 313.

X. Method of raising question.

If the property has been unlawfully annexed to the city the collection of a tax thereon may be enjoined. *Peru v. Bears*, 55 Ind. 576.

The question of the validity of the tax cannot be raised by a suit against the collector for levying on and selling property for the nonpayment of the tax. *Walden v. Dudley*, 49 Mo. 421.

The power of a city to tax farm land cannot be called in question in an injunction suit by the owner to restrain the execution of an order annexing the property to the city. *Suliz v. Indianapolis*, 55 Ind. 515.
H. P. F.

The taxes involved in these cases having been levied and assessed under laws existing before the passage of the act of July 8, 1893, providing for the government of towns of the fifth class, it is not necessary to pass upon any question that might be raised under any of the provisions of that act bearing upon the question of municipal taxation. Nor is it necessary for us to determine the effect of the provisions of our present Constitution requiring that taxes shall be uniform upon all property subject to taxation "within the territorial limits of the authority levying the tax," and prohibiting the exemption from taxation of any property except such as is exempted by the Constitution. *Copeland v. St. Joseph*, 126 Mo. 417. It is only necessary to say that under the provisions of the Constitution all property not ex-

empted by that instrument is required to be "assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." This plain requirement will prevent exorbitant and arbitrary valuations, and placing more than an equal and just proportion of the public burdens on any taxpayer.

Finding no error in the judgment in the case of *Briggs, trustees*, the judgment is affirmed. But, for the reasons given, the judgment in the case of appellee *Beall* is reversed. It is conceded by counsel for the town that only so much of his property as lies between the Owensboro & Nashville Railroad and Greenville street or pike, ought to be subjected to taxation in this proceeding, and the cause is accordingly remanded, with directions to so adjudge.

TENNESSEE SUPREME COURT.

Frank H. POST, *Appt.*,
v.

MECHANICS' BUILDING & LOAN ASSOCIATION.

(.....Tenn.....)

1. Loans at fixed premiums without free and competitive bidding, as required by the Tennessee statutes (Mill. & V. Code, § 1751) cannot be lawfully made by a building and loan association, but are usurious if the premium is more than lawful interest.
2. Payments of dues upon stock in a building and loan association cannot be credited upon a usurious loan to a stockholder in winding up the affairs when the association is insolvent, since such credit would relieve the borrowing shareholder from his share of the losses and throw them all on the nonborrowing stockholders.
3. Payment of dues in advance under an agreement with a building and loan association for interest upon the advances until they are absorbed by dues does not entitle the stockholder in case of the insolvency of the association to be treated as a creditor with the right to repayment of his advances with interest, especially when the agreement for interest thereon was not warranted by the charter.
4. A mistaken declaration of the maturity of stock by a building and loan association when the stock is in fact not matured will not make the stockholder a creditor or put him in the position of a holder of matured stock in subsequently winding up the affairs of the association when insolvent.

(October 14, 1896.)

APPEAL by complainant and others from a decree of the Court of Chancery Appeals modifying a decree of the Chancery

Court for Knox County in a proceeding to wind up the affairs of an insolvent building association. *Modified.*

The facts are stated in the opinion.

Messrs. Green & Shields and Webb & McClung, for appellants, Post and advance payment stockholders:

These contracts have in them all of the elements of mutuality and equality of benefits which take the contracts out of the usury laws and make them valid as building and loan contracts.

Patterson v. Workmen's Bldg. & L. Assn. 14 Lea, 698.

The construction of a written contract is a matter of law which this court determines for itself without embarrassment from the holding of the court of chancery appeals.

Toomey v. Atyoe, 95 Tenn. 374.

Borrowing stockholders are estopped to deny the validity of their subscriptions for stock or to dispute that they are stockholders in said association.

Morawetz, Priv. Corp. 2d ed. §§ 108, 116; *Morrow v. Nashville Iron, S. & C. Co.* 87 Tenn. 262, 3 L. R. A. 37; *Cartwright v. Dickinson*, 88 Tenn. 488, 7 L. R. A. 706; *Endlich, Bldg. Assn.* §§ 60, 61.

The borrower's relation to the association as borrower is separate and distinct from his relation to it as a stockholder.

Endlich, Bldg. Assn. §§ 448, 477, 478.

The payment of dues upon stock are not payments to the mortgage debt, and do not *ipso facto* work an extinguishment of so much of the mortgage, and hence, they are not to be regarded as partial payments.

Endlich, Bldg. Assn. 2d ed. § 477; *Rogers v. Hargo*, 92 Tenn. 35.

The usury in the loan would only entitle the borrower to have the contract of loan purged of

NOTE.—On the question of the right to apply payments made on stock in a building and loan association as credits on a mortgage given by the stockholder, see *Southern Bldg. & L. Assn. v. An-* 34 L. R. A.

niston Loan & T. Co. (Ala.) 29 L. R. A. 120, and note; *Bulst v. Bryan (S. C.)* 29 L. R. A. 127; *Randall v. National Bldg., L. & P. Union (Neb.)* 29 L. R. A. 123.

its usury, and could in no way affect the validity of the borrower's stock in the association.

The insolvency of an association and its inability to carry out its contract with the borrower work the same result.

Rogers v. Harpo, 92 Tenn. 38.

Mr. Julius Parker, for S. V. Armstrong;

The objection to the validity of the action of the association in declaring the stock matured resolves itself into an insistence that the declaration of dividends was erroneous and therefore illegal.

The capital stock of a corporation is a trust fund for the payment of creditors. This lies at the basis of the doctrine of the illegality of dividends which encroach on the capital stock.

2 Thomp. Corp. § 2136.

In the case at bar there are no creditors asking the court to enforce this doctrine intended alone for their benefit.

Upon the declaration of a dividend by directors it becomes *eo instanti* the property of the shareholders, and can be recovered by them as a debt notwithstanding the intervention of a condition of insolvency.

Cook, Stock & Stockholders, 2d ed. § 548.

When one paying money under mistake has deprived the party paid of legal rights, or influenced him to waive or lose them, the plaintiff will be estopped to show his mistake and to recover the payment so made.

Guila v. Baldridge, 2 Swan, 295.

It is not an answer to this contention to say that the directors who made the mistake were the common agents of all the stockholders including this appellant. As to dividends the corporation and the stockholder to whom such dividend was declared stand at arm's length and in opposition.

Cook, Stock & Stockholders, 2d ed. §§ 543 *et seq.*

The relation between the withdrawing stockholder whose withdrawal notice has matured, and the corporation, is that of creditor and debtor.

Endlich, Bldg. Assn. § 186.

The intervention of a condition of known insolvency between the creation of this relation and the withdrawing stockholder's getting his money does not change his relation back again to that of stockholder, and in winding up the insolvent association the withdrawing stockholder whose withdrawal notice has matured is entitled to be paid in priority to other stockholders.

Endlich, Bldg. Assn. § 486.

The right of the stockholder who gives notice of withdrawal in accordance with the by-laws and whose notice under those by-laws has matured is prior to that of general stockholders. The ground for this holding is that this is the contract method of terminating the relationship of stockholder and creating the relationship of creditor. That reason applies with its full force to this case, although the initiative step here was taken by the corporation and only assented to by the stockholder.

Messrs. Lucky, Sanford, & Tyson, for Curtis, Armstrong, Condon, and Hunt:

Every essential fact to constitute usury here exists.

Bank of Newport v. Cook (Ark.) 46 Am. St. Rep. 178, note.

34 L. R. A.

The statutes chartering building and loan associations must be strictly complied with or the loan will be held usurious.

Bates v. People's Sav. & L. Assn. 42 Ohio St. 655; *Reese v. Ladies' Bldg. Assn.* (Ark.) 18 L. R. A. 184, note.

If usurious then it must be governed by the rules governing other usurious loans,—the borrower charged with the sum actually received and credited with all sums paid, whether interest, dues, or fines.

Williar v. Baltimore Butchers' Loan & A. Assn. 45 Md. 547; *Kupfert v. Gutenberg Bldg. Assn.* 30 Pa. 471; *Southern Bldg & L. Assn. v. Anniston Loan & T. Co.* 101 Ala. 582, 29 L. R. A. 120.

In no event can appellants be required to pay back on their loans more than the amounts they actually received less the sums they paid thereon as interest, credited as partial payments, they sharing losses with other stockholders upon the sums paid in by them as dues.

Rogers v. Harpo, 92 Tenn. 35.

The investing stockholders who had paid in advance of March 27, 1895, are not preferred creditors, are simply stockholders, and have that much more of capital invested in the corporation.

The facts found by the appellate court stamp the loans as usurious.

Reese v. Ladies' Bldg. Assn. *supra*; Endlich, Bldg. Assn. 1st ed. §§ 353, 355, 356; 2d ed. § 408; *Martin v. Nashville Bldg. Assn.* 2 Coldw. 418.

Whenever a loan is found to be usurious then the borrowers have the right to have every payment made by them to the creditor credited on the loan.

Martin v. Nashville Bldg. Assn. and Southern Bldg. & L. Assn. v. Anniston Loan & T. Co. (Ala.) 29 L. R. A. 120, note, and authorities there cited; Endlich, Bldg. Assn. 1st ed. § 496.

The case at bar conclusively entitles the borrower to a credit for all of his payments. The association being the creditor has received from the borrower so much money as dues on the stock held by it as collateral. Where a creditor making a usurious loan and taking collateral from his debtor receives and collects on the collateral money he is clearly chargeable with the collections on collateral.

Endlich, Bldg. Assn. 2d ed. § 477; *Lord v. Ocean Bank*, 20 Pa. 386, 59 Am. Dec. 723.

If the transaction is not brought within the provisions of the acts governing loan associations it must be governed by the rules governing other cases of mortgagor and mortgagee.

Williar v. Baltimore Butchers' Loan & A. Assn. 45 Md. 547.

Even where the borrowing stockholder is in default and the association seeks to enforce its mortgage against him he is entitled to have credited on his debt the amount without interest he has paid on his stock.

2 Endlich, Bldg. Assn. §§ 149, 483.

Messrs. Henderson, Jourdmon, Welcher, & Hudson, and *Cormick, Henderson, & Sansom* for interveners.

Wilkes, J., delivered the opinion of the court:

This is a bill filed to wind up the defendant company as an insolvent corporation, and to

properly and equitably distribute its assets. It was filed by a shareholder and creditor. The association answered, and admitted its insolvency, and a decree was pronounced maintaining the bill as a general creditors' bill, adjudging the corporation as insolvent, and requiring all creditors to come in and file their claims, and a receiver was appointed. The chancellor passed upon the rights of the various parties, and gave decree accordingly. The case was appealed, and the court of chancery appeals has passed upon the questions involved, and the cause is now before us on appeal by several parties. The questions presented are important, and some of them quite difficult. We are content to mention and dispose of them as presented. It is found, as a matter of fact, by the court of chancery appeals, that the by-laws of the association contain a provision that no funds of the association should be loaned for a greater premium than 30 per cent, and, as a matter of fact, that the loans were not made under competitive bids, but by agreement between the borrowers and association, at a fixed premium, and were evidenced by notes payable six years after date, and secured, principal and interest, by mortgages upon real estate. These mortgages further provided to secure the dues and fines prescribed by the by-laws. No loans appear to have been made to parties other than stockholders in the association, and the stock of the borrowing shareholder was in each instance by the contract pledged to the association, to secure the loans made in addition to the real-estate mortgages. The court of chancery appeals find that these mortgages and notes matured at a definite time, and were enforceable at maturity, irrespective of the maturity of the stock hypothecated to secure the loans. The court of chancery appeals held, under this finding and statement of facts, that all of the loans made by the association to its members were in violation of the laws of the state in regard to usury, and that, in the adjustment and settlement of the rights of the parties, the loans should be purged of all usury. It is not necessary to dwell upon the question of whether the loans as made by the association were unlawful, unwarranted, and usurious. We have recently passed upon this question in one of its features in the case of *McCauley v. Workman's Bldg. & S. Asso.* in which we held that such loans were unlawful and usurious, under the statutes of our state, when the premium was fixed upon which loans could be made, and the money was not loaned under free and competitive bidding, as required by the statutes. It is not necessary for us to go further in this case. *McCauley v. Workman's Bldg. & S. Asso.* 97 Tenn. —. In accord: *Patterson v. Workmen's Bldg. & L. Asso.* 14 Lea, 696; *Bates v. People's Sav. & L. Asso.* 42 Ohio St. 655; *Endlich, Bldg. Asso.* 2d ed. 409-411; *Id.* 1st ed. 894, 897; *Reeve v. Ladies Bldg. Asso.* (Ark.) 18 L. R. A. 184, note.

The next question is: Treating the loans as usurious, upon what basis shall they be adjusted in the distribution of the assets of an insolvent corporation, and in the winding up of its affairs? The court of chancery appeals held that the borrowing stockholders should be charged with the money actually obtained by them from the association, with 6 per cent

interest per annum upon such amount, but should have credit thereon for all moneys paid by them into the association on any and all accounts, including the payment of dues upon their stock, but that they were not entitled to have these payments credited upon the principle of partial payments. That court was of the opinion that the contracts of the members to pay dues upon their stock, and to repay their loans, were indissolubly tied together; that the payment of the former was intended as a payment *pro tanto* of the latter, and, inasmuch as the loans were usurious, the subscriptions were also tainted, and the borrowing stockholders were entitled to have their payments on stock dues credited upon the loans from the association. The court further held that, as a matter of fact, the dues paid into the association were paid in on stock, and that, under a proper construction of the contracts and law applicable to them, the agreement to pay dues, fines, and interest all entered into the undertaking of the borrowing member when he made his loan, and the taint of usury, therefore, attached to the whole transaction; and for this reason that court concludes that the payments upon stock should be credited upon the loans. The effect of this would be to relieve the borrowers from all losses in the business of the association, and throw such losses exclusively upon the nonborrowing stockholders. We think the question involved in this feature of the case is not one of fact, but of law and fact, to be determined by a proper construction of the charter, by-laws, and contracts entered into by the borrower and stockholder with the association. We are of opinion the court of chancery appeals is in error in not observing the distinction, well settled, between the borrower's relation to the association as a borrower and as a stockholder. Upon this point that court says: "The one distinct from the other may be thinkable, but, from a judicial view, they are essentially parts of one and the same contract so far as the construction of the contract is concerned. This being so, the element of usury, tainting the note, taints also its necessary element of payment as fixed by the contract." The subscriptions to stock, and the obtaining a loan, are two distinct things; and, while one is clearly dependent upon the other, still they are not indissolubly connected. A shareholder may never become a borrower. While it is the original scheme that all shareholders will become borrowers, still it is not compulsory. Likewise, a borrower is not in every instance a stockholder, as outsiders are allowed to borrow surplus funds of the association after the preference demand of the stockholders is satisfied. But, as to borrowing stockholders, their contracts and obligations as shareholders and borrowers are in many respects distinguishable and different. The shareholder enters primarily into his contract of subscription. This is a plain, simple contract, tainted with no usury or other irregularity, and could stand alone. Having made this contract and become a subscriber, he applies for a loan. He states in his application that he is a stockholder, and thus puts himself in position to claim the preference given to the stockholders in making loans. Payments made on stock are simply in-

vestments in stock, whether the shareholder be a borrower or not. These payments have no direct relation to loans made to members. It is true that in solvent going concerns, under certain contingencies, as in cases of withdrawal or maturity of the scheme, the borrower has the right to have the amounts due to him upon his stock credited upon his indebtedness to the association. But this payment of dues upon stock is not "*ipso facto*" a payment on his loan. It is more in the nature of a set-off or adjustment of cross demands and claims. If the borrower prefer, he can pay his loan in money, and the association cannot force him to credit the amount of his stock payments upon his indebtedness to the association. The relations of borrower and stockholder are separate and distinct. Endlich, Bldg. Asso. 2d ed. §§ 448, 477, 478. Mr. Endlich says: "It has therefore become a well-recognized doctrine that the payments of dues upon stock are not payments to the mortgage debt, and do not *ipso facto* work an extinguishment (*pro tanto*) of so much of the mortgage, and hence that they are not to be regarded as partial payments, and that therefore the statutory rule for computing interest on partial payments is inapplicable to them." Id. § 477. Again, it is said: "It may be safely stated that the doctrine has forced its own recognition upon the courts of nearly every state in the Union, as well as England. It may, it is true, not have found, upon all occasions, express and explicit judicial sanction. In theory, it may have been persistently denied, yet in its results it has in some form or other been everywhere applied, and, in the condemnation of the outrageous consequences flowing from the opposite doctrine, it has at some time or other been everywhere confirmed." Id. § 128; *Rogers v. Hargo*, 92 Tenn. 35; *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 599, 83 L. R. A. 112.

The rule in regard to the distribution of the assets of insolvent associations, in so far as it relates to borrowing stockholders, is laid down in *Rogers v. Hargo*, *supra*, to be that the borrowing stockholder will be charged with the money actually received by him, with interest from date of its receipt. He is credited with all payments of interest and premiums as of dates when made. He is not allowed credit for amounts paid as dues on his stock. After all liabilities of the company are paid, the remaining fund is distributed *pro rata* among stockholders, whether borrowers or not, upon the basis of the amounts paid by them, respectively, as dues upon the stock. This is in accord with the rule laid down in *Strohen v. Franklin Sav. Fund & L. Asso.* 115 Pa. 278, 279, and as now held in Endlich on Building Associations, 2d ed. §§ 514, 515, though formerly the same author held to the opposite view. See also *Toule v. American Bldg., L. & I. Soc.* 61 Fed. Rep. 446.

It is insisted, and very ably urged, that while this is the correct rule in winding up associations which are merely insolvent, and which have conducted a legitimate business, a different rule must be adopted when the business of the association has been conducted upon an illegal and usurious basis, and that in such cases the borrower has the right to

have every payment made by him to the lender credited on his loan. We see no tenable ground for such distinction. The stock subscriptions, and loans, as we have seen, are separate transactions, and it is only as to the latter that the question of usury arises. The subscriptions for the stock are not tainted with usury, and there is no reason why the borrower who has paid usury upon his loan should be allowed to recoup it by receiving back the payments made on his stock. Each class must stand upon its own basis, and the shareholders' rights as between themselves must be adjusted on the status of their shares, not affected by any questions of usury involved in the loans. The stockholders must bear the losses made in the business between them, but, if the shareholders whose loans are tainted with usury are allowed credit for their payments on stock, they will escape their share of such losses, and the same will be thrown on the nonborrowing stockholders.

The next question arising is as to the right of certain stockholders who paid dues in advance of their maturity. These stockholders are not borrowers, but they claim that having paid dues in advance, under an agreement with the association that interest should be allowed upon such advance payments until absorbed by dues, they should be treated as creditors of the association, and the amounts advanced as loans to it be repaid, with interest. The charter forbids the company to retain a monthly payment exceeding two dollars per share, but does not in express terms prohibit it from allowing stockholders to pay in advance if they so desire. But here the advances were made under an agreement that the parties making the advances should be allowed interest upon the amounts advanced. It was in some respects the same thing as if the association, in order to accommodate its borrowers, had gone to some bank or outside person, and borrowed money to put into the association. Such a proceeding is not warranted by the charter or the proper scope and scheme of a building and loan association. They should not be borrowers of money, but only lenders for the proper purposes of their creation. To allow the amounts advanced to be paid back would be to sanction such proceedings as legitimate loans, to convert capital into loans, and to create preferred stock, in order to work out supposed equities. We think the proper holding upon this matter is to treat the advances as payments upon stock, and not as loans to the company; and this is, in effect, carrying out the intention of the parties, which was to pay up their stock in advance, and, by anticipation of its maturity, receive a discount by so doing.

The next question presented is as to the right of a certain stockholder (Armstrong), whose stock was declared matured in December, 1894, but who had failed to draw anything from the association. It is insisted that he should be paid the par value of the stock, as a creditor of the association, and not be required to share as a stockholder. The court of chancery appeals held: "In sound reason and legal analogy, the positions of the members holding stock in a series declared through mistake to be

matured, when in point of fact it had not matured, is, in respect to the assets of the insolvent corporation, the same, in effect and as to results, as that of members giving notice. They are not entitled to be paid in preference to other stockholders. They will prorate with all other stockholders in the assets of the association after the expenses of the administration of its affairs are paid." The court of chancery appeals found that this series of stock had been declared mature by mistake, and that the real value of petitioner's share was not \$1,000 but only \$792.80; and the contention now is that he should be paid, if not the par value (\$1,000) of his stock, its real value, of \$792.80. If this contest were alone with the association as a solvent, going concern, this contention might be sustained, perhaps, upon the theory that the association would be estopped to set up its mistake in declaring the stock paid up, and in such case would be required to pay the stockholder as it had agreed; especially in consideration of the fact that he was no longer a member after his stock matured, and had no right to vote or to withdraw on notice, secured

by the by-laws to unmatured, but not to matured, stockholders. This latter was a valuable right, in the light of the fact that all stockholders withdrawing before the bill was filed were paid in full. But, in view of the insolvency of the association, the rights of the different shareholders as among themselves, and not simply as against the association, must be considered; and the case presents itself as one purely arising out of mistake of facts and errors in the conduct of the business, and, as a matter of fact, Mr. Armstrong's stock has not matured, and he does not stand in the attitude of a creditor, or of a stockholder holding matured stock, but of a stockholder whose stock is not yet mature, and upon that theory his rights in a contest with his fellow stockholders must be adjusted and settled as a stockholder. This applies to all shareholders who stand in the same relation and occupy the same status as does Mr. Armstrong.

It follows that the decrees of the Court of Chancery Appeals must be reversed and modified in the particulars indicated, and in all other respects it is affirmed.

WISCONSIN SUPREME COURT.

Rufus W. ROBINSON, *Resp't.*,
v.

SUPERIOR RAPID TRANSIT RAILWAY
COMPANY, *Appl't.*

(.....Wis.....)

1. What a conductor said after allowing a passenger to get back on the car because he had become convinced that he had paid his fare, although he had put the passenger off because he thought he had not paid the fare, is a part of the *res gestæ* of the ejection.
2. An instruction that plaintiff is "entitled" to exemplary or punitive damages if the injury was malicious is error, since such damages cannot be claimed as matter of law, but only in the discretion of the jury.
3. Exemplary damages cannot be recovered from a carrier for the malicious act of the conductor in ejecting a passenger, unless his act is either authorized or ratified by the carrier.

(November 4, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Douglas County in favor of plaintiff in an action brought to recover damages for plaintiff's alleged wrongful ejection from defendant's car. *Reversed.*

The facts are stated in the opinion.

Messrs. Ross, Dywer, & Hanitch, for appellant:

Keeping the conductor in defendant's employ after the service of the summons and

NOTE.—On the question how near the main transaction declarations must be in order to constitute a part of the *res gestæ*, see note to *Ohio & M. R. Co. v. Stein* (1891) 19 L. R. A. 738.
34 L. R. A.

complaint in this action is not ratification, but at most is evidence of ratification.

Milwaukee & M. R. Co. v. Finney, 10 Wis. 538; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 675, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.* 42 Wis. 667, 24 Am. Rep. 437; *Eviston v. Cramer*, 57 Wis. 578; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 87 L. ed. 97; *Dillingham v. Anthony*, 73 Tex. 47, 8 L. R. A. 634.

The fact that a railroad conductor ejecting a passenger was not legally justified in refusing to allow the passenger to ride on his ticket will not justify the awarding of exemplary damages where the conductor was actuated by malice, however mistaken as to the legal rights of the passenger and as to his own duties in the premises.

Hoffman v. Northern P. R. Co. 45 Minn. 53; *Fine v. St. Paul City R. Co.* 60 Minn. 144, 16 L. R. A. 347.

Mr. Yate H. V. Gard, for respondent:

The language of the conductor after plaintiff had returned to the car was pleaded as part of the transaction, and taken in connection with what had just preceded it would seem clear that it is part of the *res gestæ*.

Bass v. Chicago & N. W. R. Co. 42 Wis. 671, 24 Am. Rep. 437.

If the defendant corporation ratified the act of the conductor it thereby became liable in exemplary damages.

The ratification of a tort may be either with full knowledge of the facts or with the purpose of the principal without inquiry to take the consequences upon himself.

Cooley, Torts, 128.

The report of the conductor shows that plaintiff was wrongfully expelled, and this is

all that is necessary to charge the corporation.

Bass v. Chicago & N. W. R. Co. 43 Wis. 669, 24 Am. Rep. 487.

The defendant in its answer approves, sanctions, and adopts every contention adverse to plaintiff that the conductor contended for against him. Such an answer under such circumstances amounts to a most forcible ratification of the conductor's acts.

Taylor v. Ryan, 15 Neb. 578; *Henderson v. Fox*, 83 Ga. 238; *Bennett v. Matthews*, 64 Barb. 410; *Klein v. Bauman*, 53 Wis. 244.

The corporation is held liable in exemplary damages for the acts of its agents and servants within the scope of their employment in all cases where such damages would be awarded against the individual if acting for himself.

Thomp. Corp. § 6388.

If the prompt dismissal of the offending servant raises a presumption against ratification, and it certainly does, then the retention must raise the presumption of ratification.

Bass v. Chicago & N. W. R. Co. 42 Wis. 675, 24 Am. Rep. 487; *Patry v. Chicago, St. P. & O. R. Co.* 77 Wis. 218; *Perkins v. Missouri, K. & T. R. Co.* 55 Mo. 201; *Cleghorn v. New York C. & H. R. R. Co.* 56 N. Y. 44, 15 Am. Rep. 375; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 3 Am. Rep. 89.

Cassoday, Ch. J., delivered the opinion of the court:

This is an action to recover damages by reason of the defendant's having without cause, unlawfully, wilfully, maliciously, and with force and violence ejected and expelled the plaintiff from one of its railway passenger cars, upon which he was rightfully riding after having paid his fare. The defendant answered, by way of admissions, denials, and allegations, to the effect that, if the plaintiff had paid his fare, the conductor of the car had forgotten the fact, and so ejected the plaintiff only after he had refused to inform the conductor whether he had paid his fare or not. At the close of the trial, the jury returned a verdict to the effect that they found for the plaintiff, and assessed his damages at \$250, of which sum \$200 was so awarded as exemplary damages. From the judgment in favor of the plaintiff for the full amount stated, and costs, the defendant brings this appeal.

1. We perceive no error in allowing the plaintiff to testify as to the conversation between himself and the conductor in respect to paying his fare while riding on the car, and at the time and immediately after he was ejected, and just after he got on the car again. The controversy was as to whether the plaintiff had or had not paid his fare. He was put off because the conductor claimed he had not paid his fare. He was allowed to get on the car again because the conductor became convinced that he had paid his fare. The *res gesta* commenced when he paid his fare, and did not terminate until he returned to the car, and was allowed, by the conductor, to ride peaceably. Within the authorities, it included what the conductor said just after the plaintiff stepped back into the car. *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542; *Hermes v. Chicago & N. R. Co.* 80 Wis. 592; *Reed v. Madison*, 85 84 L. R. A.

Wis. 674. The case is clearly distinguishable from *Gristin v. Milwaukee City R. Co.* 84 Wis. 22; *Ehrlinger v. Douglas*, 81 Wis. 59.

2. Error is assigned because the trial court, after charging the jury to the effect that the plaintiff was entitled to a verdict for compensatory damages for all injuries, including injuries to his feelings, further charged them to the effect that, if the conductor maliciously put the plaintiff off the car, then he was "also entitled" to what are called "exemplary" or "punitive" damages; that is, something different from, and over and above, the compensatory damages which the law allowed them to impose in such a case, in the way of warning and punishment, and as a public example. There is no claim that at the time in question the conductor was not acting within the scope of his employment, nor that the plaintiff had not paid his fare. The plaintiff was therefore entitled to compensatory damages. Whatever may be the rule in other states, it is settled in this state that, in actions for personal torts, such compensatory damages include, not merely the plaintiff's pecuniary loss, but also compensation for mental suffering; and that, in awarding such damages in such a case, no distinction is to be made between other forms of mental suffering and that which consists in a sense of wrong or insult. *Crocker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; *Fenelon v. Butts*, 53 Wis. 344; *Grace v. Dempsey*, 75 Wis. 323; *Reinke v. Bentley*, 90 Wis. 459. The question here presented is whether the plaintiff was "also entitled," as a matter of law, to "exemplary or punitive" damages, in case the jury found that the conductor maliciously ejected the plaintiff. In *Day v. Woodworth*, 54 U. S. 13 How. 371, 14 L. ed. 185, Mr. Justice Grier, speaking for the court, said "that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. . . . This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the peculiar circumstances of each case." This is quoted approvingly by Mr. Sutherland (vol. 1, § 392). The same was followed in *Pike v. Dilling*, 48 Me. 539, where numerous adjudications are referred to, and an instruction to the jury to the effect that in such case they "were authorized, if they thought proper, in addition to the actual damages the plaintiff has sustained, to give him a further sum, as exemplary or vindictive damages both, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like cases," was held to be in accordance with the weight of judicial authority in this country. In *Webb v. Gilman*, 80 Me. 188, it was said by the court that "exemplary or punitive damages cannot be demanded as a matter of right; actual damages may be." To the same effect: *Foot v. Nichols*, 28 Ill. 486; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426; *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119; *Louisville & N. R. Co. v. Brooks*, Id.

129; *Stilson v. Gibbs*, 53 Mich. 280; *Wilson v. Bowen*, 64 Mich. 133. In the last Illinois case cited, an instruction substantially like the one in the case at bar was held bad. In one of the Kentucky cases cited, an instruction that the jury "should" give punitive damages if they found the neglect wilful was held error; and, in the other Kentucky case cited, it was held error to instruct in such a case that the jury "ought" to award punitive damages. It is true that an instruction to the effect that the jury "ought" to give exemplary damages in such a case was sustained by this court in *Hooker v. Newton*, 24 Wis. 292; but the case is not in harmony with the best considered cases, nor with the weight of authority. Mr. Thompson, in his excellent work, after stating that "the jury may, if they think proper, give damages by way of punishment," says: "It may be stated that, in cases in which such damages may be given, whether they will be given or not, is a question within the discretion of the jury. Many judgments have been reversed because the jury were allowed to give such damages; but no case is recollected where a judgment was reversed because such damages were not given, though possibly such cases may be met with in the recent books of reports." 2 *Thomp. Trials*, § 2065. The reason for the rule, as indicated in some of the cases cited, is that the primary object of such action is to fairly compensate the plaintiff for the wrong he has suffered and the injury he has sustained, and that he is not entitled, as a matter of legal right, to anything more. Accordingly, some courts of high standing refuse to allow punitive damages in cases similar to this.

3. There is another matter calling for consideration. The charge left the question of exemplary damages to turn wholly upon the question whether the conduct of the conductor was malicious,—the same as though the action had been directly against him. This court has repeatedly held, in effect, that such exemplary damages can only be recovered against the principal for the wrongful and malicious act of the agent, when such act is either authorized or ratified by the principal. *Craker v.*

Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 Am. Rep. 495, 39 Wis. 636, and 43 Wis. 654, 24 Am. Rep. 487; *Eviston v. Cramer*, 37 Wis. 570; *Patry v. Chicago, St. P. M. & O. R. Co.* 77 Wis. 218; *Mace v. Reed*, 89 Wis. 440; *Hagan v. Providence & W. R. Co.* 3 R. I. 88, 63 Am. Dec. 877. On the same day that the plaintiff was so ejected from the car, September 12, 1894, the conductor reported his version of the transaction to the defendant; but that report, while it was not expressly excluded on the objection of the plaintiff, was allowed in evidence simply as showing that the defendant had no knowledge of wrong on the part of the conductor. The only evidence of notice to the defendant that the conduct of the conductor was malicious is the allegations contained in the complaint served September 25, 1894. There is nothing to indicate that the complaint was read to the jury, nor that they knew its contents, and the trial court stated, at the time the evidence was excluded, that there was not any evidence in the case of ratification. It does appear that the conductor was in the employ of the defendant from July 28, 1894, to December 18, 1894, and then left of his own accord. Such retention of the conductor in the employment of the defendant, with knowledge that such conduct of the conductor was wilful and malicious, would have been evidence tending to prove ratification. The decisions of this court cited are to that effect. See also cases cited in the notes to 62 Am. Dec. 887; *Cleghorn v. New York C. & H. R. Co.* 56 N. Y. 47, 15 Am. Rep. 375. In taking the question of such ratification from the jury, the court necessarily held that, if the jury found that the conduct of the conductor was malicious, then the defendant was conclusively bound to know the same, because it was so alleged in the complaint. This, we think, was error.

The judgment of the Superior Court for Douglas County is reversed, and the cause is remanded for a new trial, or, at the option of the plaintiff, for judgment in his favor on that part of the verdict assessing compensatory damages.

IOWA SUPREME COURT.

Minnie HALL
v.

Town of MANSON, App't.

(.....Iowa.....)

1. A pedestrian's knowledge that the town is laying watermain is not sufficient to give notice of an excavation at a particular place near a crossing.

2. A finding of fact by a jury on conflicting evidence will not be disturbed on appeal.

3. An unguarded and unlighted excavation in close proximity to a crosswalk may constitute negligence of a municipality, although the crosswalk itself is not defective.

4. A witness called by both parties may be impeached by the party first calling him by proof of his contradictory statements as

NOTE.—As to the power to compel the plaintiff in suit to submit to a physical examination, see *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 468, and note; also *Graves v. Battle Creek* (Mich.) 34 L. R. A.

19 L. R. A. 641; *Carrioo v. West Virginia, C. & P. R. Co.* (W. Va.) 24 L. R. A. 50; *Lyon v. Manhattan R. Co.* (N. Y.) 25 L. R. A. 402.

to a matter to which he testified only when cross-examined as the witness of the other party.

5. The measurement in the presence of the jury of a woman's foot and her leg 6 inches above the ankle, in a suit for injuries to the foot and ankle, must be permitted by the court when there is a direct conflict as to such measurements by the medical men called by the respective parties,—at least if the witness herself does not object.

6. An instruction as to the duty of a municipality in respect to a walk, which says it must be kept "in a safe condition" for public travel, ought to be changed to say that the duty in that respect is to use reasonable and ordinary care.

(October 20, 1894.)

A PPEAL by defendant from a judgment of the District Court for Calhoun County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Kinne, J.:

The plaintiff claims that on the evening of October 20, 1891, in company with another lady, she undertook to pass over Second street, in the town of Manson, Iowa, on the sidewalk crossing the same at a point near the northwest corner of the crossing of Main street and Second street, and that, without negligence on her part, and without knowledge of the existence of an excavation, and of its close proximity to said crosswalk, she fell into an excavation, was violently thrown to the bottom of it, and severely injured. She alleges that she is permanently disabled by reason of said injuries, and asks damages in the sum of \$4,000. She alleges that said crossing was dangerous for pedestrians to travel over by reason of a deep excavation and pitfall made in the earth, by defendant, at both sides of said crossing. This excavation was about 7 feet deep and extended close up to the edge of the crossing, said crossing being but 8 feet wide. That on said October 20, 1891, and long prior thereto, the defendant had negligently and carelessly permitted said excavation to exist, and said crossing to remain in said unsafe and dangerous condition, and had failed and neglected to construct or place a barrier or hand rail to prevent persons passing over said walk from falling into said excavation, and failed to place any warning, light, or signal to indicate to or warn persons passing over said crossing of the existence of said excavation. It appears that the town, for the purpose of laying its water mains, had excavated a ditch extending along Second street and across Main street. A water pipe had been laid in the ditch, but the excavation had not been filled prior to the accident. The defendant admitted its incorporation, and that the plaintiff's claim had not been paid, and denied all other allegations in the petition. The cause was tried to a jury, and a verdict returned for the sum of \$2,250, on which judgment was entered. The defendant appeals.

Mr. E. A. Walton, for appellant:

Although one has a right to use a defective street or crossing knowing it to be defective, yet he must, having that knowledge, use it so
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as to avoid injury, if possible,—not that he must use more than ordinary care but that the circumstance of knowledge changes the application of this ordinary test.

Hanlon v. Keokuk, 7 Iowa, 488, 74 Am. Dec. 276.

Plaintiff should be held chargeable with knowledge of the existing conditions, and, the night being as dark as she testifies, she did not do as an ordinarily prudent person would do under the circumstances, when she might have gone another route equally convenient.

Fulliam v. Muscatine, 70 Iowa, 486; *Parkhill v. Brighton*, 61 Iowa, 108; *McGinty v. Keokuk*, 66 Iowa, 725; *Hartman v. Muscatine*, 70 Iowa, 511; *Plymouth v. Milner*, 117 Ind. 324; *Dole v. Webster County*, 76 Iowa, 370.

The defect, if any existed, lay in the absence or want of a light at the time of the accident.

Plaintiff certainly had as much knowledge of such defect as defendant, and should have used ordinary care to avoid the danger.

Achtenhagen v. Watertown, 18 Wis. 381, 86 Am. Dec. 769; *Munger v. Marshalltown*, 56 Iowa, 216; *Cressy v. Postville*, 59 Iowa, 62; *O'Laughlin v. Dubuque*, 42 Iowa, 541; *Alline v. Le Mars*, 71 Iowa, 654; *Ely v. Des Moines*, 86 Iowa, 55, 17 L. R. A. 124.

Defendant was not negligent with reference to maintaining the crossing in a reasonably safe condition.

Plaintiff had the whole width of a crossing perfectly safe in itself and free from defects.

She must know at her peril whether she is within the limits of the crossing.

O'Laughlin v. Dubuque, 42 Iowa, 541; *Alline v. Le Mars*, 71 Iowa, 654; *Macomber v. Taunton*, 100 Mass. 255; *Hubbell v. Yonkers*, 104 N. Y. 434; *Damon v. Boston*, 149 Mass. 147; *Richardson v. Boston*, 156 Mass. 145; *Goodin v. Des Moines*, 55 Iowa, 67.

Negligence cannot in any degree be predicated on the narrowness of the crossing.

Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507; *Lansing v. Toolan*, 37 Mich. 152.

Defendant was not negligent in respect to the existence of the excavation, and is not liable to plaintiff on account thereof.

If defendant is liable it is because of a breach of a statutory duty.

Rusch v. Davenport, 6 Iowa, 443; *Wilson v. Jefferson County*, 13 Iowa, 181; *Mower v. Leicester*, 9 Mass. 248, 6 Am. Dec. 63; *Bates v. Rutland*, 62 Vt. 178, 9 L. R. A. 363; *Damon v. Boston*, 149 Mass. 147.

There was no statutory duty except to maintain its sidewalks and crosswalks in a reasonably safe condition.

The liability being created by statute, the rule is that only those using the streets in the ordinary mode for travel can recover damages.

Taylor v. Peckham, 8 R. I. 349, 5 Am. Rep. 578, 91 Am. Dec. 235; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687; *Goelts v. Ashland*, 75 Wis. 642; *Agnew v. Corunna*, 55 Mich. 428.

A sufficient time had not elapsed between the placing of the light and the time of the accident, to charge defendant with constructive notice.

Brobury v. Des Moines, 68 Iowa, 523, 50 Am. Rep. 756; *Thiessen v. Belle Plaine*, 81 Iowa, 118; *Klatt v. Milwaukee*, 53 Wis. 190, 40 Am.

Rep. 759; *Seaward v. Milford*, 21 Wis. 485; *Doherty v. Waltham*, 4 Gray, 596; *Ball v. Independence*, 41 Mo. App. 469; *Warau v. Dunlap*, 112 Ind. 579; *Weirs v. Jones County*, 80 Iowa, 351; *Aylesworth v. Chicago, R. I. & P. R. Co.* 30 Iowa, 459.

A party cannot impeach his own witness.

Hall v. Chicago, R. I. & P. R. Co. 84 Iowa, 311; *Gardner v. Connolly*, 75 Iowa, 205; *Humble v. Shoemaker*, 70 Iowa, 223; *Hunt v. Hoover*, 34 Iowa, 77; 1 Greenl. Ev. § 442.

The rule obtains in all its strictness where the adverse party is called as a witness, and it matters not in such case that the witness may be subsequently called by the other party.

Branch v. Lety, 14 Jones & S. 428; *Olive v. Olive*, 95 N. C. 485; *Gabbett v. Sparks*, 60 Ga. 532; *Hunt v. Coe*, 15 Iowa, 197; *Hunt v. Hoover*, 34 Iowa, 77; *White v. State*, 87 Ala. 24; *Craig v. Grant*, 6 Mich. 447; *Roundtree v. Tibbs*, 4 Hayw. (Tenn.) 108; *Fulton Bank v. Stafford*, 2 Wend. 483; *Ellicott v. Pearl*, 35 U. S. 10 Pet. 412, 9 L. ed. 475.

The court erred in denying plaintiff's request to exhibit plaintiff's injured foot to the jury, and declining to permit measurements to be made in the presence of the jury.

Such evidence is always competent on behalf of the party suing for personal injury.

Langworthy v. Green Top, 95 Mich. 98; *Edwards v. Three Rivers*, 96 Mich. 625; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 378; *Barker v. Perry*, 67 Iowa, 146; *Lanark v. Dougherty*, 153 Ill. 163; *Carrico v. West Virginia, C. & P. R. Co.* 39 W. Va. 86, 24 L. R. A. 50; *Osborne v. Detroit*, 82 Fed. Rep. 86; *Hess v. Lowrey*, 122 Ind. 225, 7 L. R. A. 90; *Taylor, Ev.* § 512; *Abbott, Trial Ev.* 599; *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734; *King v. State*, 100 Ala. 85; *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641; *Richmond & D. R. Co. v. Chidress*, 82 Ga. 721; *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 390; *Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14; *Walsh v. Sayres*, 52 How. Pr. 334; 25 Cent. L. J. 3.

The defendant was not bound to fence in the crossing to keep pedestrians from stepping off or wandering therefrom into danger.

O'Laughlin v. Dubuque, 42 Iowa, 542; *Alline v. Le Mars*, 71 Iowa, 654; *Macomber v. Taunton*, 100 Mass. 255; *Hubbell v. Yonkers*, 104 N. Y. 434; *Damon v. Boston*, 149 Mass. 147; *Tower v. St. John*, 83 N. B. 88; *Ross v. Davenport*, 66 Iowa, 548.

Appellant was not bound to fence in and guard the excavation.

Mears, Botsford, Healy, & Healy, for appellee:

Ordinary care only is required in such cases, but the circumstance of knowledge changes the application of this ordinary test.

Hanlon v. Keokuk, 71 Iowa, 488, 74 Am. Dec. 276.

A party is not to be denied relief simply because he goes upon a street which he knows to be dangerous.

Rice v. Des Moines, 40 Iowa, 642; *Ross v. Davenport*, 66 Iowa, 548; *Troxel v. Vinton*, 77 Iowa, 90; *Kendall v. Albia*, 78 Iowa, 242.

The city should make the streets and walks reasonably safe for the uses for which they are intended.

Bicen v. Sioux City, 85 Iowa, 351.

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If the city builds a walk over a dangerous place it is the duty of the city to guard against that danger, and that duty is equally strong if the city renders a walk unsafe and dangerous by reason of an excavation underneath or at the immediate side without guarding against that danger.

Mocre v. Burlington, 49 Iowa, 136; *Rowell v. Williams*, 29 Iowa, 210; *Duffy v. Dubuque*, 68 Iowa, 172, 50 Am. Rep. 743; *Pittinger v. Hamilton*, 85 Wis. 356; *Manderschid v. Dubuque*, 29 Iowa, 74, 4 Am. Rep. 196; *Case v. Waverly*, 36 Iowa, 545.

The sufficiency of a barrier, the sufficiency of lights, or the sufficiency of any warning to apprise pedestrians or people of the place of the danger, is always a question for the jury.

Stier v. Oakalosa, 41 Iowa, 357; *American Waterworks Co. v. Dougherty*, 37 Neb. 878; *Norwood v. Somerville*, 159 Mass. 105; *Sterling v. Schiffmacher*, 47 Ill. App. 141; *Duffy v. Dubuque*, 68 Iowa, 172, 50 Am. Rep. 743.

The ditch was *per se* a defect. Although put there for a lawful purpose it was nevertheless a defect, and the length of time it had remained there unnecessarily was a material consideration as a part of the negligence of the city.

Andrews v. Mason City & Ft. D. R. Co. 77 Iowa, 671.

Submitting one's person to the observation of the jury will not be allowed when there is abundant and competent evidence on both sides.

Loyd v. Hannibal & St. J. R. Co. 53 Mo. 509.

It is at the pleasure of plaintiff to submit her person to view of the jury.

Mulhadeo v. Brooklyn City R. Co. 80 N. Y. 370.

Kinne, J., delivered the opinion of the court:

1. This case has once before been in this court and is reported in 90 Iowa, 595. It is insisted that plaintiff's negligence contributed to produce the injury of which she complains. It is said that she was possessed of such knowledge touching the excavation as should have warned her to have taken another way to her destination, and thus have avoided the danger. The evidence does not show that plaintiff had any knowledge whatever of the existence of the excavation into which she fell. True, it appears that she knew that the town was engaged in putting in water. She had seen some of the ditches, and knew they were digging such ditches in the business part of the town; she had seen one of these ditches on the day of the accident. She could have taken another route just as direct to reach the place she was going to. She was not under such circumstances negligent in attempting to go over the crossing, having no knowledge of the existence of the excavation. She testified that it was so dark she could not see the edges of the crossing; that there was no light at or near the excavation; and there is no claim that there were barriers to keep people from falling into it. If her testimony be taken as true, and it is supported, she was in the exercise of due care. Counsel's argument is based upon the claim that when one injured has knowledge of the

danger he must use such knowledge so as to avoid injury if possible. Such is no doubt the law, but the facts of this case do not bring it within that rule. If the evidence to the effect that there was no light at or near the excavation is to be believed, then it is clear that, having no knowledge of the excavation, and no light by means of which she might see her danger, and there being nothing to prevent her stepping into the hole, and she being otherwise in the exercise of due care, she is not chargeable with negligence in not discovering and avoiding the excavation. Her knowledge that the town was laying water mains does not charge her with notice of this particular excavation. Even if she did know of the danger she would not be negligent in attempting to go over the crossing if she exercised due care in so doing. Hers was not a case of knowingly and consciously incurring danger, hence the cases relied upon are not applicable. Counsel also argue that the only duty the town owed to plaintiff was to keep its walks and crossings in a reasonably safe condition. He insists that if the crossing itself was in fact good and sufficient the town was not liable for an injury received by one when off of said crossing. The following cases are cited: *O'Laughlin v. Dubuque*, 42 Iowa, 541; *Allins v. Le Mars*, 71 Iowa, 654; *Ely v. Des Moines*, 86 Iowa, 55, 17 L. R. A. 124. These cases in their facts are all different from the one at bar. In the *Dubuque Case* the person was injured while crossing the street, not on a regular crossing, and it is said: "Sidewalks and crosswalks alone are constructed for foot travelers, and he who, without some good and sufficient reason, walks elsewhere and is injured should not be permitted to complain that he has been injured through the fault and negligence of the city." In *Allins's Case* the injured party was able to see the limits of the walk, and voluntarily and without necessity therefor, stepped from the walk without knowing she could safely do so. *Ely's Case* was one where the pedestrian on a city street unnecessarily left the street, went into an alley, and fell into an area way. None of the cases are controlling in the one under consideration. In this case the crossing was being made on the walk provided by the town, and owing to the darkness plaintiff inadvertently stepped off of the crossing into an unguarded, and, as some of the evidence shows, unlighted excavation, which came up to the very edge of the crossing. The jury must have found that plaintiff was not negligent, and we cannot disturb their finding in that respect.

2. Counsel for appellant insist that the evidence shows that the defendant was not negligent. The argument is that as the defendant had a crossing which was, in and of itself, good, and inasmuch as it had a right to excavate for its water mains, and because the excavation formed no part of the crossing walk, therefore it cannot be held liable for an injury received to one who, in the exercise of due care, and unable by reason of the darkness to discover the limits of the crossing walk, and not knowing of the excavation adjoining said walk, steps into the same. On the same theory a city might erect a bridge over a river and erect no guard rails to keep the pedestrians

from stepping over its side and falling into the stream below. The duty imposed upon the town to keep its crossings in a reasonably safe condition for the use for which they were intended "extends, not merely to the surface of the street or walk, but to those things within its control which endanger the safety of those using the street or walk properly. . . . In the statutory sense a street or sidewalk is defective when it is not in a reasonably safe condition for the use for which it is intended. . . . It may be due to the presence of something which is a menace to the safety of the users of the way as well as to imperfect construction or the absence of needed labor or material." *Bliven v. Sioux City*, 85 Iowa, 351. The real question is, Is the defect complained of in the walk itself, or so near it as to endanger the persons of those properly using it? *Rosell v. Williams*, 29 Iowa, 210; *Ross v. Davenport*, 66 Iowa, 548; *Duffy v. Dubuque*, 62 Iowa, 172, 60 Am. Rep. 743; *Pittenger v. Hamilton*, 85 Wis. 856. It was, then, a question for the jury as to whether defendant was negligent, and as there was evidence tending to show such negligence, as well as evidence to the contrary, the finding of the jury in that respect should not be disturbed.

3. The court told the jury in the seventh division of the charge, in substance, that if the defendant had caused a light, sufficient to apprise a person of ordinary prudence of the existence of the ditch, to be placed at or near it on the evening of the accident, and before it happened, then the defendant was not guilty of negligence unless it was shown that defendant had caused said light to be removed, or had actual notice or knowledge of said removal, and had sufficient time thereafter to replace the same. It is urged that the verdict is against this instruction and against the evidence. There was much evidence tending to establish the fact that a lamp or lamps were lighted at the excavation on the evening of the accident, and before it happened. There was evidence also to the contrary. There was much evidence showing that when the accident occurred there was no light at or near the excavation. There was an undoubted conflict touching this matter, and it cannot be said that the finding of the jury was contrary to either the instruction or the evidence. Again, if the evidence had been undisputed that the light was burning when the accident occurred, still it would be a question for the jury, under the instruction, as to whether it was a sufficient light to apprise one of the danger.

4. Plaintiff called one Lemoine as a witness, and showed by him that he was mayor of the town at the time the accident happened; that the town was then engaged in laying mains for water; that the excavations were made by contractors for the town. Defendant afterwards called the same witness, and he testified in chief that lamps were lighted at the excavation on the night of the accident, and before it happened. On cross-examination he was asked if he did not, on the morning after the accident, and in the presence of plaintiff and Mrs. Safford, at the latter's house, in a conversation there, state "that the town was negligent in not having the lights lit, as they depended on the moon, but after this they would

have the lights lit." This was objected to as "incompetent, and laying the ground for impeachment of a witness whom they have used as their own witness, and for the further reason it is on something entirely immaterial." The court said, "I do not understand that a witness who is called by a party cannot be contradicted, and especially I think it is competent to ask this witness this question in view of the testimony he has given." The defendant excepted to the ruling, and the witness answered, "I made no such statement." To another question propounded to this witness touching a similar conversation with Elinor Hall, the same objection was made, when plaintiff's counsel said, "Plaintiff states that this question is not asked for the purpose of charging any admission upon the defendant because the conversation was had with the mayor of the defendant town, but wholly for the purpose of impeachment of the witness as a witness." The objection was overruled, and an exception taken, and the witness answered, "I have no recollection of making such statement." Mrs. Safford, Elinor Hall, and the plaintiff were each called by the plaintiff in rebuttal, and asked touching the conversations above referred to. In each case objection was made and overruled, and the witnesses testified to the conversation. Appellant contends that the impeaching witnesses contradicted Mr. Lemoin upon a matter immaterial and irrelevant to the issue. In the second place, it is insisted that it was not competent for plaintiff to impeach her own witness. We dismiss the first contention by saying that, in view of the statement of counsel for plaintiff, this evidence is to be treated as offered for the sole purpose, as to Lemoin, of laying the ground for impeachment, and, as to the other witnesses, of impeaching Lemoin. Was it competent and receivable for that purpose? It is no doubt a general rule that one will not be allowed to impeach or discredit his own witness. 1 Greenl. Ev. § 442; *Hunt v. Hoover*, 34 Iowa, 79; *Hall v. Chicago, R. I. & P. Co.* 84 Iowa, 316; *Gardner v. Connelly*, 75 Iowa, 206; *Humble v. Shoemaker*, 70 Iowa, 226; *Clapp v. Peck*, 55 Iowa, 272. This rule only prohibits impeachment in three ways: First, calling witnesses to impeach the general character of the witness; second, proof of prior contradictory statements by him; and, third, a contradiction of the witness by another where the only effect is to impeach, and not to give any material evidence upon any issue in the case. *Becker v. Koch*, 104 N. Y. 400, 58 Am. Rep. 513; *Cross v. Cross*, 108 N. Y. 629. It is said that "whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion." 1 Greenl. Ev. § 444. It will be observed that this is not a case where plaintiff was surprised by the testimony of the witness when examined by her counsel. When the witness was called by plaintiff nothing was asked him relating to the fact as to whether the excavation was lighted. He was interrogated touching other matters, and

then, it would seem, discharged. Afterwards defendant called him as its witness, and asked him whether there were lights at the excavation. On his cross-examination the plaintiff asked the questions heretofore set out. If, when the witness was called by plaintiff, she had interrogated him regarding the lights, and he had testified that the excavation was lighted, and plaintiff had then sought to show by him that he was mistaken, and, failing so to do, had, in rebuttal, put witnesses on the stand to show that he had made contrary statements, we should have a case within the general rule. If the plaintiff had not called Lemoin as a witness, there is no doubt she might have impeached or discredited his evidence regarding the lights at the excavation which was drawn out when he testified on being called by the defendant. It could not then be claimed that she was impeaching or discrediting her own witness. When he in fact testified to the matter as to which it was sought to impeach him, he was the defendant's witness, called by it. He had before that time been called by plaintiff, and testified as to other matters, and been virtually discharged. He was no more plaintiff's witness as to the matter of lights than if she had never called him to the stand. Plaintiff did not call out the testimony as to which she seeks to impeach Lemoin, but it was elicited by the defendant while Lemoin was its witness. Whatever reason there may be for the rule which prevents one from impeaching or discrediting his own witness, there is none for extending it to a case like this. Courts of high standing have refused to follow the general rule above mentioned, and hold that by putting a witness on the stand one is not responsible for his credibility in such a sense that he is absolutely precluded, when surprised by adverse testimony, from showing that the witness had made statements of the facts contrary to his testimony. *Selover v. Bryant*, 54 Minn. 434, 21 L. R. A. 418; *Smith v. Briscoe*, 65 Md. 561; *Johnson v. Leggett*, 28 Kan. 605; *State v. Sorter*, 52 Kan. 531; *Crocker v. Agnew*, 123 Ind. 585. So much of the doctrine announced in the above cases as permits the witness, under such circumstances, to be impeached or discredited by adverse testimony showing that he had made statement of the facts contrary to his testimony, this court has not approved of. *Hall v. Chicago, R. I. & P. Co.* 84 Iowa, 316; *Smith v. Dawley*, 92 Iowa, 312; *Humble v. Shoemaker*, 70 Iowa, 226. But see *Thomas v. McDanel*, 88 Iowa, 380; *Smith v. Utesch*, 85 Iowa, 381. We held in *Arts v. Chicago, R. I. & P. Co.* 44 Iowa, 283, a case where plaintiff had called a witness who testified to nothing of benefit to either party, and he was then dismissed, and the other party, on cross-examination, drew out evidence not proper to be given on cross-examination, that the witness must be regarded as called by the defendant, therefore plaintiff might contradict him. So, in the case at bar we hold that Lemoin was the witness of the defendant, hence the court properly permitted plaintiff to interrogate him touching his former statements, and, as he denied making them, it properly permitted the plaintiff to impeach him by calling witnesses to testify that statements had been

made by him which were contradictory to the facts as testified to by him.

5. The character of plaintiff's injury, and its extent as to permanency, was a material question in the case. Her claim was that by reason of the fall "several of the ligaments of the second and third toes" were ruptured and her ankle severely sprained; that the injury caused severe and acute pain. Several medical men testified for plaintiff that they had just measured her foot at various places, and her leg 6 inches above the ankle, and found it considerable larger than the other foot. At the point above the ankle they say the leg was smaller than the other leg at the same point. An equal number of doctors, who had just measured the injured foot at the same places, swore for the defendant, that it was the same size as the other foot, except in the measurement of the leg above the ankle, which was $\frac{1}{4}$ of an inch larger than the other leg at the same point. It will not admit of a doubt that this array of medical men were not all telling the truth. Either the injured foot and leg were, at the points where measured, the same size as was the other foot and leg at the corresponding points, or it was larger or smaller at some or all of said points of measurement. Now, clearly, when such skilled men differ so radically touching a matter of mere measurement, as to which any number of men lacking in skill, but possessed of ordinary good sense ought to substantially agree, because relating to a fact capable of exact ascertainment, it was proper to resort to the practical plan of taking these measurements in the presence of the court and jury. Plaintiff being called to the stand by the defendant, she was interrogated as follows by its counsel:

Q. Mrs. Hall, you are the plaintiff in this action?

A. Yes, sir.

Q. Are you the lady whose feet and legs were measured in the adjoining room here just before noon to-day?

A. Yes, sir.

Q. Will you kindly now remove your shoes and stockings and permit the measurement to be made here and now, in the presence of the jury, in the presence of the plaintiff's witness, Dr. Saunders, and the defendant's witness, Dr. Martin? Will you kindly remove them, and allow the measurements to be made now.

A. Shall I, Mr. Healy?

Mr. T. D. Healy: I have nothing to say. It is for the court to say.

Q. Do you refuse to do so, Mrs. Hall?

Mr. M. F. Healy: The witness has been examined four times since yesterday, and I think there should be some limit to this matter somewhere, but at the same time we do not wish it to appear in the position of objecting to the examination.

By the Court: I think we have had enough of that; we are not going to start a measuring school here.

Q. Do you refuse to permit the examination; do you object to it?

Mr. Hall (from the audience): I object to this now.

Mr. O'Connell: Never mind, you are not in his case.

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Mr. M. F. Healy: Well, I rather think he is in the case, and under the circumstances I think we ought to object to the examination being made,—a further examination at this time.

By the Court: Well, this matter has gone far enough. This proposed examination and measurement will not be allowed. You may put it in the record, Mr. Reporter, that the court, of its own motion, declines to permit it. (To which the defendant excepts, both to the remarks and the ruling of the court.)

The remark of the court about not starting a measuring school was not proper. Counsel for appellee says this requirement of the plaintiff that she permit these measurements to be made was "unseemly." We may be permitted to disagree with counsel, and to say that the request was reasonable, and, under the circumstances, it ought to have been willingly complied with. Here were medical men differing as to the measurement of this plaintiff's foot. If the measurements were as sworn to by the physicians who testified on part of plaintiff, it was a material fact, indicating an abnormal condition of the injured foot. By making the measurements in the presence of the jury the actual facts would be shown by the best attainable evidence, and the conflict between the learned doctors settled. There is nothing delicate in the measurement of a foot or arm or ankle in a proper case. It is to be observed that plaintiff offered no objection to these measurements being made. No ground of objection thereto was stated by her counsel, but the court refused to permit it to be done. This court, in *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 878, said: "We are often compelled to accept approximate justice as the best that courts can do in the administration of the law. But while the law is satisfied with approximate justice when exact justice cannot be obtained, the courts should recognize no rules which stop at the first when the second is in reach. Those rules, too, which lead nearer the first should be adopted in preference to others which end at points more remote. . . . To our minds the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened the road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it." It was also held in that case that the power of the court was ample to enforce obedience to an order compelling the party to submit to an examination; so it was held that, as the plaintiff had the right in such a case to exhibit his injured limb to the jury in order to show the extent of his suffering, he may in a proper case, and under proper circumstances, be required to do the same thing for a like purpose upon the requirement of the other party. In *Barker v. Perry*, 67 Iowa, 147, an action to recover for a personal injury, the court, in speaking of this subject, said: "This kind of evidence is of an important and satisfactory nature. It brings before the jury part of the *res gesta*,

and enables them to determine the nature and character of the injury better than to receive it in a secondary way, as it must be described by witnesses." The following cases show the trend of the authorities touching this question: *Langworthy v. Green Twp.* 95 Mich. 93; *Edwards v. Three Rivers*, 96 Mich. 625; *Lanark v. Dougherty*, 153 Ill. 163; *Carrico v. West Virginia, C. & P. R. Co.* 39 W. Va. 86, 24 L. R. A. 50; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724; *State v. Wiencers*, 66 Mo. 29; *Louisville, N. A. & C. R. Co. v. Wood*, 118 Ind. 548, and 578; *Whart. Crim. Ev.* § 312; 1 *Best, Ev. Morgan's ed.* 307; *Abbott, Trial Ev.* 599; 25 *Cent. L. J.* 3; 15 *Cent. L. J.* 2; *Mulhado v. Brooklyn C. R. Co.* 30 N. Y. 870; *King v. State*, 100 Ala. 85; *Richmond & D. R. Co. v. Childress*, 82 Ga. 721; *Hatfield v. St. Paul & D. R. Co.* 83 Minn. 130, 53 Am. Rep. 14. He would be a bold man who would assert that the evidence of experts is in all cases valueless. The testimony of medical men in the case at bar touching these measurements, a matter not resting in opinion at all, but capable of physical demonstration, is in direct contradiction, and is well calculated to shake one's faith in the reliability of experts. In the interest of attaining justice these measurements should have been taken before the court and jury. We do not hold that in all cases, and as a matter of right, one party may require the injured party to expose the injured part of his person to the jury. But when such exposure is in no way indelicate, and seems to be essential in order that the jury may be properly and correctly advised as to the material fact which is in dispute, it is not only the right of the court to order such exposure and examination of measurement of the injured part on the request of a party, but its duty so to do. As we have said, the condition of this foot and ankle was material as bearing upon the question of the permanency of the injury, and the court erred in not ordering the measurements made as requested.

6. Complaint is made of the second division of the court's charge. It is in substance the same as was given on the former trial, and which we held good when the charge was considered as an entirety. While we do not think that the jury could have been misled to defendant's prejudice by the statement of the law therein contained, in view of other parts of the charge, still, as this case for other reasons must be reversed, it is proper to say that on a retrial the court should avoid the statement found in this division of the charge to the effect that it was the defendant's duty to keep its walks in "a safe condition" for public travel. Defendant's duty in that respect is to use reasonable and ordinary care. It is not an insurer of the absolute safety of its walks and crossings. The law in this respect was correctly stated in other divisions of the charge.

7. Complaint is made of the use of the word "pitfall" in the tenth division of the court's charge to the jury. Technically speaking, the word means a trap set to ensnare the unwary. The court used it as describing the hole into which plaintiff fell. While we think the court used the word in a different sense, still it would be better to use a word or words amply expressing the thought intended to be con-

veyed, and as to which no question of error can arise.

8. Error is assigned upon the refusal of the court to give instructions asked by the defendant. So far as they announced correct principles of law, they were embodied in the court's charge. The third instruction asked was properly refused, because it assumed that plaintiff knew the crossing was unsafe, and knew of the ditch, and knew that it was imprudent to attempt to pass over the crossing. There was no evidence justifying such an instruction. It is said the damages allowed are excessive. In view of a retrial, we need not discuss that question. Many other questions are discussed by counsel. We have examined the points made, and discover no error except as heretofore pointed out.

Because of the refusal of the court to permit the measurements asked for, *the judgment is reversed.*

Robinson, J. dissenting:

I cannot assent to the fifth division of the foregoing opinion. None of the authorities cited in its support appear to me to require the conclusion reached. The larger number of them merely hold that in a case involving injuries to a person it is proper to exhibit the injuries to the jury, and do not treat of compulsory, but of voluntary, examinations. Of the cases cited *King v. State*, 100 Ala. 85, is the only one which involved the compulsory examination of the alleged injuries of a person in the presence of the jury. In that case a witness testified that the defendant shot him on the arm, and the defendant, in cross examination, offered to exhibit the arm to the jury. The state objected, and the objection was sustained. It was held on appeal that the court erred in sustaining the objection, and in that connection the fact was noticed that no question was raised by the witness, court, or counsel as to the delicacy of the proposed exhibition; that the arm could have been shown to the jury without offense to the modesty or delicacy of feeling of the witness, of the court, or of the persons present in the court-room; and that in view of the conflicting testimony as to the direction from which the shot was fired it might have afforded the jury valuable aid in determining vital questions. In *Hatfield v. St. Paul & D. R. Co.* 83 Minn. 130, 53 Am. Rep. 14, also cited in the majority opinion, the plaintiff sought to recover for personal injuries which she testified caused her to limp in walking. The defendant requested the court to direct her to walk across the court-room in the presence of the jury, but the court declined to do so. That ruling was sustained on appeal. The supreme court held that a trial court has the power, in a proper case and under proper circumstances, to direct a person to do in the presence of the jury a physical act that will illustrate or show the character of the injuries of which he complains, but that the court "very properly refused to direct the plaintiff to exhibit herself to the jury and bystanders by walking across the room." It was said such an act would only have enabled the jury to determine a fact which was shown by uncontradicted evidence. Whether a person may be compelled, against his will, to submit

to an examination of personal injuries, is a matter in regard to which the authorities are in conflict. In *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 784, the power of the trial court to order the plaintiff, who was seeking to recover for personal injuries, to submit to an examination by a surgeon, was denied. See also *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 466, and note. The right to order such an examination was affirmed by this court in *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375, but that case did not involve the right to compel a public examination before the jury. The authorities which sustain the right of trial courts to order the physical examination of persons whose condition is the subject of controversy hold that the courts have a large discretion to grant or refuse such orders, and that their action will not be disturbed unless the discretion has been abused. Thus, it was said in *Hatfield v. St. Paul & D. R. Co.* *supra*, in regard to the order therein sought, that "it is evident, from the very nature of things, that the propriety of such an order must usually rest largely in the discretion of the trial court, and it would only be in case of a plain abuse of such discretion that we would interfere." In *Richmond & D. R. Co. v. Childress*, 82 Ga. 721, it was held that trial courts had the power to order the physical examination of persons alleged to have been injured, "and that in each case it was to be exercised, or not, according to the sound discretion of the presiding judge." In *Shepard v. Missouri P. R. Co.* 85 Mo. 684, the court said of orders for such examinations that it was inclined to hold that they might be made, "but not that a party has an absolute right to have such a personal examination. It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused." See also *Stuart v. Havens*, 17 Neb. 211; *Achison, T. & S. F. R. Co. v. Thul*, 29 Kan. 475, 44 Am. Rep. 659. Before a court will be authorized to order the physical examination of a witness, the necessity of the examination to a just determination of the cause must be shown. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 324; *International & G. N. R. Co. v. Underwood*, 64 Tex. 466. When a physical examination is ordered, care should be taken to protect the person examined from indignity, and no indelicate exposure of the person not absolutely necessary should be required. Especial care will be taken to avoid wounding the feelings of modest and sensitive females. *Richmond & D. R. Co. v. Childress*, and *Shepard v. Missouri P. R. Co.* *supra*. Such an examination will not be ordered in the presence of the jury, where it would require an indecent exposure of the person. 1 Thomp. Trials, § 861; 25 Cent. L. J. 7. And an unnecessary exposure of that kind should not be permitted by the court, even though no objection be made. *Brown v. Swineford*, 44 Wis. 285. Very few of the cases which involve compulsory physical examination refer to those which were, or were designed to be, made in open court in the presence of the jury. As a rule they relate to private examinations only. All authorities which treat of the subject recognize a

sacredness of the person, a right to be free from physical restraint or compulsion, which will be interfered with only for reasons of controlling importance. Until the contrary is shown, the rulings of the trial court must be regarded as correct, and we are required to indulge in all reasonable presumptions that they are correct. When Mrs. Hall was asked to remove her shoes and stockings and submit to measurements in the presence of the jury, the testimony which had been introduced showed that she had submitted to physical examinations conducted by medical experts on behalf of the defendant two years or more before the trial, and again on the day of the trial, and that but two of the four physicians who had examined her for the defendant at the time of the trial had been called as witnesses. There was no suggestion that she had refused to submit to any private examination which the defendant desired to make. Dr. Speaker had testified for her that he was present when Dr. Evans measured her feet on the day of the trial, that the left or injured foot was $\frac{1}{4}$ inch larger at the ankle and between that and the toes than the other foot, and that he thought the left leg 6 inches above the ankle was $\frac{1}{4}$ of an inch larger than the right leg at the same distance above the ankle. Dr. Evans had testified that the left foot was $\frac{1}{4}$ an inch larger than the right at the middle joint above the ball of the foot and at the ankle, and that the left leg 6 inches above the ankle was $\frac{1}{4}$ of an inch smaller than the right. Dr. Saunders had testified that this measurement, on the day of the trial, showed that the left leg of the plaintiff 6 inches above the ankle was smaller than the right, but he did not state what the difference was. Dr. Eslick had answered a hypothetical question, but did not testify to any personal knowledge of the plaintiff's feet. On the part of the defendant, Dr. Hews had testified that measurements of the plaintiff's feet had been made that day in the presence of himself, two physicians who had testified for the plaintiff, three other physicians who were witnesses for the defendant, and attorneys for the parties; that there was a difference between the feet and legs of the plaintiff at one point of measurement, but that he had forgotten which one, of $\frac{1}{4}$ of an inch, and he did not state which foot or leg was the larger. Dr. Martin had testified that he saw the measurements described by Dr. Hews, and that they showed the feet of the plaintiff to be of the same size, and that the left leg 6 inches above the ankle was $\frac{1}{4}$ of an inch larger than the right. This was the showing made with respect to the measurements when Mrs. Hall was requested to make the exhibition of herself and submit to the measurements in question. Dr. Mullarky and Dr. Young, who it appeared had assisted in making the measurements, had not testified, and the defendant gave no reason for not having called them. As they were afterwards examined for the defendant, we may presume that they were present in court, and that the court knew that the defendant had not exhausted its testimony in regard to the measurements. The question which they were designed to settle was not controlling, and was one of many involved in the case. Much testimony had been given in regard to

the anatomy of the foot and ankle, the rupture of tendons and ligaments, electrical experiments to ascertain the nature and extent of the injuries in question, besides the direct testimony of the plaintiff and others in regard to her injuries and sufferings. Mrs. Hall is described as "rather fleshy," and a difference of half an inch in measuring the circumference of her feet and limbs might easily be made by different persons, and observers be unable to detect any errors in the measurements. It is not at all probable that measurements made in the presence of the jury would have aided it materially to reach a verdict. It is by no means certain that such measurements would not have confused rather than helped the deliberations of the jury. The request of the defendant was that Mrs. Hall remove her shoes and stockings in the presence of the jury, and, we may presume, before a large audience of bystanders in a crowded court-room, for the single purpose of having her feet and legs measured in such a manner that the jury might see it done. In my opinion, it was not only within the power, but the duty, of the district court, under the circumstances shown to exist, to refuse to allow the desired experiment to be made. As it appears to me, it certainly would have been indelicate, if not positively indecent, and would have been shocking and repulsive to any modest and sensitive woman. It was not shown to be necessary. The defendant had been afforded ample opportunity to make accurate measurements, and if its witnesses failed to make and remember them the plaintiff should not suffer for their negligence. Although she and her attorneys did not offer as much resistance to the request of the defendant as they might well have made, yet it is evident that they were unwilling to make the exhibition desired, and that they did not wish to prejudice their case by appearing to withhold evidence which was within their power to give. The court had a knowledge of the plaintiff, and of the conditions under which the experiment, if permitted, would have been made, which we cannot have. The defendant had not introduced all the evidence at his command. In my opinion, no abuse of the discretion with which the

district court was clothed is shown. The opinions of the majority, while disclaiming the adoption of a rule applicable in all such cases, does, in effect, hold that the district court had no discretion, and that in this and all similar cases the defendant may, as a matter of right, require a woman whose injuries are in question to partially disrobe herself in the presence of the court, jury, members of the bar, and possibly a court-room full of bystanders, and raise her garments sufficiently high to permit each of the twelve jurors to see her legs measured 6 inches above the ankles, and that this may be done even though other evidence is at the command of the defendant, and at hand, which may show that the exhibition is wholly unnecessary. I cannot assent to such a holding. It may be further said that, after the court refused the request of the defendant, the latter called Dr. Saunders, who had testified for the plaintiff, and showed by him that he was present when the measurements were made for the defendant, and saw nothing unfair in them, and nothing to show that they were not made at the places measured for the plaintiff. Dr. Mullarky then testified, and corroborated fully the testimony given by Dr. Martin in regard to the measurements. Dr. Young testified that the feet measured the same, and that he could not see any difference between them. The plaintiff did not offer any evidence in rebuttal on this branch of the case. It thus appears that the preponderance of the evidence on that issue was on the side of the defendant. I believe it has had a fair trial, and that it has no just reason to complain of the judgment of the district court.

Granger and Deemer, JJ.:

We place our concurrence in the conclusion of the majority opinion on the fact of the interference by the court without objection by the witness or counsel. It appears in the record that the court, of its own motion, declined to permit the examination. It seems to us the record limits our inquiry to that state of facts. There was nothing in the examination not entirely proper to take place in open court if the witness did not object.

SOUTH CAROLINA SUPREME COURT.

George F. LEITZSEY, *Appt.*,

v.

COLUMBIA WATER POWER COMPANY.

(.....S. C.....)

1. A demurrer to a complaint against a grantee of one who erected a dam for injuring land by maintenance of the nuisance cannot be sustained for failure to state injury after notice to defendant of the nuisance.

where the notice was given fifteen days before suit was brought, and the complaint alleged injury up to the time it was filed.

2. A statute giving the trustees of a public canal power to raise the water in a river to a certain height by means of a dam, and providing that if in constructing the canal or developing the dam it becomes necessary to use private property, the board "shall have a right to acquire such right of way" in the manner now provided by law, requires the settlement of damages for flooding lands by the dam

NOTE.—The purposes for which a statute may authorize the flowage of land are the subject of a note to *Turner v. Nye* (Mass.) 14 L. R. A. 437. See 34 L. R. A.

also the case of *Nunamaker v. Columbia Water-Power Co.* (S. C.) post, 222.

under the eminent domain law, and not by suit for nuisance.

3. Failure to object to the raising of water along abutting lands by a dam across a river constitutes permission to do so within the provision of a statute that in case any person permits entry upon his land for the construction of a public improvement without previous compensation he shall have a right to petition for the assessment of his damages, so that such remedy is exclusive.

(October 17, 1896.)

A PPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Richland County in favor of defendant in an action brought to recover damages for the alleged wrongful flooding of plaintiff's land. *Affirmed.*

The first cause of action set out in the complaint was as follows:

(1) That the defendant was at the times hereinafter mentioned, and now is, a corporation duly created and organized under and by virtue of the laws of the said state. (2) That the plaintiff was at the time of the commission of the grievances hereinafter set forth, and now is, the owner in fee and in possession of a tract of land containing 420 acres, more or less, lying on the right bank of Broad river, in the said county and state, bounded on the north by lands of F. W. Wagener, on the east by the said river, on the south by lands of the state penitentiary, and on the west by the Newberry road, separating this tract from lands of the estates of Eli Huffman and Isaiah Haliwanger, and also by lands of the estate of Godfrey B. Nunamaker, and that running across or near to the said land, leading into the said river, is a branch and a ditch, by means of which, and the said river, the said land was, prior to the commission of the said grievances, and from time immemorial, accustomed to be drained for agricultural purposes. (3) That on or about the — day of —, 1889, the board of trustees of the Columbia Canal, a corporation duly created and organized under and by virtue of the laws of the said state, raised and erected a dam, known as the "Columbia Canal Dam," across the current of the said river, at a point a short distance below plaintiff's said tract of land; that thereafter, on or about the 11th day of January, 1892, the said board of trustees of the Columbia Canal transferred and conveyed to the said defendant the said dam, and all and singular the property thereto appertaining, and that the said defendant has since been and now is the owner and in possession thereof. (4) That since the said 11th day of January, 1892, the said defendant has kept up, maintained, and continued, and now maintains, keeps up, and continues, the said dam as aforesaid, so that by reason thereof the waters of the said river are raised 6 feet in the channel thereof, and greatly increased in quantity therein, and in the said branch and ditch, and the free, natural, and accustomed flow of the said water, and of sand and other sterile earth, through the channels of the said river and of the said branch and ditch, has been and now is hindered and obstructed;

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and the said river and the said branch and ditch have been and now are prevented and hindered from effecting the proper, natural, and usual drainage of the said land; the said waters are caused to percolate through, and water-log and water-soak 40 acres of the said land lying on the said river; and in times of ordinary freshet the waters of the said river are caused to flow back upon and inundate the said 40 acres of the said land, depositing thereon quantities of sand and other sterile earth, all of which, prior to the commission of the said grievances, and from time immemorial, the said waters were not accustomed to do. And the plaintiff further avers that prior to the grievances hereinbefore complained of the said 40 acres of the said land were of unusual and great fertility, and were not subject to overflow by the waters of the said river so as to destroy or materially injure the crops growing thereon, and that since the commission of the said grievances, and by reason thereof, the said lands have become liable to frequent and prolonged freshets, overflowing and inundating the said lands to such an extent as to destroy the crops growing thereon, and wholly to deter and prevent the use of the said lands for agricultural purposes, or for any valuable purpose whatever. And the plaintiff further avers that by reason of the said grievances so as aforesaid caused by the keeping up, maintaining, and continuing of the said dam by the said defendant as aforesaid, the said 40 acres of land, which prior thereto were reasonably worth \$75 per acre, have become water-logged, unproductive, uncultivable, and wholly valueless to the plaintiff, to the great nuisance and injury of the plaintiff, and to his damage \$4,000. (5) That on the 2d day of August, 1894, the plaintiff gave the defendant notice of the said nuisance, and then requested the defendant to remove the same, but that the said defendant has failed and refused so to do. (6) That the said keeping up, maintaining, and continuing of the said dam have heretofore been and now are without the consent of the plaintiff; that the said plaintiff has received no compensation for the injury sustained by him as hereinbefore set forth; and by reason of the premises, the plaintiff is entitled to have, of and from the said defendant, compensation in the said amount of \$4,000.

The second cause of action set out was:

(1) That the defendant was at the times hereinafter mentioned, and now is, a corporation duly created and organized under and by virtue of the laws of the said state. (2) That the plaintiff was at the time of the commission of the grievances hereinafter set forth, and now is, the owner in fee and in possession of a tract of land known as "Mickler's Island," lying in, and surrounded by the waters of, Broad river, in the said county and state, and being situated opposite to, and off from, a tract of land adjoining the tract described in the second paragraph of the first cause of action hereof, known as "Swygert's Mill Tract," and that prior to the commission of the said grievances, and from time immemorial, the said river was accustomed to flow past and by the said island without material injury thereto. (3) That on or about the — day of —, 1889, the board of trustees of the Columbia Canal, a cor-

poration duly created and organized under and by virtue of the laws of said state, raised and erected a dam, known as the "Columbia Canal Dam," across the current of the said river, at a point below the plaintiff's said tract of land; that thereafter, on or about the 11th day of January, 1892, the said board of trustees of the Columbia Canal transferred and conveyed to the defendant herein the said dam, and all and singular the property thereto appertaining; and that the said defendant has since been and is now the owner and in possession thereof. (4) That since the said 11th day of January, 1892, the said defendant has kept up, maintained, and continued, and now keeps up, maintains, and continues, the said dam as aforesaid, so that by reason thereof the waters of the said river are raised 6 feet in the channel thereof, and greatly increased in quantity therein, and the free, natural, and accustomed flow of the water, and of sand and other sterile earth, through the channel of the said river, and past the plaintiff's said land, has been and now is hindered and obstructed, and the said river has been and now is prevented from effecting the proper, natural, and usual drainage of the said land; the said waters are caused to percolate through and water-log and water-soak the whole of the said tract of land, and in times of ordinary freshet the waters of the said river are caused to flow back upon and inundate the said land, depositing thereon quantities of sand and other sterile earth, all of which, prior to the commission of the said grievances, and from time immemorial, the said waters were not accustomed to do. And the plaintiff further avers that, prior to the grievances hereinbefore complained of, the said tract of land was of unusual and great fertility, and was not subject to overflow by the waters of the said river so as to destroy or materially injure the crops growing thereon, and that since the commission of the said grievances, and by reason thereof, the said lands have become liable to frequent and prolonged freshets, overflowing and inundating the said lands to such an extent as to destroy the crops growing thereon, and wholly to deter and prevent the use of the said lands for agricultural purposes, and for any valuable purpose whatever. And the plaintiff further avers that by reason of the said grievances so as aforesaid caused by the keeping up, maintaining, and continuing of the said dam by the said defendant as aforesaid, the said tract of land, which prior thereto was reasonably worth \$100 per acre, has become water-logged, unproductive, uncultivable, and wholly valueless to the plaintiff, to the great nuisance and injury of the plaintiff, and to his damage \$2,000. (5) That on the 2d day of August, 1894, the plaintiff gave the defendant notice of the said nuisance, and then requested the defendant to remove the same, but that the said defendant has failed and refused so to do. (6) That the said keeping up, maintaining, and continuing of the said dam by the said defendant has heretofore been and now is without the consent of the plaintiff; that the said plaintiff has received no compensation for the injury sustained by him as hereinbefore set forth, and by reason of the premises the plaintiff is entitled to have of and from

the said defendant compensation in the said amount of \$2,000.

The demurrer was as follows:

The defendant, the Columbia Water Power Company, moves the court to dismiss the complaint in this action on the ground that it appears from the face of the complaint that neither in what is therein stated to be a first cause of action, nor in that which is stated to be a second cause of action, does it state facts sufficient to constitute a cause of action against this defendant. Both of said causes of action objected to are insufficient, in this: That after it is alleged in the third paragraph of each of said causes of action "that on the — day of —, 1889, the board of trustees of the Columbia Canal, a corporation duly created and organized under and by virtue of the laws of said state, raised and erected a dam, known as the 'Columbia Canal Dam' across the current of the said river, at a point a short distance below the plaintiff's said tract of land, and that thereafter, on or about the 11th day of January, 1892, the said board of trustees of the Columbia Canal transferred and conveyed to the said defendant the said dam, and all and singular the property thereto appertaining, and that the said defendant has since been and now is the owner and is in possession thereof," it does not allege any negligence or want of care on the part of the board of trustees, or their grantees, either in the construction of the dam, or in its maintenance or repair, or that the defendant has done anything contrary to any contract or obligation arising out of any agreement with the plaintiff with reference to the construction, maintenance, or repair of the said dam, and its effect upon the land claimed to be injured in the said cause of action. The action brought by the plaintiff by said complaint is a common-law action for injury to his freehold, or at least for compensation for the taking for the use of a public purpose of a private property. The court will take cognizance of the fact that, under the Constitution and laws of the state, Broad river is a navigable stream, and declared to be a public highway. The court is bound to take further judicial notice of the act of the general assembly referred to in said third paragraph, creating the board of trustees of the Columbia Canal, and all of its provisions,—the same being a public act, passed for a public purpose,—and of the act of 1890 amendatory thereof. Taking such judicial notice, it appears: That under its provisions the said board of trustees had full authority, and were commanded and directed, to erect said dam, and to flow back the waters of the said navigable stream, and to use private property in the construction and maintenance of the said canal and dam, and that for the taking and use of such private property said act makes provision for the condemnation of such lands, and a remedy to the owner to secure compensation for the taking and use of such private property. That the court therefore must hold that said remedy is exclusive unless the board of trustees exceeded their authority, or did not conform to such provisions. There is no allegation in the complaint that they exceeded their authority, or did not conform to such provisions; but it is alleged in paragraph six of each

of said causes of action "that the said keeping up, maintaining, and continuing of the said dam has heretofore been and now is without the consent of the plaintiff; that the said plaintiff has received no compensation for the injury received by him as heretofore set forth; and by reason of the premises the plaintiff is entitled to have, of and from the said defendant, compensation," etc. That said allegation is insufficient because it does not aver that the dam was erected without the consent of the plaintiff, nor that entry and use were made of the private property without the permission of the plaintiff. Further, it fails to allege that the taking complained of was after notification in writing by plaintiff to defendant of plaintiff's refusal of consent thereto, or that said taking and use complained of were and are without the permission of the plaintiff. The complaint therefore does not show that the plaintiff did not have his remedy under § 1752 of the Revised Statutes of 1898. The statute incorporating the board of trustees, authorizing the erection of the dam, having then provided a remedy for the taking and use of plaintiff's property, he is confined to such remedy; and, the complaint not showing upon its face that the case there alleged is one not provided for by said statute, it fails to state a cause of action. It is further submitted by the defendant that the complaint, upon its face, shows no actionable injury to the plaintiff between the time of the commencement of the action and of the refusal of the defendant to remove the dam. The refusal of the defendant to remove the dam was dated the 14th of August, 1894. The action was commenced the 17th of August, 1894. During this interval it is not alleged that any damage occurred to the plaintiff by reason of the flowing of his land by prolonged freshets in the river, or any injury thereto, as in law the defendant, assuming that, if liable at all, it could only be liable for such injury as arose from the time of its refusal to remove, and, the complaint showing on its face no actionable injury from said time of refusal to remove to the commencement of the action, it does not state facts sufficient to constitute a cause of action.

The order sustaining the demurrer was as follows:

"The defendant interposes an oral demurrer to the complaint upon the ground that it does not state facts sufficient to state a cause of action, and moves to dismiss the said complaint upon the ground that the same does not state a cause of action, as set forth in the written grounds filed in the cause pursuant to rule 18 of the circuit court. Now, upon hearing argument of counsel for plaintiff and defendant, it is ordered and adjudged that the said oral demurrer be sustained, and the said complaint is hereby dismissed. The court reserves the right hereafter to file its grounds and reasons for sustaining the demurrer and dismissing the complaint, if it may see fit.

"O. W. Buchanan, Presiding Judge.
"December 11, 1895."

*Messrs. Melton & Melton, J. S. Muller,
and Obeah & Douglass* for appellant.
Messrs. Abney & Thomas for respondent.
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Jones, J., delivered the opinion of the court:

This is an appeal from an order sustaining a demurrer to the complaint herein on the ground that it did not state facts sufficient to constitute a cause of action. The action was begun August 17, 1894, to recover damages or compensation for injuries to the lands of plaintiff, situated in Lexington county, caused by a dam erected in 1889 across Broad river by the board of trustees of the Columbia Canal under authority of an act approved December 24, 1887. The complaint (which will be set out in full, at least as to one of the causes of action, in the report of this case) sets up two causes of action,—one referring to injuries to an island in Broad river known as "Mickler's Island;" the other to injuries to a tract of 420 acres lying on the western bank of the river, on which were a branch and a ditch leading to the river, by which, together with the river, this tract had been accustomed to be drained for agricultural purposes. At the hearing the court properly took judicial notice of the act approved December 24, 1887, entitled "An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal and the Lands now Held therewith and Its Appurtenances, and to Develop the Same," and of the amendatory act approved December 24, 1890. The court also took judicial notice of the fact that Broad river is declared to be a navigable stream and a public highway. To this the plaintiff did not object, and, as appellant, does not object here. These acts and this fact, then, must be read into the complaint, as a part thereof. It appears that under authority of the said act of 1887 the board of trustees of the Columbia Canal completed said dam in 1889, and by authority of the amendatory act of 1890 the trustees on the 11th of January, 1892, conveyed the canal and dam, and the property appurtenant, to the defendant company, and the defendant has ever since maintained and continued said dam. The complaint further alleges, substantially, that by reason of the maintenance of the dam the water of Broad river at plaintiff's land is raised 6 feet in the channel, thereby obstructing the free and accustomed flow of water, and of sand and other sterile earth, through the channel of the river and of the branch and ditch, and preventing the proper and usual drainage of these lands; thereby causing the waters to percolate through and water-log and soak, these lands; that in times of ordinary freshet the waters of the river are caused to frequently overflow and inundate large portions of said land to such extent as to destroy the crops growing thereon, and wholly prevent the use of said lands for agricultural purposes; that the keeping up, maintaining, and continuing of the said dam by the defendant have been and now are without the consent of the plaintiff; and that the plaintiff has received no compensation for said injuries. The complaint also shows that on the 2d day of August, 1894, the plaintiff gave defendant notice of said nuisance, and requested defendant to remove the same, but that defendant has failed and refused so to do. The date of defendant's refusal does not appear. In the order sustaining the demurrer the pre-

siding judge, Hon. O. W. Buchanan, reserved the right to file his grounds and reasons for sustaining the demurrer and dismissing the complaint, if he saw fit. These grounds and reasons have not been filed, but it appears in the case that "the demurrer was sustained for the several grounds set forth therein." The demurrer specifying the grounds and the order sustaining the same will appear in the report of the case. The demurrer, and the exceptions to the order sustaining the same, raise practically the following questions: (1) Whether the statute of 1887 gave authority for the acts resulting in the injuries complained of, and afforded therefor a remedy which is exclusive. (2) Whether, assuming the affirmative of the first proposition, the complaint contains any statement of facts showing a case outside of the application of such a provision of law, such as acts of negligence in the construction or maintenance of the dam, or acts in excess of the authority conferred. (3) Distinct from the foregoing, and assuming the right to bring an action at common law, whether the complaint is fatally defective in not stating that plaintiff had been injured by defendant after notice of the alleged nuisance, and demand for its removal. We will consider the last proposition first.

1. It appears that the dam was constructed, and the water raised in the channel of the river, by the grantors of the defendant. The defendant was not the original creator of the alleged nuisance. "Where a defendant was not the original creator of the disturbance of an easement, an action will not lie against him until he has been requested to remove the cause of the disturbance which is on his land." *Elliott v. Rhett*, 5 Rich. L. 420, 57 Am. Dec. 750. In *Angell on Watercourses*, § 408, the same doctrine is announced as follows: "It has been held ever since *Penruddock's Case*, 5 Coke, *101, that where a party was not the original creator of the nuisance he must have notice of it, and a request must be made to remove it, before any action can be brought. Where a dam was erected, and land in consequence flowed, by the grantor of an individual, the grantee will not be liable for the damages in continuing the dam and flowing the land as before, except on proof of notice of damage and of a special request to remove the nuisance." This rule is based on the reason that it would be unjust to subject a person, not the creator of the nuisance, to a suit for the nuisance of which he was ignorant, and which he did not intend to continue. In this case notice of the nuisance, and request for its removal, were received by the defendant fifteen days before the commencement of this action. The alleged grievances were caused by the "keeping up, maintaining, and continuing the dam." The natural and accustomed flow of the water, etc., through the channel of the river, of the branch, and of the ditch "has been and now is hindered and obstructed." The river, branch, and ditch "have been and now are prevented and hindered from effecting the proper, natural, and usual drainage of said land; . . . the said waters are caused to percolate," etc. It is clear that the complaint alleges injury after as well as before the notice to remove the nuisance, and up to the commencement of the action. It may be that the

injury sustained by plaintiff for which action would lie is small, but that was for the jury. We do not think the demurrer could be sustained on this ground.

2. Taking the first proposition stated above: This is the crucial question in the case. Does the act of 1887 provide a remedy for the injuries complained of by plaintiff? Section 2 of this act provides "that the said board of trustees are hereby authorized and directed for the development of said canal to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered, and directed to improve and develop the same." Section 3 provides "that in order to improve and develop the power of said canal for navigation to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad river at, above, or below the head of the present canal, as by survey already made, may be deemed advisable for the development of the said water power, and in locating and constructing the said dam, they shall have the right to raise the water in the Broad river to such a height as will give a head and fall of 87 feet at the south side of Gervais street at mean low water," etc. Section 4 provides "that the said board of trustees shall have the right of way, and the same is hereby granted in and along said course of the canal, for the construction and operation of the same. If in enlarging and developing the said canal, or in constructing the said dam, it become necessary to use the private property of any person or corporation for the purpose, the said board of trustees, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the Broad river and Congaree river, and the transportation of supplies to market, shall have the right to acquire such right of way in the manner now provided by law." Appellants contend for a strict construction of this act, and that, while the power of eminent domain has been conferred, the manner prescribed for the exercise of it has been carefully and expressly limited to the securing the right of way, properly so called, along the line of the canal, and for the purpose of the construction of the dam. It is undoubtedly true, as a general rule, that statutes granting power to condemn private property for public use should be strictly construed. This principle was very strongly asserted in *Greenville & C. R. Co. v. Nunnamaker*, 4 Rich. L. 111, but this case asserts also another well-settled rule of construction, in this language (p. 115): "But in the construction of the charter, when the strict signification of a word is opposed to the apparent intention, it is proper to maintain the design and purpose of the charter, even by neglect of the meaning of the word." Mr. Endlich, in his work on Interpretation of Statutes (§ 843), shows that, while the rule of strict construction applies to such statutes, the application of such rule must stop short of defeating the object of the enactment. Mr. Black, in his work on the same subject (p. 308), says that such statutes "are to receive a reasonably strict and guarded inter-

pretation, and the power granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purposes of the grant." So in *Ross v. Georgia, O. & N. R. Co.* 33 S. C. 482, Chief Justice McIver, speaking for the court, said: "When the legislature granted a charter to the defendant company, authorizing it to construct a railway between the points therein designated, it must be regarded as having conferred upon said company the right to take and condemn such lands and rights of way as might be necessary to effect the purpose. This is the rule of construction as applied to such enterprises as railroads built for private gain, but serving a useful public purpose. The construction of the Columbia Canal was a great public work, begun by the state itself, for important public purposes; among others, 'for providing an adequate water power for the use of the penitentiary;' 'to improve and develop the power of said canal for navigation;' 'furnishing the city of Columbia with an adequate supply of water.' The state created the board of trustees, giving it large discretionary powers, and directed it to improve and develop the said canal for the purposes named. 'The principle of strict construction is less applicable where the powers are conferred on public bodies for essentially public purposes.' Endlich, Interpretation of Statutes, § 355. 'The right to condemn will be . . . more readily inferred . . . in favor of public corporations exercising powers solely for the public use and benefit than in favor of private individuals, or corporations organized for pecuniary profit.' Lewis, Em. Dom. § 241. Article 1, § 28, of the Constitution of 1868, under which the case arises, provides: 'Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor; provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and, for works of internal improvement, the right to establish depots, stations, turnouts,' etc.; 'but a just compensation shall, in all cases, be first made to the owner.' This provision of the Constitution 'was inserted for the double purpose of maintaining the sanctity of private property, and at the same time promoting internal improvements, especially in respect to rights of way over lands, and in establishing stations, etc., to facilitate transportation.' *Ex parte Bacot*, 36 S. C. 138, 16 L. R. A. 586.

The statute in question must be interpreted in the light of the foregoing principles. It is expressly provided in the 3d section of said act that in locating and constructing the said dam the board of trustees shall have the right to raise the water in Broad river to a specified height at a given point. This was deemed essential to the development of the canal, which the trustees were directed to do. The right to locate and construct the dam necessarily, and by the terms of the act, includes the right to raise the water in the channel of Broad river. Assuming that plaintiff, as a proprietor on Broad river, a fresh-water navigable stream, owned to the middle of the stream, as contended for by appellant, this act, by necessary

inference, if not in express words, when it authorized the raising of the water in Broad river to a given height authorized the entry and invasion of the plaintiff's land to the extent necessary to maintain such height of water. Now, in the 4th section of the act the board of trustees is granted necessary right of way in and along the course of the canal for the construction and development of the same. Under the well-settled rule of statutory construction, that when the subject matter of an act is clearly ascertained, in order to effect the legislative intent, and carry out the general scope and purpose of the act, general words will be restrained, and words of narrow signification will be enlarged, a court would be justified in enlarging the words above quoted to include, not only lands strictly in and along the course of the canal, but all lands necessary to be used in maintaining the dam and the specified height of water which are essential for the development and operation of the canal. But § 4 goes further, and provides: 'If in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use private property,' etc., 'the said board of trustees,' etc., 'shall have the right to acquire such right of way in the manner now provided by law.' It will be observed that in § 3 the right to raise the water in the river was complied with, and made a part of the construction of the dam; and now, in § 4, the right to use private property necessary in the construction of the dam is expressly given. Construing the terms used in the light of the manifest purpose of the act, we cannot give them the narrow and restricted interpretation contended for by appellant, limiting the right of way to the actual line of the canal, and to the land actually occupied by the structure called the 'dam,' but must give them the enlarged meaning indicated above. The real dam is the damming of the water to the specified height, and must include all lands or easements necessary to maintain it. The legislature, having directed the development of a great public work for essentially public purposes, certainly meant to grant all rights without which the power granted would be worthless.

It is contended further that, granting that the statute of 1887 vests the board of trustees with all the powers conferred by the condemnation statutes of this state (Gen. Stat. 1882, §§ 1550-1561; Rev. Stat. 1893, §§ 1743-1755), still the defendant could reap no benefit thereby without showing that the provisions of the statute have been called into actual operation in the manner provided. Section 1743 provides: 'Whenever any person or corporation shall be authorized by charter to construct . . . a canal . . . in this state such person or corporation, before entering upon any lands for the purpose of construction, shall give to the owner thereof . . . notice in writing that the right of way over said lands is required,' etc. It does not appear on the face of the complaint that any such notice was given. But in *Verdier v. Port Royal R. Co.* 15 S. C. 476, it is held that an owner may give permission to enter for purpose of construction of a highway without first receiving the notice, and that such may be inferred from facts and

circumstances. See also, to the same effect, *Tutt v. Port Royal & A. R. Co.* 28 S. C. 400, which was an appeal from an order sustaining a demurrer. The complaint does not show that the plaintiff objected at all to the raising of the water in the river 6 feet on plaintiff's banks. This was done in 1889 by defendant's grantor, without objection, so far as appears. The allegation of the sixth paragraph of the complaint, "that the said keeping up, maintaining, and continuing of the said dam by the defendant has heretofore been and now is without the consent of the plaintiff," etc., relates to time beginning January 11, 1892, when the dam, etc., was conveyed to defendant. The first and only evidence of objection was given on the 2d day of August, 1894, when the notice to remove the nuisance was served. The act authorizing the construction of the dam and raising the water in the river's channel was a public act, of which plaintiff is presumed to have known. The extensive and permanent character of so large a public work, so near plaintiff's land, with the manifest and avowed purpose of raising the water on plaintiff's land; with the inevitable result of interfering with the drainage of lands accustomed to be drained into the river in the territory necessary to maintain the specified head of water in the river, the immediate elevation of the water in the branch and ditch spoken of, and the overflow of plaintiff's land in times of ordinary freshet, must surely have attracted plaintiff's attention. The entry upon and appropriation of plaintiff's land for the construction of the dam were open and patent. The projection and maintenance of the water of the river 6 feet against his banks, above the former level, with its inevitable results, were all the entry and use of plaintiff's land necessary to be made and were as effective for the construction of the dam and canal as an entry by workmen with pick and shovel to dig up the soil would be in the case of constructing a railroad. From the absence of objection, under these circumstances, permission to enter must be inferred. Section 1752, Rev. Stat. 1893, provides for such a case: "If in any case the owner of any land shall permit the person or corporation acquiring the right of way over the same to enter upon the construction of a highway without previous compensation the owner shall have the right, after the highway shall have been constructed, to demand compensation, and to petition for an assessment of the same in the manner hereinbefore directed: provided such petition shall be filed within twelve months after the highway shall have been completed through his or her lands." This section has received interpretation in the case of *Aull v. Columbia, N. & L. R. Co.* 42 S. C. 436, where Chief Justice McIver, as the court's organ, says: "In § 1558, Gen. Stat. (Rev. Stat. 1893, § 1752), the word used is 'permit,' showing an intention to provide for cases, which oftentimes have occurred, where the railway company, without first obtaining the 'consent' of the landowner, either expressly or by presumption, has been suffered or permitted to construct its road 'over the land of another.' . . . If, therefore, a railway company, without first obtaining the consent of a landowner, and without first resorting to the proper proceedings to condemn

the land and have the compensation to which the landowner is entitled ascertained, proceeds to construct its road over the land of another, without objection, or by the implied permission, of the landowner, such landowner may at any time within one year after the completion of the road, under the provision of § 1559 (Rev. Stat. 1893, § 1752), demand compensation in the manner therein provided."

It is contended that the right to condemn lands does not include such use of or injury to the lands of plaintiff as complained of in this case; but in *Ross v. Georgia, C. & N. R. Co.* 33 S. C. 477, it was held that the word "lands" includes all rights or easements growing thereout. The compensation allowed by the statute is for the right of way, not simply the land. "The act, in effect, defines the term 'compensation' to be the value of the land, together with such special damage as may be sustained by the landowner, by reason of the construction of the road through his lands." *Bowen v. Atlantic & F. B. V. R. Co.* 17 S. C. 579. Since the compensation is for the right of way, the right of way must include such use of land as subjects the landowner to any special damage for which compensation is allowed. There is no doubt that the injuries complained of in this case could have been submitted to a jury to assess the amount of compensation, as matter of special damages. Of course, the permission granted by plaintiff to the board of trustees to enter for construction of the dam and appurtenances did not deprive plaintiff of his constitutional right of compensation, for which a remedy was provided. It simply relieved the board of trustees, so entering, from the character of trespassers. *Tompkins v. Augusta & K. R. Co.* 21 S. C. 491. Neither is the defendant grantee a trespasser for continuing the use. The remedy provided by the statute is exclusive. *McLaughlin v. Charlotte & S. C. R. Co.* 5 Rich. L. 584; *Fuller v. Edings*, 11 Rich. L. 239; *Verdier v. Port Royal R. Co.* 15 S. C. 483; *Sams v. Port Royal & A. R. Co.* Id. 487; *Ross v. Georgia, C. & N. R. Co.* 33 S. C. 477.

2. Notwithstanding the legislature authorized the erection of the dam and the raising of the water in the river, and provided an exclusive remedy to enable plaintiff to secure compensation for the lands taken, and special damages, nevertheless an action at common law would be sustained for any injury resulting from negligence in the performance of authorized acts, as compensation for injury from such a cause was not contemplated by the legislature. The complaint, however, contains no allegations to bring the case within this rule. *Wallace v. Columbia & G. R. Co.* 84 S. C. 66, is in point here: "There must be some allegations of facts showing that the defendant in doing the act which it was authorized to do, has either wantonly or through negligence done the act in such a manner as unnecessarily impaired or injured the rights of the plaintiff. . . . The wrong, if any, which was done to the plaintiff by the defendant did not consist in constructing its roadbed over the streams flowing through the lands of the plaintiff, for that it had a legal right to do. Nor did it consist necessarily in the fact that the natural flow of the water was obstructed, for that may have

been the inevitable and unavoidable consequence of the construction of the railroad, but it may have consisted in the unskillful or negligent manner in which the work was done." Authorities on this subject are numerous. The point is tersely stated in *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L. R. A. 674: "The grant is a defense as to all acts done within it, not outside it." Neither a right of way conferred by grant, nor one conferred by condemnation, will give exemption from damages consequential upon the improper or negligent exercise of the rights, and not from the fair, proper, and reasonable exercise of it; for the reason that neither in making such grant, nor in the assessment upon an inquisition, are damages contemplated or included that are to be solely attributed to such misuse of the right.

The demurrer was properly sustained upon the grounds discussed in the second and third propositions above stated.

The judgment of the Circuit Court sustaining the demurrer and dismissing the complaint is affirmed.

Arthur S. NUNAMAKER, *Appt.*,

v.

COLUMBIA WATER POWER COMPANY.

(.....S. C.....)

The grant of a right to flood a part of a farm by the erection of a dam will preclude the maintenance of an action for injuries caused by the dam to the remaining portion.

(October 17, 1896.)

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Richland County in favor of defendant in an action brought to recover damages for alleged wrongful flooding of plaintiff's land. *Affirmed.*

The facts are stated in the opinion.

Messrs. Melton & Melton, J. S. Muller, and Obear & Douglass for appellant.

Messrs. Abney & Thomas for respondent.

Jones, J., delivered the opinion of the court:

This case, being in all respects, except in one particular to be hereinafter noticed, like the case of *Leitzzey v. Columbia Water Power Co.* (just decided by this court) *ante*, 215, is ruled by the principles therein announced. The point of difference in this case and the one just referred to is this: In the third paragraph of the complaint it is alleged that "on or about the 15th day of March, 1891, the said board of trustees of the Columbia Canal purchased from the plaintiff herein the right to overflow and cover with water, and keep covered with water, 14½ acres, part and parcel of the tract of land described in the second paragraph, and bordering on the said river." These acres, however, are not included in the 60 acres, for injuries to which damages are demanded. To this defendant demurred as follows: "The complaint, upon its face, shows no cause of action, in that it appears therein that the plain-

tiff granted to the board of trustees, under whom defendant claims, the right to overflow and cover with water, and keep covered with water, 14½ acres of land, being part and parcel of the same tract alleged now to be damaged by reason of the keeping up and maintaining of the dam alleged in the complaint to be a nuisance. In law, this grant of the easement to overflow this portion of the particular tract of land has the same effect as if condemnation proceedings had been taken under the provisions of law, and all injuries to the residue of the tract of land are conclusively presumed to have been taken into consideration in fixing the amount of the purchase money of the parcel of land so granted." The demurrer was sustained on this ground, as well as upon the other grounds stated in said *Leitzzey's Case*, and appellant's third exception in this case alleges error. The circuit court did not err. In *Lewis, Em. Dom. § 566*, it is stated: "If one individual should convey to another a strip of land to be used for a railroad, there would be a release of all damages resulting from the operation of the road in a reasonable and proper manner." This is precisely what this court decided in *Wallace v. Columbia & G. R. Co.* 34 S. C. 62. In the last-mentioned case the railroad company acquired a right of way by agreement with the landowner, and it was held that the landowner could not maintain an action against the company for damages resulting to the landowner from the construction and maintenance of its roadbed, without showing that the damage was the result of the unskillful and negligent manner in which the work was done. *Randolph, Em. Dom. § 129*, says: "There is a well-settled rule to the effect that where property is purchased where it might have been condemned, the consideration is conclusively presumed to cover all damages to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings." In *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363, it is held that, where a person conveys a right of way over his land, it will be conclusively "presumed that all the damages to the balance of the land, past, present, and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace." To the same effect is the well-considered case of *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L. R. A. 674, which holds that, when one grants to a railroad company a strip of land for its use in the construction of its road, all damages to the residue of the tract, arising from construction, which can be taken into consideration in the assessment of compensation under proceedings for condemnation, are released. There are many other cases to this effect. It would be unreasonable to hold that a voluntary grant of a right of way is not as effectual to protect the grantee from suit for damages arising from its proper use as a right of way taken under compulsory proceedings. This, which is settled law as to railroads, applies, on principle, to canals as well. We have shown in *Leitzzey's Case* that this land, including its use for the purpose for which it was granted, may have been condemned for the necessary use of the canal. The plaintiff, having seen fit to grant

NOTE.—See the preceding case of *Leitzzey v. Columbia Water Power Co.* (S. C.) *ante*, 215.
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a license to permanently flood a part of his tract of land for the maintenance of the canal, is presumed to have taken into consideration the damage to the residue of his tract which would accrue to him from the proper and reasonable use of the right granted. If for such

damage he did not get adequate compensation in the price paid for the grant or license, and greater injury than he contemplated has resulted from such reasonable use, it is *damnum absque injuria*.

The judgment of the Circuit Court is affirmed.

ALABAMA SUPREME COURT.

C. McANALLY, *Appl.*,

v.

ALABAMA INSANE HOSPITAL.

(.....Ala.....)

A contract by a married woman to pay for the support of her insane husband in an asylum, not made in the mode provided by statute, is not valid under Code, § 2346, giving a

wife capacity to contract as if sole, "with the assent or concurrence of her husband expressed in writing," and § 2350, authorizing her to engage in trade or business without his consent, if he is of unsound mind or has abandoned her.

(February 6, 1896.)

A PPEAL by defendant from a judgment of the Birmingham City Court in favor of plaintiff in an action brought to enforce de-

NOTE.—Insanity of husband as affecting wife's disability of coverture.

- I. Generally,—wife as head of family.
- II. As to separate property and rights of wife.
- III. As to dower rights.
- IV. As to community property.
- V. As to property and rights of husband.

I. Generally,—wife as head of family.

The cases are hopelessly conflicting, but it may be possible to draw the conclusion from them that the wife of an insane man is to be regarded as the head of the family so far as may be necessary to its proper care and maintenance. But even this can be regarded only as a general, and not as an universal, rule.

Thus, the wife of an insane man should be regarded as the head of the family and entitled to its control during his insanity, and she has the right as against his father to control his abiding place or change his domicile. *Robinson v. Frost*, 54 Vt. 106, 41 Am. Rep. 835.

And the guardianship of an insane husband for whom no statutory guardian had been appointed is in his wife rather than his father, and she may enter the father's dwelling where they had temporarily occupied an apartment, and remove her husband notwithstanding the father's opposition. *Ibid*.

So, in *Gustin v. Carpenter*, 51 Vt. 585, an insane husband was spoken of as being intellectually dead for the present.

And in *Forbes v. Moore*, 32 Tex. 185, the wife is also said to be the head of the family during the husband's insanity. See *infra*, IV.

And she is also spoken of as the head of the family in *Sawyer v. Cutting*, 23 Vt. 493, *infra*, V.

So, in *Wenman's Case*, 1 P. Wms. 701, the wife of a lunatic was treated as his custodian, and was committed for contempt of court for not obeying an order to produce him before a commission granted to inquire as to his lunacy, where it appeared that she had been with him and had been instrumental in removing him from place to place in order to avoid his production.

And in *Bird v. LeFevre*, 4 Bro. Ch. 100, interest on a fund in court belonging to a person afflicted with imbecility was ordered to be paid to his wife for the maintenance of himself and his family, it appearing to be for the benefit of the family that the interest should be so paid.

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And in *Re Edwards*, 3 Macn. & G. 134, an order was made for payment of a lunatic's maintenance to a married woman who was the committee of his person on her separate receipt, her solicitor undertaking that the money should be duly applied.

And in *Retcourt v. Ewington*, 9 Sim. 252, where an attachment was issued against a married man for want of answer of himself and wife, and the sheriff returned that the husband was insane and therefore incapable of answering, it was ordered that the wife should answer separately, and that the service of subpoena on her should be deemed good service, and that the senior clerk should be appointed guardian of the husband to put in his answer.

So, the wife of an insane husband may employ the selectmen of the town to commit him to an insane asylum under N. H. Rev. Stat. chap. 9, § 16, providing that the parent, guardian, or friends of an insane person may cause him to be sent to an asylum with the consent of the trustees and there supported on such terms as they may agree, the wife being regarded as the friend of the husband in such case. *Davis v. Merrill*, 47 N. H. 208.

And in England the wife of a lunatic would appear to have power to prosecute an inquisition of lunacy against him. See *Re F.* —, 2 De G. J. & S. 80, and *Chester v. Rolfe*, 4 De G. M. & G. 798, 18 Jur. 114, 23 L. J. Ch. N. S. 283, *infra*, V.

But the wife of an alleged lunatic is not considered as a friend or relative of her husband within the Maine statute allowing the appointment of a guardian upon the application of any friend or relative, on the ground that husband and wife should not be permitted to act adversely to each other except in cases of violence or divorce. *Re Howard*, 31 Me. 552.

And physical or mental incapacity is not included within the words "any other cause" in Wis. Rev. Stat. chap. 95, § 4, providing that any married woman whose husband, either from drunkenness, profligacy, or any other cause shall neglect or refuse to provide for her support or the support and education of her children, shall have the right in her own name to transact business and to receive and collect her own earnings, as such words must be understood to refer to like or similar causes. *Edson v. Hayden*, 20 Wis. 683.

And the wife of an insane man under guardianship cannot maintain an action to recover possession of property belonging to her in her own name.

defendant's liability on a bond given by her to plaintiff. *Reversed.*

Defendant's husband was in need of treatment at the hospital. Defendant and E. F. Enslen executed a bond to the hospital conditioned that so long as the husband remained in the hospital defendant should supply him with clothing and pay the hospital charges. Plaintiff alleged that the clothing was not furnished and charges were not paid, and it therefore brought this suit on the bond.

Further facts appear in the opinion.

Messrs. C. B. Powell and Joseph G. Crews for appellant.

Messrs. Ward & Campbell, for appellee: At common law a wife was incapable of making a contract.

1 Co. Litt. 112a-129; Reeve, Dom. Rel. 98; *Arthur v. Broadnax* (Ala.) 87 Am. Dec. 709, Freeman's note.

Exceptions grew up and fastened themselves upon the body of the law. Originally they were these:

First, where the wife was a sole trader by the custom of London, an exception which of course never obtained in this country.

Second, where the husband was *civilliter mortuus*—civilly dead. As the modes of civil death existing at common law are these: (1) at-

tainer of treason or felony; (2) banishment from or adjuration of the realm; (3) entering into religion—that is becoming a monk professed.

Third, where the husband was an alien enemy.

Fourth, where the husband was an alien and had never been in England.

Arthur v. Broadnax, 3 Ala. 557, 87 Am. Dec. 707; *Manby v. Scott*, 8 Smith, Lead. Cas. 1752; *Gregory v. Paul*, 15 Mass. 81; *Roland v. Logan*, 18 Ala. 307; *Rhea v. Rhenner*, 26 U. S. 1 Pet. 105, 7 L. ed. 72; *Love v. Moynahan*, 16 Ill. 277, 68 Am. Dec. 306; *Curstens v. Hanselman*, 61 Mich. 426.

The husband was at common law liable for the wife's engagements for necessities furnished her upon the ground of an implied agency.

Manby v. Scott, *supra*; *Sawyer v. Cutting*, 23 Vt. 486; *Benjamin v. Benjamin*, 15 Conn. 847, 39 Am. Dec. 384; *Freestone v. Butcher*, 9 Car. & P. 648.

An insane husband was liable for the wife's support upon the same ground.

Manby v. Scott, 8 Smith, Lead. Cas. 1767.

During the husband's insanity the wife is the head of the family and has control of it.

Robinson v. Frost, 54 Vt. 105, 41 Am. Rep. 835.

and the joinder of her husband as plaintiff is a ground for the dismissal of the action under Mo. Rev. Stat. 1879, § 5804, providing that it shall be the duty of the guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward. *Hayes v. Miller*, 81 Mo. 424.

And the fact that two of three trustees have died, and the third, who was a widow, had married a person afterwards found to be a lunatic, authorizes the appointment of new trustees in their places, where it had become impossible to obtain a payment of the dividends, as the bank would not pay them to the wife without the husband's concurrence. *Re Wood*, 3 De G. F. & J. 125.

See also *Shaw v. Thompson*, 16 Pick. 198, 26 Am. Dec. 655, *infra* II., holding that the husband's insanity does not remove the wife's disability or confer on her any new power.

II. As to separate property and rights of wife.

As to the separate and independent rights of the wife, though the decisions are conflicting, it would seem that the insanity of the husband is generally regarded as removing, or at least affecting, the disability of coverture to some extent.

Thus, the fact that a husband is insane and out of the state in an insane asylum without will or ability to return endows the wife with as much right to act in her own name with reference to her own right as she would have if her husband was civilly dead or had abjured the realm and abandoned her. *Gustin v. Carpenter*, 51 Vt. 585.

And a married woman whose husband is insane and confined in an insane asylum in another state may sue in her own name for a personal tort to her, which is a cause of action which would survive to her. *Ibid.*

So, a married woman having property, and whose husband is insane and has no settlement and cannot reduce her property to possession and thereby gain a settlement, may herself gain one in her own right by virtue of the possession of her property as if she were sole. *Andover v. Merrimack County*, 37 N. H. 487.

Nor can a wife's property be reduced to the possession of the husband where he is insane, by the act of his guardian, the right of election to so—
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duce it being in its nature a personal one to the husband which cannot be exercised by another. *Ibid.*

So, in *Steed v. Cadley*, 2 Myl. & K. 52, a fund bequeathed to a married woman whose husband was of unsound mind, but against whom no commission had issued, was transferred into court on bill filed by the husband and wife for payment of the legacy to their joint account, and afterwards in consideration of their poverty, on the wife's application, the dividends were ordered to be paid to her for life.

And a settlement of one half of a fund to which a lunatic was entitled upon his wife, made upon her application and approved by the master by writing at the foot of the draft, after which the lunatic died without further proceedings having been taken, will not preclude the wife from retiring from the proposed settlement and claiming for herself the whole of such fund to which she was entitled upon the distribution of the intestate's estate. *Baldwin v. Baldwin*, 5 De G. & Sm. 325.

In *Shaw v. Thompson*, 16 Pick. 198, 26 Am. Dec. 655, however, it was held that the fact that a husband is *non compos mentis* does not remove the disability of his wife or confer on her any new power to bind herself by contract, and she cannot render herself liable on contract for necessities supplied her, as the law would still raise an implied promise against the husband for such necessities.

So, a wife appointed by commissioners of insanity custodian of her insane husband cannot recover compensation for services in that capacity from his estate under Iowa Code, § 2507, making the expenses of the family chargeable upon the property of both husband and wife or of either of them. *Grant v. Green*, 41 Iowa, 88.

And the wife of an insane husband, who contracts with his guardian to care for him for a specified sum for her services, cannot recover thereon as the agreement is without consideration, the services being such as she owed to her husband in virtue of the relation existing between them. *Ibid.*

III. As to dower rights.

The husband's insanity does not seem to affect

When a husband is insane and confined in an asylum in another state the wife may sue as if sole.

Gustin v. Carpenter, 51 Vt. 585.

Mr. James E. Webb also for appellee.

Haralson, J., delivered the opinion of the court:

At common law, marriage vested in the husband the title of the wife to all personal chattels of which she had actual or legal possession; and to her real estate he gained a title only to the rents and profits during coverture, but the estate itself remained entire to the wife, after the death of her husband, or to her heirs, if she died before him, unless by the birth of a child he became tenant for life by the curtesy. 2 Brick. Dig. pp. 71, 72, §§ 36, 51. At common law, the wife was generally incapable of entering into any valid contract to bind either her person or property, and could not be sued at law in an action *ex contractu*; and, except as modified by statute, this disability continues to exist. 2 Story, Eq. Jur. § 1397; Reeve, Dom. Rel. 188; 14 Am. & Eng. Enc. Law, p. 604; *Davis v. Carroll*, 71 Md. 570; *Canal Bank v. Partee*, 99 U. S. 832, 25 L. ed. 398; 8 Brick. Dig. p. 545, §§ 52, 53. This rule of the common law has been modified in

this state, and "the wife has full legal capacity to contract in writing, as if she were sole, with the assent or concurrence of her husband expressed in writing." Code, § 2348. This statute, as to contracts therein referred to, does not enlarge the capacity of a married woman to contract in all of the usual modes; but, as we have heretofore held, it is enabling and restrictive,—enabling, so as to authorize her to contract in any manner that she could do if a *feme sole*, with the written consent and concurrence of her husband; and restrictive, in that it denies this power, except in the specific mode prescribed in the statute. For the full exercise of the power to contract, two things are necessary,—a written contract by the wife, and the written assent or concurrence of the husband for her to make or enter into the contract. *Scott v. Cotten*, 91 Ala. 628. One of the exceptions to the common-law rule to which we have referred, disabling the wife to contract, was, that if the husband abandoned her, and departed into another country without the intention of returning, the law conferred on her the capacity of contracting and suing as though she were sole. *Arthur v. Broadnax*, 8 Ala. 557, 37 Am. Dec. 707; *James v. Stewart*, 9 Ala. 855; *Mead v. Hughes*, 15 Ala. 148, 50 Am. Dec. 123; *Roland v. Logan*, 18 Ala. 307. Or, when the

the wife's power to convey or bar her right to dower.

Thus, where a wife separate and apart from her husband could not convey or bind her dower or homestead right by deed or mortgage, her joinder in a deed or mortgage with her husband, who is insane and incompetent to make a deed, will not bind her. *Brothers v. Bank of Kaukauna*, 84 Wis. 261.

And a joinder by a wife with her husband in a deed of his property, which had been sold by his guardian while he was insane and incapable of contracting, will not bar her dower or estop her from claiming dower under Mo. Rev. Stat. 1879, §§ 698, 2197, providing that a married woman may relinquish her dower in the real estate of her husband by their joint deed, acknowledged and certified as required by statute. *Rannells v. Gerner*, 80 Mo. 479.

Nor will the joinder of a wife with her husband in a deed of his property, made by his guardian when the husband was insane and incompetent to contract. *Rannells v. Isgrig*, 99 Mo. 19.

And the Massachusetts statute, providing that no conveyance by a married woman of any real property except a lease for a term not exceeding one year shall be valid without the assent of her husband in writing or his joining with her in the conveyance, contemplates an intelligent assent of a sound mind capable of contracting and advising, and a conveyance made by her in which her husband joins when he is insane is void to the same extent as if there had been no assent, and no subsequent action or failure to act on his part could give it validity. *Leggate v. Clark*, 111 Mass. 308.

And an order of the probate judge committing a husband to an insane asylum is not *prima facie* evidence of or admissible to prove his insanity on an issue whether he was of sufficient mental capacity to give an intelligent assent to his wife's conveyance of real estate. *Ibid*.

See also *Heidenheimer v. Thomas*, 68 Tex. 287, *infra*, IV.

IV. As to community property.

During the insanity of the husband the wife is the head of the family, and as such head has the 34 L. R. A.

legal right to dispose of so much of the common property of husband and wife as may be necessary to supply the wants of herself and his and her children. *Forbes v. Moore*, 28 Tex. 196.

And no recovery can be had by a husband who had been insane, after his recovery, from persons employed by his wife during his insanity to dispose of community property for the support of herself and children, unless there was an unnecessary squandering of the property by them. *Ibid*.

But the rule that the wife may sell community property or the property of her husband where he is insane springs only from the necessity of the family to have a support, and would not apply where the sale would deprive the family of the only piece of property which could have contributed to its support. *Heidenheimer v. Thomas*, 68 Tex. 287.

And the wife of an insane man has no power to dispose of community property or the separate property of her husband, where the statute makes provision for the support of the family and the education of the children. *Ibid*.

And a deed made by a husband and wife of the homestead when the husband is *non compos mentis*, for the purpose of the payment of a debt already due from the husband, is invalid and ineffectual to transfer her homestead, though she properly acknowledged it, where the homestead constituted her entire property. *Ibid*.

In *Heidenheimer v. Thomas*, *supra*, *Forbes v. Moore*, *supra*, was criticized, the court saying that it did not appear in that case that the wife had disposed of any property, and the remarks made in the course of the opinion, so far as could be seen from the record, were not necessary to the decision of the cause.

V. As to property and rights of husband.

The general rule would seem to be that laid down in *Richardson v. Du Bois*, L. R. 5 Q. R. 51, 30 L. J. Q. R. N. S. 69, 21 L. T. N. S. 635, 18 Week. Rep. 62, 10 Best & S. 830, that the agency of the wife of a lunatic, and her authority to pledge her husband's credit do not differ from those ordinarily implied from the relation of husband and wife.

Thus, the estate of an insane husband is bound

husband was civilly dead,—outlawed, banished, imprisoned for life, etc.,—the wife had the powers of a *feme sole*. 14 Am. & Eng. Enc. Law, p. 591. The reason for ingrafting the exception referred to on the disabilities of the wife to contract at common law was, that without it oftentimes married women whose husbands had renounced their wives, families, and country "could obtain no credit on account of their husbands, for no process could reach them; and they could not recover for a trespass upon their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support." *Gregory v. Paul*, 15 Mass. 81; *Mead v. Hughes*, *supra*. The same reasons, it is contended for the appellee, apply to ingraft an inception in favor of married women in cases of the insanity of their husbands, and for the further reason that, the husband being insane, no marital right can be affected, and every presumption of possible coercion is removed out of the way,—citing *Reeve*, Dom. Rel. 188. But, the reasons in the two cases are not the same. It has been held as the common-law doctrine that "the husband must maintain the wife, not only during cohabitation, but whenever there is a separation without her fault. Insanity in either is not a fault; therefore, whether he or she is insane, or though both are, he must still provide for her. If she is in an insane asylum, he

must support her there. He may be sued for necessities there supplied to her. Or, should he be the one in the asylum, the wife, though sane, may charge him with necessities while he is there confined." 1 Bishop, Mar. & Div. § 565.

One is not civilly dead who is insane, nor,—if not removed beyond his state,—can he be said to be where process may not be served on him. He is responsible for contracts made before he became insane, and may be sued on them. And that one insane may be the better taken care of, and not become a charge on his family, the statutes of this state provide for the appointment of a guardian of his person and property. Code, § 2390. So far as he is concerned, if a married man, the wife has no occasion to enter into a contract for his support with an asylum. The same reasons, then, for the rule invoked as to the capacity of the wife to contract, whose husband is civilly dead, or who has abandoned his wife and family, and gone to reside in another state, with no intention of returning, do not apply to cases of the mere insanity of the husband. In the American & English Encyclopædia of Law, it is said on this subject that, "as a general rule, the insanity, infancy, or other incapacity of a husband does not affect the personal status of his wife," and the compilers while stating that there seemed to be no cases on the point, added that the "proposition is an easy inference from the well known principles on this

for necessities furnished his wife upon her request upon an implied contract to provide them for her during cohabitation. *Pearl v. McDowell*, 8 J. J. Marsh. 653, 20 Am. Dec. 190; *Davidson v. Wood*, 1 DeG. J. & S. 465, 9 Jur. N. S. 589, 11 Week. Rep. 791, 8 L. T. N. S. 476.

And the fact that the wife has a separate income does not affect the rule. *Davidson v. Wood*, *supra*.

And the wife of a lunatic, though he is confined in an asylum as dangerous, may pledge his credit for necessities for herself and bind his estate therefor, and the person supplying her may sue the husband in an action for debt. *Read v. Legard*, 4 Eng. L. & Eq. 523.

So, an action of assumpsit will lie against a husband to recover a sum of money due for the tuition of his children on a contract made by his wife during the pendency of a bill in chancery for divorce and alimony filed by the wife on the ground, among others, that the husband was a lunatic, under which an order had been made allowing a designated sum per annum for the support and maintenance of herself and the children, the husband having been subsequently restored to sanity and the bill dismissed. *Harris v. Davis*, 1 Ala. 259.

And the estate of an alleged lunatic is bound for the costs of lunacy proceedings brought by his wife against him though she was living apart from him at the time, and he recovered within a few months, where she had fair reason for believing that he was in such a state as to require the intervention of a court to protect their persons and property. *Re F*—, 2 De G. J. & S. 89.

And a solicitor employed by the wife of a lunatic upon an issue of a commission de *lunatico inquirendo* against him on her petition is entitled to stand directly in his own right as a creditor against the estate of the lunatic for his costs, where the proceedings were reasonable and for the benefit of the lunatic. *Chester v. Rolfe*, 4 De G. M. & G. 798, 18 Jur. 114, 23 L. J. Ch. N. S. 233.

But while a married woman, whose husband was

sick and his mind was wandering and he was unconscious of what was transpiring and continued in that condition until his death, may be regarded as the head of the family for the purpose of taking care of the property and providing necessities for it, she is not thereby constituted the general agent of her husband, and authorized to transact his business generally, or to transfer his property to pay his debts. *Sawyer v. Cutting*, 23 Vt. 486.

And the fact that a husband is a lunatic and confined in an insane asylum does not authorize his wife to sell a crop of wheat belonging to him to pay a particular creditor to the prejudice of others. *Alexander v. Miller*, 16 Pa. 215.

Nor is an insane husband in a lunatic asylum liable for repairs upon his house in which his wife and her children reside upon her order, though the repairs were necessary for the house, where she had been supplied with money sufficient and applicable to the payment for such necessary repairs. *Richardson v. Du Bois*, L. R. 5 Q. B. 51, 39 L. J. Q. B. N. S. 60, 21 L. T. N. S. 635, 18 Week. Rep. 62, 10 Best & S. 830.

And the fact that the committee of the person of a lunatic is his wife will not release her from the charge of malversation, as against the committee of the estate, for having made savings out of the moneys supplied for his support, though she properly discharged her duty as committee of the person. *Stephenson v. Holmes*, 3 L. J. Ch. N. S. 41.

In *Rock v. Slade*, 7 Dowl. P. C. 22, 1 Arn. 346, 2 Jur. 993, however, it was held that the wife of a lunatic who has no committee has a sufficient implied authority to sue in the name of the lunatic for funds due to him.

And in *Forbes v. Moore*, 32 Tex. 195, the wife of an insane man was held to have the right to dispose of so much of the separate property of the husband as may be necessary to supply the wants of the family when there is no common property.

F. H. B.

subject." Volume 14, p. 593. Said § 2846 of the Code, touching the wife's power in this state to contract with the written consent of her husband, is in derogation of the common law, and it would seem that none of the exceptions to which we have been referring, on the power of the wife to contract at common law, have anything to do with the statutes of this state on the subject. These statutes seem to create their own exceptions to the wife's power to contract. In § 2848 it is provided that "if the husband be *non compos mentis*, or has abandoned the wife, or is a nonresident of the state, or is imprisoned under a conviction for crime for a period exceeding two years, the wife may alienate her lands as if she were sole," and, —as to her personal property,—"if the husband is living apart from the wife, without fault on her part, or if he be of unsound mind, the wife may convey or dispose of such property in any manner, as if she were sole." In the section providing that the wife may, with the consent of the husband expressed in writing, and under the conditions specified, enter into and pursue any lawful trade or business as if she were sole, it is provided that "the consent of the husband is not necessary, if he be of unsound mind, or has abandoned his wife, or is a nonresident of the state, or is imprisoned under conviction for crime." § 2850. Again, it is provided that "all property of the wife held by her previous to the marriage, or to which she may become entitled after the marriage in any manner, is the separate property of the wife, and is not subject to the lia-

bilities of the husband," and that "the earnings of the wife are her separate property." §§ 2841, 2842. These statutes, regulating the rights and liabilities of husband and wife, were designed to furnish a complete system within itself, not dependent on common-law rules for its enforcement. What the wife may do in case of the insanity of her husband, in respect to contracting and taking care of herself and her property, is carefully provided for in the statutes, and it would seem, on a common principle of interpretation, she is excluded from doing anything more in this respect than is authorized by statute. Her power to contract under the statute being specified and limited by the terms of the statute, she is restricted to the mode prescribed. *Ashford v. Watkins*, 70 Ala. 160; *Scott v. Cotten*, *supra*; *Vincent v. Walker*, 98 Ala. 169. We have no occasion, therefore, in this case, to apply any of the common-law rules invoked in favor of the liability of the appellant, on the bond she gave to indemnify the asylum on the liability of her husband to it for his support. If in any case these rules may be made applicable to a married woman and her estate, they are wanting in application to the case in hand. The appellant was without authority to enter into any such obligation as the one here sued on, and it is not binding on her.

Reversed and remanded.

Brickell, Ch. J., and Coleman, J., dissent.

PENNSYLVANIA SUPREME COURT.

Edwin A. LANDELL, Jr., *et al.*, *Appts.*,

Matthew HAMILTON *et al.*

(173 Pa. 327.)

1. The test in equity to determine whether a covenant in a deed runs with the land is the intention of the parties.
 2. A covenant that the "house" on a lot conveyed "shall be forever hereafter restricted from having any building or part of a building attached to the said messuage thereon erected" more than 10 feet high is not limited to the house or building then existing on the land.
 3. A change in the use of premises from residence to business purposes after the making of a covenant restricting erections thereon above a certain height is not sufficient to destroy the effect of the covenant.
- On Rehearing.*
4. Building along the division line and partly on each lot a solid wall higher than a covenant requires the servient lot to remain unobstructed for the purpose of furnishing light and air to the dominant lot will prevent the dominant owner, who builds it, from enforce-

ing the covenant in equity as to the space below the top of the wall, but will not absolutely terminate the covenant.

(May 4, 1894.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas, No. 2, for Philadelphia County refusing an injunction to restrain defendants from constructing a building on certain property in alleged violation of a restrictive covenant. *Reversed.*

The facts are stated in the opinions.

Messrs. Henry K. Fox and Charles C. Lister, for appellants:

Any words indicating the intention of the parties create a covenant running with the land.

Faschall v. Passmore, 15 Pa. 307; *Cromwell's Case*, 2 Coke, 71a, and *Sheppard's Touchstone*, 122; *Hartung v. Witte*, 59 Wis. 285; *Batley v. Foerderer*, 163 Pa. 460.

While at common law it would be necessary to make an inquiry as to the relative difference between a condition and a covenant, yet equity goes directly to its substantial elements and inquires what duty does it assure and to whom.

Clark v. Martin, 49 Pa. 297.

The manifest and only purpose of the parties to the covenant was to assure light and air to the properties adjoining the restricted premises.

NOTE.—For restrictions on buildings as easements of light and air, see note to *Case v. Minot* (Mass.) 22 L. R. A. 538.

31 L. R. A.

Equity will give effect to the intention and spirit of the restriction by restraining any impairment of the light and air.

Clark v. Martin, *supra*; *Muzzarelli v. Ivulshiser*, 168 Pa. 646; *Ivory v. Burns*, 66 Pa. 800; *St. Andrews Lutheran Church's Appeal*, 67 Pa. 512; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa. 284, 29 L. R. A. 423; *Wray v. Lemon*, 81* Pa. 273; *Philips's Appeal*, 98 Pa. 50; *Groff v. Bird-in-Hand Turnp. Co.* 144 Pa. 152.

The instrument, being the deed of the party to be bound, must be taken most strongly against him.

Beeson v. Patterson, 86 Pa. 27; *Miner's Appeal*, 61 Pa. 283; *Klaer v. Ridgway*, 86 Pa. 534.

Many cases have been found where a building restriction has been held to be invalid by reason of the changed conditions of the neighborhood, but for the most part these cases contain conditions or restrictions which affected either the person of the owner or the time to which they were limited, or relating to the character of the use and occupation of the premises.

Columbia College v. Thacher, 87 N. Y. 811; *Keates v. Lyon*, L. R. 4 Ch. 218; *Peek v. Matthews*, L. R. 8 Eq. 517; *Sayers v. Collyer*, L. R. 24 Ch. Div. 180; *Roper v. Williams*, Turn. & R. 18; *Page v. Murray*, 46 N. J. Eq. 325; *Duncan v. Central Pass. R. Co.* 85 Ky. 525; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Dana v. Wentworth*, 111 Mass. 291.

Messrs. Julius C. Levy and John G. Johnson, for appellees, in support of petition for rehearing:

The construction of a party wall by one owner amounts to a permanent dedication of such wall to the use of both owners as a party wall.

It avails nothing to the appellants to appeal to the restriction.

By their own act they have done that which amounts to an extinguishment. When they crossed the line and built the only wall permissible, *i. e.*, a solid one, they did an act utterly inconsistent with the maintenance of the restriction.

Hoffelot v. Voight, 146 Pa. 636; *Evans v. Jayne*, 23 Pa. 36; *Childs v. Napheys*, 112 Pa. 507; *Kirby v. Fitzpatrick*, 168 Pa. 437; *Weigmann v. Jones*, 183 Pa. 380; *Western Nat. Bank's Appeal*, 102 Pa. 188.

The voluntary act of each of the appellants in permanently obstructing the easement extinguished the same.

Moore v. Rawson, 3 Barn. & C. 332; *Corning v. Gould*, 16 Wend. 539; *Taylor v. Hampton*, 4 McCord, L. 96, 17 Am. Dec. 710; Washb. Easem. new ed. *559; *Innes, Easem.* 85; *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399; *Matts v. Hawkins*, 5 Taunt. 30.

The erection by Allen of a party wall to the full depth of his lot notwithstanding the fact that there are some openings therein in the southern part entitles the appellees to the use of such party wall to any height.

The act of each of the appellants in erecting solid party walls, even though they did not extend the whole depth of the lot, extinguishes the restriction, which is invalid if not enforceable to its full extent.

The acts of the appellants in the construction

of party walls make it impossible now to perceptibly injure their properties in light and air by the erection of a building south of such walls.

Peek v. Matthews, L. R. 8 Eq. 514; *Child v. Douglas*, 5 De G. M. & G. 742.

Dean, J., delivered the opinion of the court:

In the year 1881, William Hause, being the owner of a lot of ground on the south side of Chestnut street, between Twelfth and Thirteenth streets, fronting on Chestnut 74 feet, and extending back to Sansom street 235 feet, divided it into three lots, giving the middle and western lot, each, a frontage on Chestnut street of 25 feet, and the eastern one 24 feet on the same street, all extending back at right angles to Sansom street. On each of the two outer lots he built a $3\frac{1}{2}$ story brick house, covering the entire front, these main buildings extending back 51 feet 11 inches; then, back, buildings for dining room and kitchen, only two stories high, but extending 66 feet further back. These back buildings, however, were 5 feet 6 inches narrower than the main building, leaving that width between the walls and the lines of the middle lot. He also built a house on the middle lot, the main building being the same as the other two, but with no back building, the kitchen being in the basement, the windows looking south towards Sansom street. On March 24, 1882, Hause conveyed both the eastern and western lots to Lindsay Nicholson and Rebecca H. Willing, for the consideration of \$19,000 for each lot. In the deeds was this condition: "Under the condition, nevertheless, that no building or part of a building, other than steps and railings, cellar doors, door frames, window shutters, eaves, and cornices, shall hereafter be built or erected on the said hereby-granted lot of ground within 5 feet of the south line of the said Chestnut street. And the said William Hause, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said Lindsay Nicholson, his heirs and assigns, that the house on the lot of ground adjoining to the west of the hereby-granted lot, now belonging to the said William Hause, shall be forever hereafter restricted from having any building or part of a building attached to the said messuage thereon erected of a greater height than 10 feet from the surface of the yard." The numbers of these two lots are 1,206 and 1,210. The title to 1,206, by regular conveyances, all duly recorded, and embodying the condition, in 1888 became vested in this plaintiff, and in 1888 that of 1,210 became vested in George Allen for the consideration of \$125,000. On November 10, 1882, Hause for the consideration of \$16,000, conveyed the middle lot, 1,208, to one Stewart, under whom defendants claim. In that deed, after mentioning that the lot is bounded east by 1,206 and west by 1,210, is inserted the following condition: "Under the condition, nevertheless, that no building, other than steps and railings, cellar doors and door frames, window shutters, eaves, and cornices, shall hereafter be built or erected on the said hereby-granted lot of ground within 5 feet of the south line of the said Chestnut street; and

subject to the condition that the house on the lot of ground hereby granted is, and shall be forever, restricted from having any building or part of a building attached to the said message now erected thereon of greater height than 10 feet from the surface of the yard." In the warranty clause it is declared it is "under the condition and subject as aforesaid." There seems to be no doubt that in the intervening sixty-three years between 1832, the date of the first conveyance, and 1895, when defendants took their title, the owners and occupants of the middle lot had, in some particulars, failed to keep within the strict terms of their conveyance. Structures had been put upon the Sansom street end of the lot higher than the limit prescribed in the deed, and some of the buildings on the lot in rear of the main building were of a height slightly in excess of the allowable 10 feet from the surface; but no hostility to right of plaintiffs was intended, and there was no substantial interference with the light and air enjoyable by 1,206 and 1,210 from a practically unobstructed middle lot free from high buildings. The defendants, the last purchasers of the middle lot, are about to take down the old house erected in 1832, with the view of putting upon it a building 100 feet high, extending from Chestnut to Sansom, formerly George, street. The plaintiffs file this bill to restrain them, alleging that such a structure will be a palpable violation of their right under the covenants in the prior deeds of their common grantor. The defendants admitted the facts as we have stated them, but denied that the building they intended to put up was an illegal violation of the restriction. Further, they averred the character of the locality had wholly changed since 1832, when the restriction was first imposed. At that time that part of Chestnut street was taken up by residences; now it is devoted to business. The court below refused to enjoin defendants, and plaintiffs appeal.

We are of opinion the issue turns wholly on the interpretation of the covenant in the deed of March 24, 1832, from Hause to Nicholson, for lot 1,206. The grantor covenants for himself, his heirs, and assigns, with the grantee, his heirs, and assigns, "that the house on the lot of ground adjoining to the west of the hereby-granted lot, now belonging to the said William Hause, shall be forever hereafter restricted from having any building or part of a building attached to the said message thereon erected of a greater height than 10 feet from the surface of the yard." Then the subsequent conveyance of the middle lot imposes on that grantee and his assigns subservience to the restriction in favor of the grantees of the east and west lots. Does the covenant run with the land? If so, the power of the owner of the land out of which he carved three lots to burden the middle one with such a continuing covenant cannot be questioned. It has been decided, as will be noticed from the cases hereinafter cited, that in equity the test by which to determine whether a covenant in a deed runs with the land is the intention of the parties. To ascertain the intention, resort must be had to the words of the covenant read in the light of the surroundings of the parties and the subject of the grant. It is argued, in substance, that a cov-

enant running with the land, so manifestly prejudicial to the enjoyment of the middle lot, could not have been intended by the grantor; that the reasonable construction is, the obligation under it terminates with the removal of the house then upon the middle lot. That this covenant, if a perpetual burden, now most vexatiously restricts the owner of 1,208 in the enjoyment of the property, and very greatly depreciates its value, may be conceded; and, if such result had appeared imminent at the date of the conveyance, this argument would, perhaps, not have been without weight. It will be noticed that, notwithstanding the restriction, the consideration for the middle lot in 1832 was \$16,000, and for each of the others \$19,000. The owner seems to have received, in enhanced value of the two outside lots, by reason of the additional back buildings and the benefits accruing to them from the restriction in their favor on the middle one, \$6,000. He, doubtless, at that day assumed this sum represented the value of the relative advantages and disadvantages to the lots created by the restriction. But he did not foresee the comparatively near future any more than we see ours. In our bargains, to the extent we judge probable, we provide for and guard against proximate future contingencies. As to the very remote or what appears to us the very remote, we are indifferent. The serious effect of the restriction now, after the comparatively short period of sixty years, as affecting the enjoyment of the middle lot, even if his intention had been to hold it for himself and heirs, was not thought probable by him or any other lot owner of that period. The present values of real estate in the present Philadelphia may have been thought possible in a couple of centuries, but not sooner. They knew the growth of the city in the preceding century and a half of its existence, and that it had then reached a population of less than 200,000, but they had no reason to believe that in the next half century the population would reach more than a million, and that new methods of communication and travel would then have placed other millions practically as close to them as was Lancaster county then. They bargained on a knowledge of their future no more limited than ours as to our future, only much more limited than ours of theirs, because we are looking backward. Not one of us would hesitate to place a perpetual burden on land we expected to hold in favor of land we wanted to sell, if thereby a present decided pecuniary benefit resulted, and no serious depreciation was probable in that held for a century or two. To us, with no laws of entail, and no particular passion for perpetuating family landed estates in city lots, that period suggests to the mind a practical "forever," and so it probably appeared to Hause when he burdened what he kept to enhance the price of what he sold. It was not an absurdly bad bargain, tending to negative the intention of a continuing covenant, but was merely such an ignorance of a phenomenal future as exists where men of good business capacity sell land one year which enhances in value, in some instances, the next year, one or two hundred per cent. Of course, they would not have sold if they had known, or had reason to believe, such appreciation probable, and

Hause would not have placed the restriction on the middle lot if he had thought it probable that without it the lot would appreciate in value an average of 20 per cent annually, besides yielding the interest on his original investment. Considering the surroundings, we see nothing in the historical fact of the growth in value and change of use of unencumbered lots to negative the intention of the grantor as indicated by his words. And this intention is only the more clear when we consider the subject of the contract. He had built the three houses with a view to such a restriction. By the character of the structures he intended the middle lot should be servient to the other two. For the depth of the main buildings they should be equal, but from these back the east and west lots should be dominant. The middle shall have no building higher than 10 feet erected upon it. For this one he provides a basement kitchen, so that the lot is unobstructed from all three main buildings to the rear. What was the purpose in having the lot thus unobstructed? Manifestly that, as thus arranged by him, all three should enjoy light and air. He then conveys the two outer lots with an expressed intention conforming to the structures. These last measured the extent to which the dominant lots should "forever" enjoy light and air; at the same time did not exclude the occupant of the main building on the middle one from a like benefit. The latter's right to the enjoyment of the surface of his lot for building purposes is alone restricted. The parties were not dealing about houses as houses, but concerning the future enjoyment of land, with light and air, as affected by the plans and size of houses or buildings which were then or might be thereafter erected upon it. The word used, "forever," is not one appropriate to the limited existence of a house or other building, but to the durability of land. The expression, if intended only to restrict while the then house stood, is scarcely less awkward than if, intending to restrict only during the life of the first grantee, the grantor had said, "And during the life of the said Lindsay Nicholson the said Hause and his assigns shall be forever hereafter restricted." A word is used emphatically expressive of a continuance beyond the duration of a life or the existence of an artificial structure, which, if simply omitted, would have indicated the intent claimed by appellees.

The purpose to afford air and light to the dominant lots could only be accomplished by an unlimited—as to time—restriction, and there is nothing to indicate that a change in the nature of the occupancy should affect the expressed right under the covenant. It is probable that deprivation of air is less endurable to the occupants of a dwelling than to those of a store or factory, and generally the latter are less disposed to resist such deprivation; but these elements promote the health and comfort of one class of occupants as fully as the other, and both have the same right to insist on a restriction for their protection. No such change in the use of the land as appears here has ever been held destructive of the original covenant in any of the adjudicated cases in this state; nor, in our opinion, can such judgment be sustained on sound legal principles. Taking the

surroundings of the parties at the date of the conveyance, the subject of the contract, the purpose of it, and the words of it, we are of the opinion it was intended to place a restriction upon the middle lot, running with the land, for the benefit of the eastern lot which should forever prevent the obstruction of light and air by buildings higher than 10 feet to the rear of the main building. As long as such restrictions are not unlawful, it is to no purpose to argue that they seriously retard the improvement of the city. We can no more strike down by decree a lawful restriction creating an easement than we can compel the lot owner to erect buildings in accord with the best style of architecture. Contracts such as this, whether construed as covenants or conditions, since *Spencer's Case*, 1 Smith, Lead. Cas. 9th Am. ed. 174, have been enforced both at law and in equity between the immediate parties to them and their grantees, near and remote. And whether they be personal to the grantor or be limited to a period less than "forever" depends on the intention of the parties, as expressed in the written instrument. *Clark v. Martin*, 49 Pa. 297; *Muzzarelli v. Hulshizer*, 183 Pa. 646; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa. 284, 29 L. R. A. 423. We concede some of the cases decided in other states are in apparent conflict with our decision. But what this court has uniformly held, and now holds, is that where the restriction, notwithstanding the change of use of the land and buildings, still is of substantial value to the dominant lot, equity will restrain its violation, if relief, as here, is promptly sought. There may be, and doubtless will occur, cases where the restriction has ceased to be of any advantage. In such cases equity would not interpose and retard improvements simply to sustain the literal observance of a condition or covenant. And three of the cases relied on by appellees are of this very character, and therefore clearly distinguishable from the one before us. In *Columbia College v. Thacher*, 87 N. Y. 811, the agreement was between owners of dwelling houses that one of them would not erect, carry on, or establish any stable, schoolhouse, engine house, community house, or any kind of manufactory, trade, or business whatsoever on the land. His grantees opened up and carried on many kinds of business in violation of the original covenant. The purpose of the covenant was, manifestly, to secure privacy and freedom from noise in the dwelling houses. But by the construction of an elevated railroad its desirability for dwellings had been practically destroyed; privacy and quiet could no longer be enjoyed. The court refused to enjoin the use of the land for business and manufacturing purposes, because, by the change consequent upon the construction and operation of the railroad, the purpose of the restriction had been defeated. Equity would not lend its aid to the enforcement of a mere legal right, where no damage resulted to plaintiff from nonenforcement. In *Page v. Murray*, 46 N. J. Eq. 325, the restriction was to protect the land from cheap tenement buildings, and encourage its occupation by a superior class of residents. To this end it provided that for a period of twenty years no building should be erected costing less than \$3,000, and no hotel, tavern,

lager-beer saloon, livery stable, etc., should be erected thereon. In the meantime buildings of a low class had been erected in all the surrounding neighborhood. The purpose to make the land desirable for another class of occupants was thereby defeated, and this, together with the fact that the twenty-years term had nearly expired, induced the court to refuse an injunction to restrain violation of the condition. The court would not enjoin that which could not damage the plaintiff. In *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744, there was a condition in the grant, that the land bordering on the ocean should be used for no other purpose than access to the water for bathing and boating, and low bath houses. It was held, from the facts in that case, that the intention of the grantor was to create a restriction in favor of adjoining land which he continued to hold; that, as this land had passed to other grantees in separate lots, they could not insist on a restriction personal to the original grantor; and the court says: "Where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed," equitable relief will be afforded. Not one of these cases is in conflict with our decision here; on the contrary, they support it. While cases are cited which support the contention of appellees, the weight of authority is the other way, and we see nothing to induce us to depart from the settled rulings on this question as announced in our own cases already cited.

The decree of the court below refusing an injunction is reversed, and injunction is awarded as prayed for in plaintiffs' bill. It is further ordered that appellees pay the costs.

A petition for rehearing having been filed, Dean, J., on July 15, 1896, handed down the following response:

At the first hearing in this case, both in oral argument and on the paper books, the case turned on but a single question, *viz.*, whether the restriction as to building placed by the original grantor on lot No. 1,208, in favor of lots 1,206 and 1,210, was perpetual, or whether it ended with the existence of the house then upon the middle lot. After a careful consideration, we decided the restriction was continuing, and directed that an injunction issue in conformity to the prayer of the petitioner. The effect of this was to restrain defendants from putting any building on 1,208 to the rear of the house upon it in 1882, higher than 10 feet from the surface of the lot. The defendants then petitioned the court for a modification of the decree, for the reason that, even if the judgment of the court that the restriction was a continuing one were well founded, the plaintiffs, by their own acts, had relinquished the right to assert it to the full extent set out in House's deed of 1882. The case is fully reported. *Landell v. Hamilton*, 175 Pa. 327, ante, 227. The court ordered a reargument only on the

question as to whether the decree should be modified, and, if so, to what extent. This reargument was heard on the 27th of May, 1896. As will be noticed in the reported case, Landell's lot is 1,208, the eastern one; the defendant's, 1,208, the middle one; and Allen's, 1,210, the western one. It now appears on reargument, that as to Landell's lot either he or his grantors, years prior to the filing of the bill to restrain defendants, had built a solid wall 17 feet high, from the rear of the old building on 1,208, south towards Sansom street, a distance of not quite 19 feet, and then continued the same kind of wall, at the height of 12 feet, 37 feet further. The defendant calls this a party wall. There is no evidence that it is such, or was so intended by the builder, except that it extends over the line of 1,206, and rests partly on 1,208. The character of the structure, 12 feet in height for 37 feet in length, and then 17 feet high for about 19 feet, rebuts the inference that it was ever intended as a party wall in the legal significance of that term, to be used by both lot owners for building purposes. The most that can be said for it on the evidence is that it was a partition or division wall, the same as a partition fence dividing the two lots. It may have been a trespass on 1,208 to the extent it rests on that lot. If so, the owner or owners submitted to it; but by their submission they acquired no right inconsistent with the restriction imposed upon the middle lot by the covenant in the deed. The right to a party wall is statutory. It is not a right to at any time, and in any manner, use the land of another. One of two adjoining owners, for building purposes, may, subject to limitations consistent with the right of each, encroach upon his neighbor with a party wall. But, manifestly, this, was no such structure, and conferred on defendants no right to assume that it absolutely terminated the restriction in favor of the Landell lot; for, even if a party wall, at most it gave the middle lot owner the right to use it as a party wall to the height of 10 feet, the limit of the restriction. But the wall was solid to the height and length it was built. The purpose of the restriction was to afford light and air to 1,206, and the extent of the enjoyment was measured by the extent of the restriction on 1,208. That restriction was, no building or part of a building should be added to the house upon the lot to the rear, higher than 10 feet from the surface of the lot. But Landell or his grantors themselves erect a solid wall along the line of 1,206 and 1,208, 56 feet in length from the rear of the old building on the middle lot, through which neither light nor air could penetrate. By their own act, plaintiffs have said, "For 19 feet we do not ask for light and air, except at the height of 17 feet, and for 37 feet further we do not ask for either except at the height of 12 feet." Clearly, equity will not compel defendants to award plaintiffs that which, by their own distinct and unequivocal act, they have declared is valueless to them.

It is alleged now the ownership of plaintiff to 1,206 does not extend to Sansom street, but only 149 feet from Chestnut, leaving about 86 feet to which the injunction should not apply. To this it is replied the bill alleges and the answer admits, plaintiffs, Landell *et al.*, own

back to Sansom street; and there is no proof to the contrary. So far as we can discover from the pleadings and proofs, the title of Landell *et al.*, or any part of it, is nowhere disputed; therefore we can make no modification of the decree in this particular. The restriction here by the covenants in the original deeds, renders it impossible to make such modification of the original decree as will preserve the apparent right of defendant as against each of these parties. The middle lot is servient to both the eastern and western; but the owner of neither the eastern nor western can, by his independent act or deed, relinquish that subserviency so as to affect the other. Here the owner of 1,206 has declared that for 19 feet light and air from 1,208 are valueless to him below a height of 17 feet, and for 87 feet further they are valueless below 12 feet; thus, for a distance of 56 feet, waiving the strict terms of the restriction. The owner of 1,210 has also waived the restriction by building his wall 56 feet to a height of 13 feet 9 inches. We

cannot say, because the one waived the restriction for 19 feet to the height of 17 feet, therefore the other did so too; or because one waived it for 87 feet to the height of 13 feet 9 inches, therefore the other is bound, when by his own act he only waived to a height of 13 feet for that distance. As we have said, neither could, by his independent act or deed, affect the right of the other. But it seems to us the correct conclusion is that to the full extent they have equally gone in dispensing with the restriction both can in equity be made subject to our decree. Therefore we modify the original decree so that it shall not operate to restrain defendants from building to a height of 13 feet 9 inches for a distance of 19 feet from the rear of the old main building of the middle lot. Further, from the end of the 19 feet thus specified it shall not operate to restrain defendants from building to a height of 12 feet from the ground for a further distance of 87 feet. The costs of this case to be taxed as part of the original decree.

NEW YORK COURT OF APPEALS.

Re Appraisal of ESTATE OF Augustus WHITING, Deceased.

(150 N. Y. 27.)

1. Bonds of a foreign corporation, as well as bonds and certificates of stock of domestic corporations, when deposited in a safe-deposit vault within the state, although owned by a nonresident, are "property within the state," within the meaning of the transfer tax act of 1892.

2. Bonds issued by the United States were not intended to be made subject to tax by the transfer tax act of 1892, as property over which the state "has any jurisdiction for the purposes of taxation."

(Gray and Haight, JJ., dissent.)

(October 6, 1894.)

APPEAL by the executors, etc., of Augustus Whiting, deceased, from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of the Surrogate for New York County assessing for succession tax the estate of decedent. *Modified and affirmed.*

The facts are stated in the opinions.

Mr. George L. Rives, for appellants:

A debt cannot be regarded as property in a state in which neither the debtor nor the creditor resides.

People, Hoyt, v. Commissioners of Taxes, 23

N. Y. 224; *People, Westbrook, v. Trustees of Ogdensburg*, 48 N. Y. 390; *People v. Willis*, 133 N. Y. 388; *People, Jefferson, v. Smith*, 88 N. Y. 576; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; 1 *Desty, Taxn.* 64, 826; *Johnson v. Oregon City*, 8 Or. 13; *Ankeny v. Multnomah County*, 4 Or. 277; *Orcutt's Appeal*, 97 Pa. 179; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372; *Re Enston's Will*, 113 N. Y. 174, 3 L. R. A. 464; *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401; *Small's Estate*, 151 Pa. 1; *Coleman's Estate*, 159 Pa. 281; *Re Phippe's Estate*, 77 Hun, 825; *Re James*, Id. 211.

Any attempt to impose taxes on nonresidents in respect to property outside the jurisdiction is void, because the tax laws of a state have no extraterritorial operation.

Northern O. R. Co. v. Jackson, 74 U. S. 7 Wall. 262, 19 L. ed. 88; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds") 82 U. S. 15 Wall. 300, 21 L. ed. 179; *Re Enston's Will*, *supra*; *People, Darrow, v. Coleman*, 119 N. Y. 137, 7 L. R. A. 407.

Bonds of the United States are bonds of a foreign corporation.

Re Merriam's Estate, 141 N. Y. 479; *Orcutt's Appeal*, *supra*.

The state has no power to impose a legacy or succession tax in respect of bonds of the United States owned by a nonresident.

Strode v. Com. 52 Pa. 181; *Re Swift's Estate*, 137 N. Y. 77, 18 L. R. A. 709; *Re Merriam's Estate*, *supra*; *Re Hoffman's Estate*, 143 N. Y. 327; *Homs Ins. Co. v. New York*, 134 U. S. 594,

NOTE—As to the *situs* of property for purposes of taxation, see numerous cases in a note to *Com. v. Delaware Division Canal Co.* (Pa.) 2 L. R. A. 798; also *Liverpool & L. & G. Ins. Co. v. Board of Assessors* (La.) 16 L. R. A. 56.

As to the *situs* of debts evidenced by notes and 34 L. R. A.

mortgages for the purpose of taxation, see *Boyd v. Selma* (Ala.) 16 L. R. A. 729, and note; also *Holland v. Commissioners of Silver Bow County* (Mont.) 27 L. R. A. 797.

See also the following case, *Re Houdayer's Estate* (N. Y.) post, 285.

33 L. ed. 1025; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579; *Weston v. Charleston*, 37 U. S. 2 Pet. 460, 7 L. ed. 485; *Bank of Commerce v. New York*, 67 U. S. 2 Black. 620, 17 L. ed. 451; *New York, Bank of the Commonwealth v. New York City & County Tax & A. Comrs.* ("Bank Tax Case"), 69 U. S. 2 Wall. 200, 17 L. ed. 793; *New York, Bank of New York Nat. Bkg. Assn., v. Connelly* ("The Banks v. The Mayor"), 74 U. S. 7 Wall. 16, 19 L. ed. 57; *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 853, 19 L. ed. 701; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772.

Messrs. Emmet R. Olcott, Edgar J. Levey, and Jahiah Holmes, Jr., with Mr. Elliot Danforth, for respondent:

The state of New York possesses jurisdiction, for purposes of taxation, over bonds of foreign corporations actually within the state, regardless of the domicile of the owner; such bonds being in themselves "property" and being capable of having a *situs* of their own, away from the domicile of their owner.

Burroughs, Taxn. § 6, and cases cited; Cooley, Taxn. 2d ed. 21, and cases cited.

Personal property as now defined by statute makes the bond itself property, and not the mere evidence of debt.

Rev. Stat. pt. 1, chap. 18, title 1.

Bonds are now recognized as personal property, and not as mere evidences of debt or of an incorporeal right, and have a *situs* where found.

Burroughs, Taxn. § 50; People, Jefferson, v. Smith, 88 N. Y. 685; *Beers v. Shannon*, 73 N. Y. 299; *People, Westbrook, v. Trustees of Ogdensburg*, 48 N. Y. 590; *Von Hesse v. Mackaye*, 55 Hun. 368, 121 N. Y. 694; *People, Edison Electric Light Co., v. Campbell*, 138 N. Y. 547, 20 L. R. A. 453; *People, Day, v. Barker*, 185 N. Y. 656; *Re Houdayer*, 3 App. Div. 474.

The fiction *Mobilis sequuntur personam* does not give these bonds a *situs* in a foreign state.

People, Jefferson, v. Smith, 88 N. Y. 576; *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), 82 U. S. 15 Wall. 300, 21 L. ed. 179; *People, Edison Electric Light Co., v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453; *Plimpton v. Bigelow*, 93 N. Y. 593; *Re James*, 144 N. Y. 6.

In the event of a dispute as to the ownership of bonds their presence in the state gives jurisdiction to our courts.

Von Hesse v. Mackaye, 55 Hun. 367, 121 N. Y. 694.

The *situs*, for purposes of taxation, of railroad bonds and government, state, and municipal bonds, is to be determined by reference to the actual location of the instruments themselves.

Cleveland, P. & A. R. Co. v. Pennsylvania ("State Tax on Foreign-held Bonds"), *supra*; *People, Darrow, v. Coleman*, 119 N. Y. 137, 7 L. R. A. 407; *People, Edison Electric Light Co., v. Campbell*, *supra*; *People v. Barker*, 185 N. Y. 656; *Collin v. Hull*, 21 Vt. 158, Approved in *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 232; *American Coal Co. v. Allegany County Comrs.* 59 Md. 185; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 81; *People, Jefferson, v. Smith*, *supra*.

The tax being on the right of succession, and 34 L. R. A.

not on the property, it is immaterial whether the property would be taxable under the general tax laws.

Re Knoedler's Will, 140 N. Y. 390.

The value of the United States bonds was properly included in determining the amount of the tax.

Strode v. Com. 52 Pa. 181; *Wallace v. Myers*, 88 Fed. Rep. 184, 4 L. R. A. 171.

The tax is upon the privilege of succeeding to property, and not upon property *per se*, which is only used as a medium for ascertaining the value of the succession so as to fix the amount of the tax.

Re Swift's Estate, 137 N. Y. 77, 18 L. R. A. 709; *Re Merriam's Estate*, 141 N. Y. 479; *Re Hoffman's Estate*, 148 N. Y. 829; *Re Oullum's Will*, 145 N. Y. 598.

The Supreme Court of the United States has repeatedly upheld taxes imposed on the value of the franchises of corporations or upon the value of privileges granted, when it has been necessary to include the value of the United States bonds in determining the amount of the tax.

People v. Home Ins. Co. 92 N. Y. 328; *Home Ins. Co. v. New York*, 134 U. S. 598, 33 L. ed. 1029; *Society for Sav. v. Coite*, 73 U. S. 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Sav. v. Massachusetts*, 78 U. S. 6 Wall. 681, 18 L. ed. 913; *Mager v. Grima*, 49 U. S. 8 How. 490, 12 L. ed. 1168.

Vann, J., delivered the opinion of the court:

Augustus Whiting, a resident of Newport, Rhode Island, died there on the 23d of July, 1894, leaving a will by which he gave his entire estate in trust for his infant daughter. At the time of his death he had money on deposit in a bank in this state, and owned certain bonds and certificates of stock that were found in a box rented by him in a safe-deposit vault in this state. The stocks and bonds were issued partly by domestic and partly by foreign corporations, and there were also bonds of the United States to the amount of \$52,545. All except the stock of foreign corporations were included in the appraisalment, which was sustained by the surrogate and by the appellate division. The theory upon which the supreme court, by a divided vote, proceeded to judgment, was that the written instruments were physically within the state, and constituted property here subject to taxation. They were regarded as tangible, and apparently as in the nature of chattels. I think this is a sound conclusion, warranted by the *Romaine Case*, which was decided before the act "to tax gifts, legacies, and collateral inheritances" was expanded into the present statute "in relation to the taxable transfers of property." *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401; *Laws 1887, chap. 713; Laws 1892, chap. 399*. I think, moreover, that the written instruments issued by domestic corporations, including their bonds and the interests represented by them, are subject to a succession tax, independent of the fact of their physical presence in this state, as I have already attempted to show in an opinion filed in the *Bronson Case* (argued and de-

cided at the same time as the case in hand), 150 N. Y. 1, *post*, p. 238. This involves the conclusion that the legislature intended to tax the investment itself when practicable, otherwise the evidence of the investment, in the form of a certificate, when that is habitually kept in this state. The law clearly distinguishes "written instruments themselves" from "the rights or interests to which they relate" (Laws 1892, chap. 677, §§ 1, 4, 32), and makes either taxable. The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans, and are used in various ways as property. They pass by delivery from hand to hand, are the subject of larceny, and are taxable generally when in possession of an agent in this state. They are the only evidence of transfer required by the corporations issuing them in order to make the actual transfer on the books. There is obvious propriety in subjecting the instrument of transfer to a transfer tax when it is left in this state for safe-keeping. It is subject to the jurisdiction of our laws, and hence is within the intent of the transfer tax act. When the design of the legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing in one form, if another is not available. Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or transferred. Thus, the legislature intended, as I think, to repeal the maxim *Mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this state. I think this intention plainly appears from the history of legislation upon the subject, the decisions of the courts, some of them in effect repealed, and from the sweeping language of the statute, which subjects everything that can be owned in this state to a succession tax, except so far as expressly exempted. The legislature possessed and exercised the power to employ the maxim when necessary, and to disregard it when necessary, to attain that object. That dominant purpose is the key to the construction of the act, and it should not be thwarted by the conservatism of the courts, even if, in order to embrace all kinds of property, it is necessary to make it so pliable in application as to conform to all methods of doing business, and all ways of holding property.

A majority of my associates, however, are of the opinion that the United States bonds, although physically present in this state, are not subject to a transfer tax. By their direction I announce, as the conclusion of the court, that the certificates of stock in question as well as all of the bonds, except those issued by the United States, were properly held by the courts below subject to taxation under the transfer tax act on account of their physical presence in this state; that, although the state may have the power to impose a succession tax upon United States

bonds, it has not yet done so; that the phrase, "property . . . over which this state has any jurisdiction for the purposes of taxation," refers to the jurisdiction actually exercised through contemporary statutes, rather than to the entire jurisdiction actually possessed by the state; that hence the order appealed from should be so modified as to exempt from taxation the bonds owned by the decedent that were issued by the United States, and, as thus modified, affirmed, without costs in this court to either party.

O'Brien, J., concurs.

Andrews, Ch. J., and **Bartlett and Martin, JJ.**, concur in the result.

Gray, J., dissenting:

I cannot concur in the opinion that the bonds of foreign corporations, which formed a part of the nonresident decedent's estate, were subject to appraisal for taxation purposes under the transfer tax act, because they happened to be, at the time of his decease, deposited within this state. Holding, as we do, and must, in conformity with authority and reason, that the property represented by the bonds is the debt which follows the creditor's person, I am unable to perceive how they can be dissociated from that indebtedness. Nor do I perceive any good reason for taking a view which permits of double taxation. The claim for the comptroller is that, both by the terms of the act and by force of the statutory construction law of the state (chap. 677, Laws 1892, § 4), these bonds could have a *situs* here, where found at their owner's death. The argument is that, inasmuch as personal property is defined to include written instruments by which any debt or official obligation is created or evidenced, bonds are expressly made property of a tangible nature, having a *situs* where physically present. There are, however, several considerations which militate strongly against our reading into the transfer tax act the provision of the general statutory construction act. In the first place, it was passed prior to the statutory construction act, and itself gave a definition to the word "property" as used in the act, which ought to control; especially so as it permits of a construction which is consistent with rules of law, and with a greater dignity of purpose on the part of the state in its efforts to raise revenue. In the second place, we should not assume that the legislature had any intention, through the statutory construction act, to change a settled rule of law, which regards the debt as the creditor's property, having its *situs* at his domicile. And nothing seems to compel such an assumption with respect to an act which contains within itself a complete system for the taxation of transfers of property in cases of testacy and of intestacy. Why shall we unnecessarily impute to the legislative body an intention to include for the purpose of this tax that which is only the evidence of property, when the property itself is beyond the reach of state laws? I think such a construction to be unreasonable and oppressive. We cannot afford, however desirable it may be to in-

crease the revenues of the state at the least sacrifice of its inhabitants, to put a construction upon its laws which will make them appear to be unwise, if not unconscionable. Mr. Justice Patterson, who spoke for the majority of the members of the appellate division in this case, in his able opinion, amply conceded that the bonds, as evidences of indebtedness, could have no *situs* different from the domicile of their owner, and clearly showed that to be an incontrovertible proposition, borne out by cases in the United States Supreme Court and in this court. In the *Boston Case*, 113 N. Y. 181, 8 L. R. A. 464, Andrews, J., speaking of bonds of foreign corporations which were owned by a nonresident decedent, but were in the hands of her agent within the state, said: They "were not, in a legal sense, property within this state, and they were not, under the general laws or the policy of the state, taxable here. On the contrary, they were, by the general policy of the state, exempted from taxation here." It is unnecessary to review the authorities upon the evident proposition that these bonds could have no *situs* different from the domicile of their owner. In the *Bronson Case* I had occasion to express views which I shall not repeat here. It seems to me that the policy of the law is satisfied when it has reached, for taxation purposes, those many and varied objects of possession which have a tangible and visible existence, and in the words of Judge Comstock in the *Hoyt Case*, 28 N. Y., at page 240, are "capable of a *situs* away from the owner or his domicile." That the bonds and obligations of a foreign corporation held by a nonresident, but happening to be in this state, might be included by the legislature for taxation purposes,—that it may ignore their legal existence elsewhere,—I need not now deny; but, without some clear warrant in the terms of the law, is any wise policy subserved by construing language, certainly admitting of a doubt, in such wise as to justify state officers in assessing the paper evidence of the indebtedness in order to exact the tribute of a tax? If depositories and depositories in this state are availed of by a nonresident for the temporary custody of his bonds, can it be said that he has placed his property in the debt within the dominion of the state? Clearly not. The bond is not property, as distinguished from the debt it evidences. It may be destroyed, and the creditor loses no right to recover the debt.

The state has no jurisdiction over a right of succession which accrues under the laws of the foreign state. That is something in which this state has no interest, and with which it is not concerned. The legal title to these bonds vested in the personal representatives of the decedent by force of foreign laws, and we have held that an executor's title will be recognized by the laws of this state without any grant of letters by its courts. *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 128 N. Y. 45. As before suggested, when the state undertakes to reach those objects of property of the nonresident decedent which have a tangible and visible existence within this state, and imposes a

tax upon the right to succeed to their ownership, its right to do so is not without support in reason and authority. For it to undertake to collect from the estate of a nonresident decedent a tax based upon and measured by such possessions as the bonds of foreign corporations, which happen, at the time of his death, to be within this state, may be justified upon the principle that might is right, but not, in my opinion, by sound public policy. There is a reasonable basis for taxing the transfer by will, or under the intestate laws, of the personal estate of the resident decedent, whether within or without the state. Being subject to its jurisdiction, and having had the privileges and protection of its laws in the accumulation and enjoyment of his property, the exertion of the legislative authority, in imposing a tax on the right to the succession of whatever composed the personal estate and constituted the wealth of the resident within its borders, rests upon some appreciable legal principle. If the claim of the comptroller is upheld, I cannot but regard it, to use Mr. Justice Field's language in the *Foreign Bonds Case*, 82 U. S. 15 Wall. 300, 21 L. ed. 179, as "in fact a forced contribution levied upon property held in other states, where it is subjected, or may be subjected, to taxation upon an estimate of its full value." Is it at all necessary, for the purposes of justice, that the legal *situs* of such property as is now in question should be deemed other than at its owner's domicile? If so, I am unable to perceive it, and I do not think that the court should commit the state to any policy that is not justifiable in the law, and based upon the highest principles of government. I think that the order appealed from should be reversed.

Haight, J., concurs.

Re Appraisal of ESTATE OF John F. HOU-
DAYER, Deceased.

(150 N. Y. 37.)

Money of a nonresident, deposited by him in a bank within the state, although commingled with trust funds in an account opened by him as trustee, constitutes "property within the state," within the meaning of the New York transfer tax act of 1893, which includes property of a nonresident decedent if within the state.

(Gray and Haight, JJ., dissent.)

(October 6, 1896.)

A PPEAL by the comptroller of the city of New York from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of the surrogate for New York County appraising the estate of John F. Houdayer for a transfer tax. *Reversed.*

NOTE.—As to the place for taxation of trust property, see *Richmond County Academy v. Augusta* (Ga.) 20 L. R. A. 151, and note.

See also, in connection with this case, that of *Re Whiting's Estate*, ante, 232.

The facts are stated in the opinions.

Mr. Emmet R. Olcott, for appellant:

The property subject to the tax includes all property or interest therein "over which this state has any jurisdiction for the purposes of taxation."

The legislative power of every state extends to all property within its borders.

Green v. Van Buskirk, 72 U. S. 5 Wall. 307, 18 L. ed. 699; *Hervey v. Rhode Island Locomotive Works*, 98 U. S. 671, 23 L. ed. 1008; *Harkness v. Russell*, 118 U. S. 679, 30 L. ed. 291; *Walworth v. Harris*, 129 U. S. 855, 32 L. ed. 712.

Unless restrained by the provisions of the Federal Constitution the power of the state as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction.

Re McPherson, 104 N. Y. 316, 58 Am. Rep. 502; *People v. Equitable Trust Co.* 96 N. Y. 387; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gordon v. Cornes*, 47 N. Y. 608; *People, Crowell v. Lawrence*, 41 N. Y. 187; *Howell v. Buffalo*, 4 Trans. App. 505; *Brewster v. Syracuse*, 19 N. Y. 116; *Guilford v. Chango County Supers.* 18 N. Y. 143; *People, Griffin v. Brooklyn*, 4 N. Y. 419; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514, 7 L. ed. 939.

The state has power to tax personal property, even when separated from its owner.

Story, Conf. L. §§ 297-311, 550; *Green v. Van Buskirk*, *supra*, and 74 U. S. 7 Wall. 139, 19 L. ed. 109; *Hervey v. Rhode Island Locomotive Works*, 98 U. S. 664, 23 L. ed. 1008; *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285; *Walworth v. Harris*, *supra*; *Whart. Conf. L. §§ 297-311*; *Lewis v. Woodfolk*, 2 Baxt. 25; *Doe, Biruhtistle, v. Vardill*, 5 Barn. & C. 438; *Atvany v. Powell*, 2 Jones, Eq. 57; *American Coal Co. v. Allegany County Comrs.* 59 Md. 185; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 31.

For the purposes of taxation personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen of the state which imposes the tax.

Lane County v. Oregon, 74 U. S. 7 Wall. 71, 19 L. ed. 101; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), 82 U. S. 15 Wall. 300, 21 L. ed. 179; *Union P. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 21 L. ed. 787; *Tappan v. Merchants' Nat. Bank*, 86 U. S. 19 Wall. 490, 22 L. ed. 189; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94; *People, Jefferson v. Smith*, 88 N. Y. 580; *People, Westbrook, v. Trustees of Ogdensburg*, 48 N. Y. 390; *Williams v. Wayne County Supers.* 78 N. Y. 561; *Re Hoardman v. Tompkin's County Supers.* 85 N. Y. 359; *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401.

The money on deposit in the trust company was property subject to taxation under the act, whether treated as "money" or a "thing in action"—a claim by the representatives of decedent against and an obligation of the trust company.

People, Westbrook, v. Trustees of Ogdensburg, 84 L. R. A.

48 N. Y. 397; *Morejon's Estate*, Sur. Dec. 1891, 307; *Bowden's Estate*, Sur. Dec. 1891, 115; *Simons's Estate*, N. Y. L. J. Jan. 20, 1896.

With the presence of the property from its arrival within the state all the laws of the state relating to the transfer of the property of the owner, living or dead, attached themselves to the property.

Re Swift's Estate, 137 N. Y. 77, 18 L. R. A. 709.

Such moneys were not transiently here as upon the person or in the baggage of a man suddenly dying within this state.

Re Enston's Will, 118 N. Y. 182, 3 L. R. A. 464; *Re Romaine's Estate*, 127 N. Y. 88, 12 L. R. A. 400; *Re Phipps's Estate*, 77 Hun, 325.

Mr. J. Culbert Palmer, for respondent:

The law in question imposes a special tax and must be strictly construed against the state.

Re Enston's Will, 118 N. Y. 178, 3 L. R. A. 464.

The courts will incline against a construction involving double taxation, which would result should the order herein appealed from be sustained, as the estate is clearly taxable in the state of New Jersey, the place of the decedent's domicile.

Re James, 144 N. Y. 6.

The decedent having mingled his own funds with those of the trust estate, his representatives, on his decease, succeeded merely to a right to an action for an accounting; which having been held, or other settlement made, the administrators would still hold merely a chose in action in the nature of a claim against the trust company, because the relation of a bank to its depositor is that of debtor and creditor.

Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464; *First Nat. Bank v. Clark*, 134 N. Y. 369, 17 L. R. A. 580.

The situs of a debt is the domicile of the creditor, and not the debtor.

Re Phipps's Estate, 77 Hun, 325, 143 N. Y. 641; *Guillander v. Howell*, 35 N. Y. 662; *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 224; *People, Westbrook, v. Trustees of Ogdensburg*, 48 N. Y. 397; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 553; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), 82 U. S. 15 Wall. 300, 21 L. ed. 179.

The property in or claim to the deposit as distinguished from the deposit itself was consequently never located within this state, but was actually in the state of New Jersey. Therefore being the property of a nonresident decedent and situated out of this state it does not fall within the purview of this act.

Re James, 77 Hun, 211, 144 N. Y. 6.

A debt held by a nonresident decedent against a resident of this state is not taxable under this act.

Re Phipps's Estate, 77 Hun, 325, 143 N. Y. 641; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), *supra*; *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 228.

Assuming that this claim against the trust company can be regarded as in the nature of property, it is still not taxable because property transiently within the state is not taxable.

Re Phipps's Estate, 143 N. Y. 641; *Re Romaine's*

Estate, 137 N. Y. 83, 12 L. R. A. 401; *Re Enston's Will*, 113 N. Y. 174, 3 L. R. A. 464; *Gustlander v. Howell*, 35 N. Y. 67; *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 224; *Re Tulane*, 51 Hun. 213; *Herron v. Keeran*, 59 Ind. 473, 26 Am. Rep. 87.

Vann, J., delivered the opinion of the court:

On the 21st of May, 1895, John F. Houdayer died intestate at Trenton, New Jersey, where he had resided for a number of years. In 1876 he opened an account with the Farmers' Loan & Trust Company, of the city of New York, as trustee under the will of Edward Husson, deceased, in which he made deposits, from time to time, of moneys belonging to the trust estate, as well as moneys belonging to himself. This continued as an open running account until his death, when the balance on hand was the sum of \$78,715, of which \$2,000 belonged to him as trustee, and the remainder to himself as an individual. The appraiser deducted \$3,500 for the payment of debts and expenses, and included \$68,215 in the appraisal, which was affirmed by the surrogate, but reversed by the supreme court. The theory upon which that learned court decided the case appears in the following extract from its opinion: "It is well settled that the legal relation which existed between the decedent, as such trustee, and the Farmers' Loan & Trust Company, was that of debtor and creditor. The deposits became the property of the trust company, and thereupon the company became indebted to the depositor for the amount so deposited. Here, however, even this relation existed only between the decedent in his representative capacity, as trustee under the will of Edward Husson, and the company. Individually he occupied no contract relation towards the company. His individual deposits simply went to swell the trust account. Ordinarily it would have required an accounting in equity to separate the individual from the trust deposits, and to appropriate the general bank balance in accordance with just principles. Here this separation was amicably arranged between the decedent's estate and the trust estate, but this was merely a friendly substitute for an accounting. Precisely what the decedent had individually within this state was the right to an accounting in equity with regard to a debt due from the company to himself as Husson's trustee. We do not think that the debt was property within this state, within the meaning of the taxable transfer act. Much less was the right to an accounting with respect to such debt." In my judgment, this is sound reasoning upon an unsound basis, because it places form before substance. It enables a large sum of money, invested and left in this state, and enjoying the protection of its laws, to escape taxation because the decedent had voluntarily commingled his own funds with those of an estate he represented, and for the further reason that his rights as against the trust company were intangible. But what were his rights, or those of his successors, as against the state of New York, in view of the command of its legislature that all property, or

interest in property, within the state, susceptible of ownership, should be subject to a transfer tax upon the death of its owner, whether he was a resident or nonresident? What was the real thing—the essence of the transaction—that gives rise to this controversy? The decedent brought his money into this state, deposited it in a bank here, and left it there until it should suit his convenience to come back and get it. While the commingling of funds may complicate administration, it does not change the facts as thus stated. If he had deposited in specie, to be returned in specie, there can be no doubt that the money would be property in this state subject to taxation. But, instead, he did as business men generally do,—deposited his money in the usual way, knowing that, not the same, but the equivalent, would be returned to him upon demand. While the relation of debtor and creditor technically existed, practically he had his money in the bank, and could come and get it when he wanted it. It was an investment in this state, subject to attachment by creditors. If not voluntarily repaid, he could compel payment through the courts of this state. The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this state. Its repayment would be a corporate act in this state. Every right springing from the deposit was created by the laws of this state. Every act out of which those rights arose was done in this state. In order to enforce those rights, it was necessary for him to come into this state. Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this state, for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act. *Re Romaine's Estate*, 127 N. Y. 80, 89, 13 L. R. A. 401.

While distribution of the fund belongs to the state where the decedent was domiciled, as such distribution cannot be made until his administrator has come into this state to get the fund, possibly, after resorting to the courts for aid in reducing it to possession, the fund has a *situs* here, because it is subject to our laws. A reasonable test in all cases, as it seems to me, is this: Where the right, whatever it may be, has a money value, and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owning the right, without coming into this state, it is property within this state for the purposes of a succession tax. Thus, the right in question is property, because it is capable of being owned and transferred. It is within this state, because the owner must come here to get it. It is subject to taxation, because it is under the control of our laws. It has a money value, because it is virtually money, or can be converted into money upon demand. It is subject to a transfer tax, because the passing, by gift or inheritance, of "all property, or interest therein, whether within or without this state, over which this state has any jurisdiction for the purposes of taxation," comes within the expressed intention of the legislature. I regard further discussion as unnecessary, as I

have fully expressed my views as to the scope of the statute in the *Bronson Case* (decided herewith), 150 N. Y. 1, *post*, 238.

While a majority of my associates concur in the result reached by me, they do not all concur in the reasons given therefor. They are of the opinion that a deposit of money in a bank, although technically a debt, is still money, for all practical purposes, and as such is taxable under the transfer tax act.

The order of the Supreme Court should therefore be reversed, and the order of the surrogate affirmed, with costs.

O'Brien, J., concurs. Andrews, Ch. J., and Bartlett and Martin, JJ., concur in result.

Gray, J., dissenting:

When the deceased made deposits with the trust company, they became the property of the depository, and the relation which sprang up between them was that of debtor and creditor. The right of the decedent as a depositor was a mere chose in action. More than that, as the account in the trust company was with the decedent as trustee of Husson's will, there was, of course, no clear liability, to him individually. The sum owing to him could only be established as the result of an accounting, or by amicable arrangement in lieu thereof. Thus, all that the decedent owned in this state at the time of his decease, to put it in its strongest expression, was the right to an equitable accounting with respect to the debt due to him as Husson's trustee. To say that that constituted "property," within the meaning of the act, would be to carry the doctrine of the inheritance tax laws too far for support in law or in reason. I think the order appealed from should be affirmed, with costs.

Haight, J., concurs.

Re Appraisal of ESTATE OF Henry BRONSON, Deceased.

(150 N. Y. 1.)

1. Bonds of a domestic corporation, which are in another state in possession of a nonresident owner, are not "property within the state," within the meaning of the transfer tax act of 1892, imposing a tax on the transfer from a nonresident decedent of property within the state.

2. Shares of capital stock of a domestic corporation, although the certificates are in another state in possession of a nonresident owner, constitute "property within the state," within the meaning of the transfer tax act of 1892, taxing a transfer of property within the state from a nonresident decedent.

(Vann and O'Brien, JJ., dissent.)

(October 6, 1896.)

APPEAL by the comptroller of New York from an order of the Appellate Division of

NOTE.—See also *Re* Whiting's Estate, *ante*, 232; *Re* Houdayer's Estate, *ante*, 235.
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the Supreme Court, First Department, reversing an order of the surrogate of New York County appraising the estate of Henry Bronson, deceased, for a transfer tax. *Reversed*.

The facts are stated in the opinions.

Mr. Emmet R. Olcott, for appellant:

The property subject to the tax includes all property or interest therein "over which this state has any jurisdiction for the purposes of taxation."

Every state has the right to regulate the transfer of property within its limits, and whoever sends property into it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides.

Green v. Van Buskirk, 73 U. S. 5 Wall. 307, 18 L. ed. 599; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 671, 23 L. ed. 1003; *Harkness v. Russell*, 118 U. S. 679, 30 L. ed. 291; *Walworth v. Harris*, 129 U. S. 355, 32 L. ed. 712.

Unless restrained by the provisions of the Federal Constitution the power of the state as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction.

Re McPherson, 104 N. Y. 316, 58 Am. Rep. 502; *People v. Equitable Trust Co.*, 96 N. Y. 387; *Stuart v. Palmer*, 74 N. Y. 163, 30 Am. Rep. 289; *Gordon v. Cornes*, 47 N. Y. 608; *People, Crowell, v. Lawrence*, 41 N. Y. 137; *Houell v. Buffalo*, 4 Trans. App. 505; *Brewster v. Syracuse*, 19 N. Y. 116; *Grafford v. Chenango County Supers.*, 13 N. Y. 143; *People, Griffin, v. Brooklyn*, 4 N. Y. 419; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514, 7 L. ed. 939.

The right to inherit or succeed to property is not an inherent, natural, or an absolute right; neither is the right to dispose of property after one's death by bequest or devise. These rights are clearly the creatures of the civil or municipal laws, and accordingly are in all respects regulated by them.

2 Bl. Com. chap. 1, 10-13; *Strode v. Com.*, 52 Pa. 183.

By the civil law strangers cannot make a testament or other disposition of their property in view of death.

2 Domat, Civil Law, 279, 280.

The right to take property is the creature of the law.

Eyre v. Jacob, 14 Gratt. 422, 73 Am. Dec. 367; *Stroud v. Com. supra*; *Wallace v. Myers*, 88 Fed. Rep. 185, 4 L. R. A. 171; *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 577, 39 L. ed. 817; *Scholey v. Rew*, 90 U. S. 23 Wall. 331, 23 L. ed. 99; *Mager v. Grima*, 49 U. S. 8 How. 490, 12 L. ed. 1168; *Re Elwes*, 8 Hurlst. & N. 719.

This tax is upon the succession to property. *Re Swift's Estate*, 137 N. Y. 77, 18 L. R. A. 709; *Re Merriam's Estate*, 141 N. Y. 479; *Re Hoffman's Estate*, 143 N. Y. 829; *Re Cultum's Will*, 145 N. Y. 693; *Re Hamilton's Estate*, 148 N. Y. 310.

The old rule expressed in the maxim *Mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages when movable property consisted chiefly of

gold and jewels which could be easily carried by the owner from place to place or secreted in spots known only to himself. In modern times since the great increase in amount and variety of personal property not immediately connected with the person of the owner, the rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used.

Green v. Van Buskirk, 72 U. S. 5 Wall. 307, 18 L. ed. 599, 74 U. S. 7 Wall. 139, 19 L. ed. 109; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285; *Walworth v. Harris*, 129 U. S. 855, 33 L. ed. 712; *Story*, Conf. L. § 550; *Whart. Conf. L.* §§ 297-311.

For the purposes of taxation personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen of the state which imposes the tax.

Lane County v. Oregon, 74 U. S. 7 Wall. 71, 19 L. ed. 101; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), 82 U. S. 15 Wall. 300, 21 L. ed. 179; *Union P. R. Co. v. Peniston*, 85 U. S. 18 Wall. 529, 21 L. ed. 787, 791; *Tappan v. Merchants' Nat. Bank*, 86 U. S. 19 Wall. 490, 22 L. ed. 189; *State Railroad Tax Cases*, 93 U. S. 575, 23 L. ed. 663; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, 32 L. ed. 94; *People, Jefferson, v. Smith*, 88 N. Y. 580; *People, Westbrook, v. Trustees of Ogdensburg*, 48 N. Y. 890; *Williams v. Wayne County Supers.* 78 N. Y. 561; *Re Boardman v. Tompkins County Supers.* 86 N. Y. 859; *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401; *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 226.

The court may give the shares of stock held by individual stockholders a special or particular *situs* for the purposes of taxation, and may provide special modes for the collection of the tax levied thereon; and it is often convenient, as well as perfectly just, to take that course.

Cooley, Taxn. 2d ed. 23; *American Coal Co. v. Allegany County Comrs.* 59 Md. 185; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 31.

The fiction upon which the rule is based exempting property of a nonresident decedent actually within the taxing state did not originally relate to questions of taxation but was based merely upon questions of comity between states or nations. It never had any application to creditors of the deceased in the state where the property actually was situated, and should not exist against a state tax which the citizen is compelled to pay.

Thomson v. Advocate General, 12 Clark & F. 28; *Bruce v. Bruce*, 2 Bos. & P. 229, note; *Catlin v. Hull*, 21 Vt. 158; *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 232; *Whart. Private International Law*, 11-13, 297; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 150, 19 L. ed. 113; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Lewis v. Woodfolk*, 2 Baxt. 25; *Doe, Birtwhistle, v. Vardill*, 5 Barn. & C. 438; *Albany v. Powell*, 2 Jones, Eq. 51; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 273; *Pullman's Palace Car Co.* 34 L. R. A.

v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595.

Wherever convenience appears to demand that personality be situated there it is deemed to be situated.

Story, Conf. L. § 880.

The bonds and stocks of the domestic railroad corporations standing in the name of the decedent and owned by him at the time of his death were "property within the state."

Such corporations are the creatures of statute. They can have no legal existence out of the boundaries of the sovereignty by which they are created; they must have their domicile and residence in the place of their creation. *Ang. & A. Corp.* 11th ed. § 104, and cases cited; *Plimpton v. Bigelow*, 93 N. Y. 598.

And their existence, powers, capacities, and mode of exercising them must depend upon the law of their creation and upon their objects.

Ang. & A. Corp. 11th ed. § 111, and cases cited.

Hence the holdings of owners of stock in such corporations, its transfer of ownership, the imposition of any tax thereon, the lien and payment of such tax, are all under the regulation of the legislature; for the corporations are its own creations, "whose rights and obligations it may limit, define, and control."

Re Prime's Estate, 136 N. Y. 860, 18 L. R. A. 718.

The physical presence of the paper writings representing registered bonds or certificates of stock was not necessary for the purposes of taxation.

Plimpton v. Bigelow, *supra*; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 492; *Burr v. Wilcox*, 23 N. Y. 556; *Re Enston's Will*, 118 N. Y. 181, 8 L. R. A. 464; *Cook, Stock & Stockholders*, 8d ed. § 15.

The legislature has attached as a condition precedent for the privilege of succession to property within the state, of nonresidents, that the tax known as the transfer tax shall be paid—not on the property itself, but on the privilege; and the person in whom the estate of the nonresident decedent vests, who comes to this state to secure possession of his property, comes here possessed only of the legal title to the property, less the tax; for *eo instante* at the moment of the death of the decedent the state of New York "appropriates for its own use a portion of the property and only allows the balance to pass;" and the right of succession is not conferred by the laws of the state where the decedent resided and died except as to such balance.

Re Swift's Estate, 187 N. Y. 77, 18 L. R. A. 709; *Re Merriam's Estate*, 141 N. Y. 479; *Re Hoffman's Estate*, 143 N. Y. 329; *Re Cultum's Will*, 145 N. Y. 593; *Re Hamilton's Estate*, 145 N. Y. 810; *Mager v. Grima*, 49 U. S. 8 How. 491, 12 L. ed. 1169; *Frederickson v. Louisiana*, 64 U. S. 23 How. 447, 16 L. ed. 578; *Wallace v. Myers*, 38 Fed. Rep. 185, 4 L. R. A. 171; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 578, 39 L. ed. 818; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 272.

Mr. Howard Mansfield, for respondents:

The facts must make an undoubted case of application of the act to the bonds and stocks

in question before the tax can be imposed as to either.

Re Enston's Will, 118 N. Y. 174, 8 L. R. A. 464; *Re Swift's Estate*, 187 N. Y. 77, 18 L. R. A. 709; *Re James*, 144 N. Y. 6.

There should be no question that the bonds are exempt from the tax.

The purpose of the act is plainly limited by the language employed to the property of a nonresident within the state at the time of his death, and ought not by any refinements of reasoning to be extended in scope.

Re James, supra.

Bonds of railroad corporations are property; but being debts are property in the hands of the holders only, and not property of the company.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; *Cleveland, P. & A. R. Co. v. Peniston* ("State Tax on Foreign held Bonds"), 82 U. S. 15 Wall. 800, 21 L. ed. 179; *Re Swift's Estate*, 187 N. Y. 85, 18 L. R. A. 709; *Re James*, 144 N. Y. 12; *People, Manhattan R. Co., v. Barker*, 146 N. Y. 304.

The prohibition in § 9 of the act against the assignment or transfer by a foreign executor, administrator, or trustee of stock or obligations of a decedent is expressly limited to such stock or obligations as are "within this state" and "liable to any tax."

Re Enston's Will, 118 N. Y. 180, 8 L. R. A. 464.

Nor is there any sound legal theory on which the stocks can be consistently declared subject to the transfer tax.

The relations between the stockholder and the corporation give him no such legal position as that of a joint owner of its property.

Queen v. Arnaud, 9 Q. B. 806; *Hyatt v. Allen*, 56 N. Y. 558; *Plimpton v. Bigelow*, 93 N. Y. 592; *Burrall v. Bushwick, R. Co.* 75 N. Y. 216; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 492.

Nor can the further theory be maintained that the property of a domestic corporation is necessarily within the jurisdiction of this state and has the protection of its laws and administration, since corporations formed under our laws may carry on their business and own their property wholly in other states or in foreign countries.

Gen. Corp. Law, § 14.

The legal situs of the stocks of these domestic corporations owned by the resident decedent must, for purposes of taxation, be held to be where the shareholder had his domicile.

People, Jefferson, v. Smith, 88 N. Y. 576; *People, Edison Electric Light Co., v. Campbell*, 188 N. Y. 548, 20 L. R. A. 458; *San Francisco v. Mackey*, 22 Fed. Rep. 602; *People, Hoyt, v. Commissioners of Taxes*, 28 N. Y. 228.

The weight of authority within and without the state is decisively against the application of the transfer tax law to stocks of a domestic corporation owned by a nonresident decedent.

Alexander's Estate, 4 Pa. L. J. 448; *Commonwealth's Appeal*, 11 W. N. C. 492; *Del Busto's Estate*, 23 W. N. C. 111; *Bacon's Estate*, 8 Del. County Rep. 608; *Coleman's Estate*, 159 Pa. 281; *Citizens' Nat. Bank v. Sharp*, 53 Md. 581; *People, Jefferson, v. Smith, supra*; *Re James's Estate*, 144 N. Y. 12; *Re Merriam's Estate*, 141 N. Y. 479; *Re Enston's Will*, 118 N. Y. 174, 8 L. R. A. 464.

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Gray, J., delivered the opinion of the court:

The decedent was domiciled in the state of Connecticut, where he died in 1893, leaving, by his will, his residuary estate to his two sons also residents of that state. A part of the residuary estate consisted in shares of the capital stock and in the bonds of corporations incorporated under the laws of this state, and which were in the testator's possession at his domicile. They had been handed over to the residuary legatees, prior to the institution by the comptroller of the city of New York of this proceeding to appraise them for the purposes of taxation under the transfer tax act (chap. 399, Laws 1892). It was held by the appellate division of the supreme court, reversing the decree of the surrogate's court in the county of New York, that the executors were not liable to pay a transfer tax upon the basis of the stocks and bonds in question. The claim of the comptroller is that, both by the terms of that act and by force of the statutory construction law of the state, and upon the theory that these bonds and shares represent interests in corporations incorporated under the laws of this state, they were, although not physically within the state, properly assessed for the purposes of such taxation. The act under which this tax was sought to be collected was passed in 1892 (Sess. Laws, chap. 399), and is known as the "Transfer Tax Act." By § 1, a tax is imposed upon the transfer of any real or personal property of the value of \$500 or over, in the following cases, *viz.*: "When the transfer is by will or by the intestate laws of this state from a resident decedent; or when the transfer is by will or intestate law of property within the state and the decedent was a nonresident at the time of his death." The important words to be noticed in this section, which imposes the tax, are, in the case of a nonresident decedent, "property within the state." Their importance is evident, inasmuch as the attempt of the state to collect a tax, where the decedent was not subject to its jurisdiction, is limited to that which possesses the legal attributes and characteristics of property here. In that connection, reference may be made to § 22 of the act, which defines the word "property," as used in the act, as meaning all property, or interest therein, "over which this state has any jurisdiction for the purposes of taxation." In the endeavor to ascertain the intention of the legislature with respect to what should be assessable for the purposes of taxation as property under this act, we need go no further than the act itself, which, in imposing the tax, undertakes, in addition, to give a definition to property the transfer of which by will, or by the intestate laws of the state, creates the liability to taxation. It seems unimportant to consider that section of the statutory construction law which gives a definition to the term "personal property" (Laws 1892, chap. 677, § 4), if, indeed, applicable. The act contains within itself a complete system for the taxation of transfers of property in cases of testacy and of intestacy, and also controlling definitions for such words used in its sections as, in the judgment of the legislature, might seem to require definition. The section of the statutory construction act, in terms, is only applicable, as I think, to a

statute where its general object, or the context of the language construed, or other provisions of law, do not indicate that a different meaning is intended.

Whatever may be argued in support of the right to subject the bonds of domestic corporations to appraisement for taxation purposes under this act, when physically within the state, upon some theory that they are something more than the evidences of a debt, and constitute a peculiar and appreciable species of property, within the recognition of the law as well as of the business community, such argument is certainly unavailing in this case, where the bonds themselves were at their owner's foreign domicil. They did not represent "property within the state" in any conceivable sense. What property they represented consisted in the debt of their maker, and that species of property, unquestionably, must be considered to be, as a chose in action, the holder's and owner's, and to be inseparable from his personality. The Supreme Court of the United States held in the *Foreign-held Bonds Case*, 82 U. S. 15 Wall. 300, 21 L. ed. 179, where the state of Pennsylvania assumed to tax the interest payable upon bonds issued by a Pennsylvania corporation, secured by a mortgage upon its property, and held by a nonresident, that the tax was invalid. It will be profitable to quote some of the language of the opinion in that case, the soundness of which has never been questioned: "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. The principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." It seems difficult to furnish an argument in support of the view that the debt owing to a creditor is the property which follows him everywhere, and not the written or printed obligation expressing the indebtedness, that is not presumed in the foregoing opinion. In our consideration of the question, we should not lose sight of the fact that the state, through the transfer tax act, is exerting its taxing power only over that as to which it had jurisdiction for the purposes of taxation; and we should not be confused, in that consideration, by statutes or decisions which bear upon the exercise of that power over residents within its territorial limits.

The "Inheritance Tax Act," or, as it is known to-day, the "Transfer Tax Act," imposes a tax upon the right of succession. *Re Swift's Estate*, 187 N. Y. 77, 18 L. R. A. 709; *Re Merriam's Estate*, 141 N. Y. 479; *Re Hoffman's Estate*, 143 N. Y. 829. It was said of it by Judge Andrews, in the *Eaton Case*, 113 N. Y. 34 L. R. A.

Y. 181, 8 L. R. A. 464: "It is not a general but a special tax, reaching only to special cases and affecting only a special class of persons." And, as he also observed, in substance, there must be a clear warrant in the law for the imposition of the tax. In the *Swift Case*, 187 N. Y. 77, 18 L. R. A. 709, it was decided that the personal property of a resident decedent, wheresoever situate, within or without the state, is subject to the tax. The act of 1885 was under discussion, and the general theory of the inheritance tax law was considered; and it was held to be a fundamental requirement that there should be jurisdiction over the subject taxed, or an actual dominion over the subject of taxation at the time the tax is imposed. In the *Phipps Case*, 77 Hun, 826, which was affirmed here upon the opinion of the general term (143 N. Y. 641), the question was whether the right to an unpaid legacy left to a nonresident decedent in the will of a resident decedent was property within this state, and, as such, assessable for purposes of taxation under the act of 1887. It was held that it was not such property, upon the principle that the residence of the debtor does not fix the *situs* of the debt, but the domicil of the creditor. It was there observed that "a mere chose in action, a right to recover a sum of money, has never, as yet, been given the attribute of tangibility." By the act of 1887 (chap. 718), the legislature had amended the inheritance tax law, as it existed under the act of 1885, so as to impose a succession tax with respect to the property of nonresident decedents, which should be within this state. In the *James Case*, 144 N. Y. 6, we had occasion to consider the operation of that act. An Englishman, who died abroad, left property deposited within this state, consisting in stocks and bonds of corporations of this and of other states. The question was considered whether, in view of these words in the act "which property shall be within this state," it was its intentment to reach, for purposes of taxation, any personal property that was not within the state, either in fact or because of the domicil here of its owner. We thought not, and that it would be highly improper to impute to the legislature an intention to tax that over which there was no jurisdiction. It is obvious that the state has no jurisdiction over a right of succession which accrues under the laws of the foreign state. That is something in which this state has no interest, and with which it is not concerned. The legal title to these bonds, or the debts they represent, vested in the personal representatives of the decedent by force of foreign laws. The decedent was a creditor to whom the obligors in the various bonds were indebted, the extent and terms of whose obligation were evidenced by those bonds. The legal *situs* of the indebtedness was at the creditor's domicil, and, as the actual *situs* of the bonds themselves was also there, upon no theory can it be held that the provisions of the transfer tax act could reach them in its operation. The logical result of the proposition which has been established, that the tax is upon the right of succession to property, is, in my opinion, to confine the operation of this law, where nonresidents' estates are concerned, to cases of property having a tangible and vis-

ible existence, and being the actual subject of the ownership.

But, with reference to the shares of capital stock owned by the decedent, I think we are compelled to differ with the appellate division. The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant, but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to manage its affairs. They have the right to share in surplus earnings, and, after dissolution, they have the right to have the assets reduced to money, and to have them ratably distributed. Each share represents a distinct interest in the whole of the corporate property. As said in *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 492, it "represents the interest which the shareholder has in the capital and net earnings of the corporation;" or, as Parke, B., put it, in *Bradley v. Holdsworth*, 3 Mee. & W., at page 423, it is "a right to have a share of the net produce of all the property of the company." Corporate shares must be regarded as "property," within the broad meaning of that term. Certificates of stock, in the hands of their holder, represent the number of shares which the corporation acknowledges that he is entitled to. In legal contemplation, the property of the shareholder is either where the corporation exists or at his domicile, accordingly as it is considered to consist in his contractual rights, or in his proprietary interest in the corporation. In the case of bonds, they represent but a property in the debt, and that follows the creditor's person. Hence it cannot be said, if the property represented by a share of stock has its legal *situs* either where the corporation exists or at the holder's domicile, as we have said in the *Enston and James Cases* (*Re Enston's Will*, 118 N. Y. 181, 8 L. R. A. 464; *Re James*, 144 N. Y. 12), that the state is without jurisdiction over it for taxation purposes. As personality, the legal *situs* does follow the person of the owner; but the property is in his right to share in the net produce, and, eventually, in the net residuum of the corporate assets, resulting from liquidation. That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that the property as to which the right relates, and which is, in effect, a distinct interest in the corporate property, is not within the jurisdiction of the state for the purpose of assessment upon its transfer through the operation of any law, or of the act of its owner. The attempt to tax a debt of the corporation to a nonresident of the state, as being property within the state, is one thing, and the imposition of a tax upon the transfer of any interest in or right to the corporate property itself is another thing. The corporation is the creation of state laws, and those who become its

members, as shareholders, are subject to the operation of those laws, with respect to any limitation upon their property rights, and with respect to the right to assess their property interests for purposes of taxation.

It results from these views that *the order appealed from must be reversed to the extent that it reversed the order of the surrogate affirming an assessment upon the estate of the decedent based upon an appraisal of the shares of stock of domestic corporations*, and the determination of the surrogate in that respect is affirmed. In other respects the order appealed from is affirmed, and the matter is remitted to the surrogate's court, to be proceeded with in conformity with our opinion. Under the circumstances, no costs are awarded to either party.

Andrews, Ch. J., and Bartlett, Haight, and Martin, JJ., concur.

Vann, J., dissenting:

Henry Bronson, for many years a resident of New Haven, Connecticut, died in that city on the 26th of November, 1893, leaving a will, which was admitted to probate in the state of Connecticut, but was never proved or filed in the state of New York. By this will, after making some gifts to his grandchildren, he gave the bulk of his estate to his two sons, now his executors, both of whom are nonresidents of this state. At the time of his death he owned bonds of the value of \$18,200, and stocks of the value of \$487,898.25, all issued by corporations organized under the laws of the state of New York. Said securities, as written instruments, were not within this state when the decedent died, but were in the state of Connecticut, where he had his domicile. They had never been kept in the state of New York, either for safety or any other purpose; and, before the initiation of these proceedings, they had been formally transferred by the executors to themselves, as residuary legatees. Upon the report of the appraiser, who included both bonds and stocks in his appraisal, the surrogate decided that they were subject to a transfer tax, and made the usual order, which was affirmed by him on appeal; but his determination was reversed by the appellate division, and the case is now here upon appeal from their order of reversal.

Two questions are presented for decision, *etc.*: (1) Whether capital invested by a nonresident, or by his assignor, in corporations organized and doing business in this state, for which certificates of stock in such corporations were issued to him, is subject to a succession tax under our laws, when such certificates, although standing in his name as registered on the books at the date of his death, were habitually kept by him in the state where he resided; (2) whether capital lent to such corporations by a nonresident, or his assignor, for which bonds were issued to him, is taxable under like circumstances.

In order to determine these questions, it is necessary to construe certain sections of a statute passed in 1892, entitled "An Act in Relation to Taxable Transfers of Property." Laws 1892, chap. 889. The first legislation upon the subject in this state was in 1885, when an act was passed "to tax gifts, legacies, and collat

teral inheritances in certain cases." Laws 1885, chap. 483. This statute was so crude in structure and doubtful in meaning as to cause much litigation, which led to its amendment by the legislature, even before the first questions that arose had been passed upon by the courts. Laws 1887, chap. 718; *Re Enston's Will*, 113 N. Y. 174, 8 L. R. A. 464; *Re Romaine's Estate*, 127 N. Y. 80, 12 L. R. A. 401. Other amendments followed in quick succession (Laws 1889, chap. 307; Laws 1889, chap. 409; Laws 1890, chap. 553; Laws 1891, chap. 215; Laws 1892, chap. 169), until finally, owing in part to conservative construction by the courts, and in part to the growth of public sentiment upon the subject, the statute was thoroughly revised, so as to meet the difficulties encountered in its enforcement, and the result was the act now before us for consideration. That act, as we have already declared, "was passed with knowledge of our decisions and in view of our construction, and was obviously intended in some respects to compel on our part different conclusions." *Re Hoffman's Estate*, 143 N. Y. 327, 831. The history of legislation upon the subject shows a constant advance in the grasp of the statute, as nearly every amendment reached out further and took in more, until at last the intention of the legislation was limited only by its power, for its command was to "include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation." Laws 1892, chap. 390, § 22. This sweeping intention on the part of the legislature doubtless, had its origin in the fact that personal property, as a general thing, when its great value is taken into account, escapes taxation during the lifetime of its owner. Real estate, owing to its fixed location, presents a problem of slight difficulty to the legislator in his effort to provide means for the support of government, for it cannot escape the view of either the assessor or collector, and the result is that it pays an undue proportion of the annual tax levy. Personal property, however, especially when it exists, practically, in such a form that, to the extent of millions of dollars, it can be carried in one's pocket, has long perplexed the legislator and the statesman, owing to its adroitness and success in avoiding taxation. In 1891 the governor, in his annual message to the legislature, made pointed allusions to the difficulty of reaching personal property, and recommended such legislation as I am now about to consider, in order that, as stated by him, "personal estate can, at least, be subjected to one tax, although it may never have been able to be reached during the life of the decedent." *Dos Passos*, *Collateral Inheritance Taxes*, 2d ed. § 5. It is evident from this that the executive regarded the laws then existing as too narrow, and that he thought public policy required statutes of broader scope. The legislature, apparently, was of the same mind, for, not long after, the act was passed which it is now our duty to construe.

While the courts should carefully gather the intention of the legislature, so far as may be, from the language of the statute, they should also bear in mind the facts which led to the enactment in its present form; for the evil to

be remedied, the difficulty of applying the remedy, and the changes made in order to force a construction in harmony with the growth of legislative purpose, may be of material aid in reaching the correct conclusion. The object of the statute, as indicated by the title, is no longer simply "to tax gifts, legacies, and collateral inheritances," but to bring under taxation all "taxable transfers of property." This broad purpose pervades the entire act, as a careful reading of its provisions will show. The statute provides that, subject to certain exceptions, "a tax shall be . . . imposed upon the transfer of any property, real or personal, . . . or of any interest therein, or income therefrom, . . . when the transfer is by will or by the intestate laws of this state" of property of a resident, or "when the transfer is by will or intestate law of property within the state, and the decedent was a non-resident of the state at the time of his death." Sec. 1. Two classes of cases are thus provided for: (1) The property of residents, passing under the laws of this state, without regard to where the property may be; (2) the property of nonresidents, passing under the laws of another state, when the property is within this state. What is meant by the phrase "property within the state" is a question so difficult that we are unable to unite in declaring its meaning, but are compelled to decide it by the vote of a majority. The question, in concrete form, is whether the stocks and bonds under consideration, or the interests they represent, are "property within the state." Light is thrown upon the subject by § 9, formerly § 11, but radically changed, which provides that "if a foreign executor, administrator, or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to" an officer designated, "on the transfer thereof." The phrase "liable to any such tax" refers to such "stocks and obligations" as are not expressly exempted, owing to the limited value of the entire estate and the close relationship to the decedent of the persons to whom it passes. Sec. 2. What did the legislature mean by "stock or obligations in this state standing in the name of the decedent?" This is the same question in another form as that previously asked, but the change from general to specific words of description in the statute has much significance. The same section commands depositaries, both corporate and personal, "holding securities or assets of a decedent," not to "deliver or transfer the same to the executors, administrators, or legal representatives of said decedent, unless notice of the time and place of the intended transfer" is given to the proper authorities, and a failure to give the notice renders the depositary personally liable "to the payment of the tax." The word "assets," as thus used, is the most comprehensive that could be used to expand the meaning of the statute.

There is but one more section that has a direct bearing upon the question in hand, and that is the 22d, which relates to "definitions," and is of especial importance, not only because it is new, but because it emphasizes the purpose of the statute. It provides that "the words 'estate' and 'property,' as used in this

act, shall be taken to mean the property or interest therein of the testator" or "intestate . . . passing or transferred to those not therein specifically exempted from the provisions of this act, . . . and shall include all property or interest therein, whether situate within or without the state, over which this state has any jurisdiction for the purposes of taxation." This language, although not as specific as could be used, is so comprehensive as to include whatever the legislature has power to subject to taxation. It does not mean jurisdiction as theretofore exercised through other statutes, for it does not say so, but it means whatever jurisdiction the state can exercise. Both the words used and the growing purpose of the legislature show this. The section further provides that "the word 'transfer,' as used in this act, shall be taken to include the passing of property, or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise," or "bequest . . . in the manner herein described."

Partial directions for the construction of the act are found in § 25, which requires that such parts as "are substantially the same as those of laws existing on April 30th, 1892," which was the day before the statute took effect, "shall be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments." This is the rule of construction provided by the statutory construction law, that is "applicable to every statute, unless its general object, or the context of the language construed, or other provisions of law, indicate that a different meaning or application was intended." Laws 1892, chap. 677, §§ 1, 82. It does not exclude from our consideration, when construing the transfer tax act, the definition of "personal property," as laid down in the statutory construction law, which is retroactive as well as prospective in its effect, and applies to all statutes, except as otherwise provided. "The term 'personal property,'" as defined by that law, "includes chattels, money, things in action, and all written instruments, themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien, or encumbrance in, to, or upon property, or any debt or financial obligation, is created, acknowledged, evidenced, transferred, discharged, or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership." Laws 1892, chap. 677, § 4. It is difficult to conceive a definition more comprehensive than this, for it includes intangible property, as well as tangible, written instruments as such, and everything, except real property, that is capable of being owned or transferred. Thus, the legislature has declared its intention to subject to a transfer tax everything owned by a resident at the time of his death, and everything within this state owned by a nonresident at the time of his death, with certain exceptions not now important. It has specifically mentioned "stocks and obligations in this state standing in the name of a decedent," as well as "securities and assets," and has prohibited the transfer thereof, except upon notice to an agent of the state; and, finally, it has summed up its purpose by saying that the

succession to whatever may be the subject of ownership, whether within or without the state, that it can tax, it intended to tax.

The question at once arises, What limitation is there upon the power of the legislature with reference to the subject of taxation? In answering this question, it must be borne in mind that the tax under consideration is not a tax upon property, but upon the transfer of property, under succession laws, on the death of the owner. *Re Merriam's Estate*, 141 N. Y. 479; *Re Swift's Estate*, 187 N. Y. 77, 18 L. R. A. 709. The position of the Supreme Court of the United States upon the subject appears from the following authorities: *Mager v. Grima*, 49 U. S. 8 How. 490, 12 L. ed. 1168; *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 18 L. ed. 599; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), 82 U. S. 15 Wall. 800, 319, 21 L. ed. 179, 186; *Hertey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003. In deciding the case last cited, the court declared "that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides." Page 671, L. ed. p. 1004. The *Foreign-held Bonds Case* involved a tax upon property, not held upon the right of succession to property. This right was not considered by the court, and it rests upon principles utterly different from those applicable to taxation upon property itself. It would be a startling proposition for that learned court to hold that a state may not regulate the transfer of property within its own limits by subjecting it to any reasonable condition. Property owned by a resident gives rise to no question, for there is jurisdiction of the person of the decedent and of his personal representatives. Tangible property, which is apparent to the senses, presents no difficulty, even when it belonged to a nonresident decedent, provided it is physically present in the state. Intangible property, however, because it has no physical presence, has long perplexed both those who make and those who expound the law. It may exist, as it were, in the air, for it may consist of a right, which, if denied, must be established by parol evidence. Such rights are ordinarily regarded as attached to the person of the owner, but they are not inseparable from him, because creditors are permitted to seize them for the payment of debts, even in a state where the owner never resided and never was personally present. *Plimpton v. Bigelow*, 98 N. Y. 592, 596, 600; Code Civ. Proc. §§ 648, 2478. See also Laws 1880, chap. 320, § 16; *Beers v. Shannon*, 73 N. Y. 292; Story, Conf. L. § 380; *Cullin v. Hull*, 21 Vt. 158; *Atvany v. Powell*, 2 Jones, Eq. 51; *State v. Dalrymple*, 70 Md. 294, 8 L. R. A. 272. In *Plimpton v. Bigelow*, *supra*, this court said: "We do not doubt that shares [of stock in a domestic corporation] for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intentment of law always remains, to wit, in the state or country of its creation." P. 600.

There is nothing, therefore, in the nature of the most intangible right, such as a debt without any written evidence thereof, to prevent the legislature from giving it a *situs* apart from the residence of its owner; but, in order to permit this, it must have some practical existence in the state that assumes jurisdiction over it either for the purpose of taxation or the collection of debts. In the latter case the residence of the debtor is deemed to give the debt a practical existence in the state where the debtor resides, because the nonresident creditor, if his claim is not paid voluntarily, must go where his debtor is, and invoke the aid of the laws in force there, in order to collect it. If the legislature has jurisdiction over intangible property for the purpose of enabling creditors to collect debts, why has it not jurisdiction over it in order to provide means for the support of government, including the courts and other agencies provided to enable nonresidents, as well as residents, to enforce collection of their claims? The most serious obstacle thus far encountered in the effort to subject to taxation the transfer of all the personal property of nonresident decedents, which has a practical existence in this state, is the legal maxim, *Mobilia sequuntur personam*. This is a mere fiction of the law, and is not, as we have seen, universal in its application. It is based partly on comity between states, and partly on convenience of administration. Long as it has stood, and well embedded in the law as it is, it is not paramount to a statute, and must stand aside whenever the legislature directs it to give way. As said by Judge Comstock: "Like other fictions, it has its special uses. It may be resorted to whenever convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action. . . . Accordingly there seems to be no place for the fiction of which we are speaking, in a well-adjusted system of taxation." *People v. Commissioners of Taxes*, 28 N. Y. 224, 228. So, Judge Story said that the legal fiction "yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined. . . . Hence it is that, whenever personal property is taken by arrest, attachment, or execution within a state, the title so acquired under the laws of the state is held valid in every other state; and the same rule is applied to debts due to nonresidents, which are subjected to the like process under the local laws of a state." Story, Conf. L. § 550. Mr. Justice Gray, of the Supreme Court of the United States, referring to this maxim, said that it "grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*. . . . For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a

resident of the state which imposes the tax." *Pullman' Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595. Long ago the legislature subjected to general taxation certain kinds of debts due to nonresidents, and the act was unanimously sustained by the commission of appeals. *Laws 1851, chap. 871; People, Westbrook, v. Trustees of Ogdensburgh*, 48 N. Y. 890.

Another statute, which virtually repealed the maxim *pro tanto* as to foreign capital invested in banking business in this state, was referred to by this court as "designed to remedy an evil then existing, which mainly consisted in persons residing near the borders of our state carrying on trades and business here in competition with our own citizens, and, while enjoying the protection of our laws, escaping all the burdens of taxation by having their residences beyond the boundary line." *Laws 1855, chap. 87; Williams v. Wayne County Supers.* 78 N. Y. 561, 568. In *People, Jefferson, v. Smith*, 89 N. Y. 576, 581, Judge Earl said: "That choses in action can have a *situs* away from the domicile of the owner for the purpose of taxation and for other purposes, is frequently manifested in the statutes of this state. . . . I think it may safely be said that the legal fiction that choses in action always attend the owner and have a legal existence only at the place of his domicile has been frequently ignored by the legislature in framing our system of taxation." That the legislature intended to do away with this fiction, so far as it tended to restrict the scope of the act, and to give personal property a special *situs* for the purposes of taxation, is evident from the quotations already made from the statute, and especially from the declaration that "all property or interest therein" capable of ownership shall be included, "whether situated within or without this state, over which this state has any jurisdiction for the purpose of taxation;" that foreign executors shall not "transfer any stock or obligations standing in the name of a decedent," without payment of the tax; and that no depositary shall transfer "securities or assets of a decedent" without giving the required notice. *Laws 1892, chap. 899, §§ 9, 22.* "Stock . . . in this state standing in the name of a decedent" apparently refers to shares of stock in a domestic corporation. What are shares of stock, and what rights does the owner thereof enjoy? Judge Andrews answered this question when he wrote in *Plimpton v. Bigelow, supra*, that "the right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts." Chief Justice Shaw answered it when he said "that the right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation."

Fisher v. Essex Bank, 5 Gray, 377. Judge Earl, referring to, the same subject, has said that "a share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature, that is, the shareholder cannot by any act of his, nor ordinarily by any act of the law, reduce it to possession." *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 492. "A share of stock is an incorporeal, intangible thing." *Neiler v. Kelley*, 69 Pa. 407. "The expression 'shares of stock,' when qualified by words indicating number and ownership, expresses the extent of the owner's interest in the corporation property. The interest is equitable, and does not give him the right of ownership to specific property of the corporation. But he does own the specific stock held in his name, and, under the rules of law, the property of the corporation is held by the corporation in trust for the stockholders." *Bridgman v. Keokuk*, 73 Iowa, 42. Shares of stock should be distinguished from certificates of stock which are merely evidence as to the number of shares to which the holder of the certificate is entitled. *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 488, 492. The same rights exist whether any certificate is issued as evidence of those rights or not. Formerly no certificates were issued, and the only evidence of the existence of the right was upon the books of the corporation. 28 Am. & Eng. Enc. Law, p. 484; Cook, Stock & Stockholders, § 1.

What was the nature of the investment made by the decedent when he became the owner of stocks in various corporations organized and doing business in this state? Necessarily he was either an original investor of capital when the corporation was organized, or he acquired the rights of one who was such investor at that time. In either event his rights were the same, and the nature of his investment was the same. For instance, he owned stock in a bank doing business in the city of New York. That stock represented an investment of money, either paid in by him when the bank was organized, or by someone else, whose rights, or a part of them, he subsequently purchased. Whether he was an original proprietor, or acquired the rights of an original proprietor, he made an investment in a banking business in this state at the moment that he became the owner of the stock. Was that investment property "within this state," under the comprehensive statute now before us? It was capital invested in a corporation organized here, doing business here, having its principal office here, and earning money here with which to pay dividends to the decedent and others. He was one of the owners of the franchise, and had an equitable interest in all the property of the corporation. He assisted, or had the right to assist, in the management of the business, through his power to vote for directors. That right he could exercise only by coming here in person, or by sending someone with authority to act for him here. He placed his money physically within the state of New York when he invested it in a New York enterprise, and he left it here under the protection of our laws, and thereby gave it a local habitation here. Under these cir-

cumstances should a fictitious *situs* prevail over the actual *situs* located by himself? If he had invested money, in his own name, in tangible personal property in this state, it would have been subject to a succession tax upon his death, although he resided in another state. *Re Swift's Estate*, 187 N. Y. 77, 18 L. R. A. 709. If, on the other hand, he had invested the same money, in the name of a corporation owning the same property, would the investment be free from such tax? If so, by virtue of what provision of the statute would it escape? While there is a difference in form, I see no difference in substance of the two investments. If a transfer tax can be imposed on the tangible property of a nonresident decedent in this state, why not on the intangible? There is nothing to prevent it except a fiction that has never prevailed against creditors, and why should it against taxation? That fiction is as foreign to questions of revenue as it is to the collection of debts; and it should not be allowed, under the sweeping provisions of the statute, to create a constructive presence in another state, and enable it to prevail over an actual presence, for all practical purposes, within this state. This accords with the position of the court, as declared in the *Enston Case*, decided under the act of 1885, where it was said that "the *situs* of the property owned by a shareholder in a corporation is either where the corporation exists, or at the domicile of the shareholder." *Re Enston's Will*, 113 N. Y. 174, 181, 3 L. R. A. 484. The same thing was said in the *James Case*, decided under the act of 1887. *Re James's Estate*, 144 N. Y. 6, 12. The fiction prevails until changed by statute, and that it was repealed as to money invested in this state was expressly held in the *Romaine Case*, 127 N. Y. 80, 88, 12 L. R. A. 401. Since then the statute has been radically changed in furtherance of the principle that prevailed when that decision was made. Moreover, the state has the right to regulate all transfers of property made within its limits. The name of the decedent as a shareholder, and the number of shares to which he was entitled, were recorded on the stock books of the corporations in which he held stock in this state. No effective transfer of his stock could be made except by changing the record upon the books in this state. That transfer is a corporate act, involving a change upon the records of the corporation; and ordinarily the issue of a new certificate; and it must be performed by the corporation in order to vest the title in the foreign executor or legatee. The old certificate must be brought here and surrendered, or, if lost, the loss must be accounted for here. If the transfer is not made voluntarily resort must be had to the courts of this state, in order to compel it. So, the owner must come here to get his dividends, as well as to get his final share of the surplus upon the dissolution of the corporation. The capital was not only invested here, but it still remains here, represented by property here, and the owner must come here to get it. If his rights are withheld, the courts of no state but this can restore them. The decedent placed his property in this state, and thereby impliedly committed it to the jurisdiction of our laws, then in force and such as might be enacted

thereafter; and property subject in any respect to the laws of a state, even if only as regards the transfer thereof, must, if required, pay its share towards the enforcement of those laws. Look for a moment at the consequences of holding otherwise. Business corporations might be organized in this state wholly upon foreign capital, a few shares being held in the name of resident directors to make the organization regular, and yet none of the stock, however valuable, be subject to a succession tax. This would tend to drive business corporations into foreign ownership. If the stock of a corporation belonged one half to residents and one half to nonresidents, the former would be taxable, but the latter not; and thus an unfair discrimination would be made against inhabitants of this state. It is a matter of common knowledge that stocks in domestic corporations are owned to a vast amount by persons doing business in this state, and having their business residence here, but their actual residence in an adjoining state. Did the legislature intend to offer a premium to nonresidents, by exempting them from burdens that our own citizens have to bear? Did it intend to encourage men of wealth to move out of the state? It is possible that substantially all the stock representing a great property like that of the New York Central Railroad Company or the Western Union Telegraph Company, in both of which the decedent was a large shareholder, might be owned outside of the state. Should such investments, which are under the exclusive protection of the laws of this state, escape the payment of a tax upon the privilege of succession? Considering its emphatic language, is it reasonable to believe that the legislature intended such a result?

It is urged that the stocks in question may be taxed in the state of Connecticut, and thus be subjected to double taxation. As it happens, this cannot be the result, for the inheritance tax act of that state does not apply to lineal descendants, although it covers in terms all property within the jurisdiction of the state passing to collateral relatives "whether belonging to inhabitants" there "or not, and whether tangible or intangible." Conn. Stat. 1889, chap. 180. Even if it were otherwise, while double taxation is admitted to be an evil, still it is better that the same property should, at long intervals, be twice taxed than to open such an avenue of escape from taxation as would release millions of foreign capital enjoying the protection of our laws. The great object of the statute is to cause all property, and especially all personal property, subject in any degree to the laws of this state, to pay a reasonable tax, once during every generation, under such circumstances as to make the burden as light as taxation ever can be, because it is paid for the privilege of succeeding to property, without earning it or paying for it.

The bonds of which the decedent died the owner present a different, but not a difficult, question, provided the proper conclusion has been reached in relation to stocks owned by him. An investment in corporate bonds, being practically a loan of capital to the corporation, differs from an investment in stocks, which represent capital employed by its owners in the business of the corporation.

In the latter case there is an interest in the corporation itself, as well as indirectly in its property, while in the former there is the relation of debtor and creditor. Where the bonds are registered, however, as it was asserted on the argument by the appellant, and not denied by the respondent, that these bonds were, the transfer can only be effected at an office designated by the corporation, Cook, Stock & Stockholders, § 15. It would be necessary, upon this assumption, for the person entitled to succession to these bonds to come into the state of New York, directly or indirectly, to complete his title. The transaction, by virtue of the contract itself, would become localized, for the transfer would require a corporate act in this state done under the sanction of our laws, and possibly by virtue of an appeal to our courts. As an examination of the record, however, does not disclose the fact that the bonds were registered, we must proceed upon the basis that they were not. The bald question is therefore presented whether money lent by a nonresident to a resident corporation, or a bond given as evidence of the debt thus created, is subject to a transfer tax. While such a bond can be transferred without the state, it cannot be collected against the will of the corporation without coming into this state. Even if collected through the Federal courts, it must be within this state. The fact that property of the corporation found in another state may be attached there does not change the general rule that the bond represents money lent in this state, and that the holder thereof must come here to get it. If secured by a mortgage, the recording act of this state controls. If not paid when the corporation is dissolved, the statutes of this state apply. The power of the corporation to borrow or pay depends on our laws, and hence there is an obvious distinction between corporate and private debts. While an individual can contract a debt without the aid of legislation, a corporation cannot borrow nor give a valid bond except under the authority of some statute, general or special. The state makes the bonds property, and preserves them as property. Their value rests on the action of the state government, both in their creation and in the protection subsequently afforded. A debt which owes its existence to our laws, and which could not have been contracted under the laws of any other state, has a local existence for the purpose of taxation. A bond is personal property, not only created, but protected, by the state, and protection and taxation are reciprocal. As the protection is the same whether the bond is owned by a resident or nonresident, why should the accident of residence affect the power to provide the means of protection? The exercise of the power does not impair the obligation of contracts, because every contract is made in view of possible taxation, and the parties are bound to anticipate that there may be legislation to that end. Tax laws and police laws may lawfully be applied to prior contracts. The place where the contract is made and is to be performed, and where the corporate borrower resides, and must always reside, is the place where the legislature may reasonably declare the debt of its own creature to exist as property, so as to be taxed. While at

common law it follows the person of the owner, it may be given a fixed habitation by statute. This does not result in any discrimination between resident and nonresident bondholders, for succession to the bonds of either is taxed in the same way. I think that whatever the state government can reach and lay its hands on—as, beyond question, it can on a debt through the process of attachment—has a practical existence here, and is subject to the control of our legislature for the purpose of taxation. While I concur in the result reached by the court that the stocks in question are taxable, I am constrained to dissent from its conclusion that the bonds are not taxable. The order of the appellate division should be reversed, and that of the surrogate affirmed, with costs.

O'Brien, J., concurs.

William V. PENOYAR *et al.*, Appts.,

William E. KELSEY *et al.*, Resp'ts.

(180 N. Y. 77.)

1. A statute authorizing the granting of a warrant of attachment against one who makes a false statement in writing to obtain credit will be strictly construed in favor of those against whom it may be employed, as it is in derogation of the common law.
2. The making of a false written statement as to financial ability, for the purpose of obtaining credit, does not make one liable to an attachment in favor of a creditor who had no knowledge of such statement until after the credit was given, under Laws 1894, chap. 736, § 1, authorizing the granting of an attachment where defendant, for the purpose of procuring credit, makes a false statement in writing as to his financial responsibility.

(October 6, 1896.)

APPEAL by permission by plaintiffs from an order of the Appellate Division of the Supreme Court, Fourth Department, affirming an order of a Special Term for Niagara County vacating an order of attachment. *Affirmed.*

The appellate division certified for the consideration of the court of appeals the following question:

"It is hereby certified that a question has arisen under § 636 of the Code of Civil Procedure, which provides that an attachment may issue, *viz.*, where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand and signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial responsibility or standing, whether an alleged false statement in writing by a debtor, which does not come to the knowledge or notice of a creditor

until after credit has been given to the debtor, is sufficient to authorize the granting of a warrant of attachment under such provisions."

Mr. Stillman F. Kneeland, with Mr. Charles P. Norton, for appellants:

Statutes relating to attachments are entitled to a liberal construction.

The object of the act of 1894 was to provide for all creditors present security from a debtor who has been proved dishonest in his commercial transactions.

In this state the plaintiff in attachment is never required to go beyond the terms of the statute.

Treadwell v. Lawlor, 15 How. Pr. 8; *Camman v. Tompkins*, 12 Barb. 265.

The language of the act of 1894 being plain and unambiguous the courts must ascertain by its terms the intention of the lawgivers. They have no power to add to its terms or change its tenor.

Cooley, Const. Lim. 55; *People, Bockes, v. Wemple*, 115 N. Y. 302; *Novell v. People, Phelps*, 7 N. Y. 67; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 188, 6 L. ed. 63; *People v. Purdy*, 2 Hill, 81.

Mr. J. B. Tuttle also for appellants.

Mr. Norman D. Fish, for respondents:

The remedy of attachment was unknown to the common law, and is strictly a creature of statute, and as such involves the involuntary dispossession of the owner, and antagonizes the common-law idea of property right.

1 Am. & Eng. Enc. Law, p. 894; *Kneeland. Attachm. § 3; Rowles v. Hoare*, 61 Barb. 271; *Re Denny*, 2 Hill, 220.

Statutes are to be construed with reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovations upon the common law further than the case absolutely required.

1 Kent, Com. 464; *Bertles v. Nunan*, 92 N. Y. 157, 44 Am. Rep. 361; *Potter's Dwar.* Stat. 185; *Linderman v. Parquharson*, 101 N. Y. 434; *Fitzgerald v. Quann*, 109 N. Y. 445; *Smith, Const. & Stat. Constr.* §§ 701-703; *White v. Wager*, 32 Barb. 250.

In the construction of statutes effect must be given to the intent of the legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute.

Smith v. People, 47 N. Y. 336; *Church of Holy Trinity v. United States*, 143 U. S. 437, 36 L. ed. 227; 1 Kent, Com. 368; *People v. Utica Ins. Co.* 15 Johns. 380, 8 Am. Dec. 243; *Hayden v. Pierce*, 144 N. Y. 516; *Vail v. Broadway R. Co.* 147 N. Y. 377, 80 L. R. A. 626; *Cleveland Fire Alarm Teleg. Co. v. Metropolitan Fire Comrs.* 55 Barb. 293.

That which is within the manifest intention of the lawmakers is to be deemed within the law as much as that which is within its letter. *Stowel v. Lord Zouch*, 1 Plowd. 366; *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340.

The legislature never intended, in enacting the statute in question, to give a summary remedy by attachment to persons who had in no wise been injured by the false representations specified in the statute. And the failure of the plaintiffs to show injury to themselves

NOTE.—On the question what fraud will sustain a judgment, see note to *Weare Commission Co. v. Druley* (Ill.) 30 L. R. A. 466.

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by reason of the representations complained of is fatal to their attachment.

Haber v. Nassitts, 13 Fla. 610; *Louenstein v. Bew*, 68 Miss. 266; *Montague v. Gaddis*, 87 Miss. 453; *White v. Wilson*, 10 Ill. 21; *Ridgeway v. Smith*, 17 Ill. 38; *Stewart v. Cole*, 46 Ala. 648; *Pickard v. Samuels*, 64 Miss. 832; *Drake*, Attachm. § 68; *Warder v. Thrillkeld*, 53 Iowa, 184; *Lyons v. Mason*, 4 Coldw. 525; *Russell v. Wilson*, 18 La. 867.

Vann, J., delivered the opinion of the court:

The question certified to us for determination depends upon the construction of § 636 of the Code of Civil Procedure, which prescribes "what must be shown to procure" a warrant of attachment against property. The learned counsel for the respective parties differ as to the rule of construction that should be applied; the one contending that it should be strict, because the provision is in derogation of the common law, while the other insists that it should be liberal, because the statute does not derogate from the common law, but merely amplifies a well-known common-law remedy. The process of attachment, as it existed under the common law, differed in its nature and object from the provisional remedy now known by that name. Its original purpose was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property, which he forfeited if he did not appear or furnish sureties for his appearance. 3 Bl. Com. 280; 1 Rolle, Abr. *Customs of London*, K. 13; *Kneeland*, Attachm. § 6; *Drake*, Attachm. § 5; *Ashley*, Attachm. 11; *Locke*, Foreign Attachm. 12. It was part of the service of process in a civil action through a species of distress, in which the goods attached were the ancient *vadii* or pledges. *Bond v. Ward*, 7 Mass. 123, 128; *Gilbert*, Law Distress, 24. As said in the case last cited: "The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on our statute law." Its present purpose is not to compel appearance by the debtor, but to secure the debt or claim of the creditor. It is a proceeding *in rem*, and the process may issue, in certain cases, whether the defendant has been served with a summons or not, although inability to serve, through the fault of the defendant, is a ground upon which the warrant may be granted. It exists as a provisional remedy only when authorized by statute, and, as such, is comparatively recent in its origin. While attachments were permitted in justices' courts by the Revised Statutes, and were extended somewhat by the nonimprisonment act, they were proceedings in the nature of original process, by which the action was commenced. 2 Rev. Stat. p. 274; Laws 1831, chap. 800; *Bradmer*, Attachm. 2. See also 1 Webster & S. 286; 2 Rev. Laws 1813, p. 157. Attachment as a provisional remedy, with the object of securing a debt by preliminary levy upon property to conserve it for eventual execution, was created by the Code of Procedure, and has been continued and extended by the Code of

Civil Procedure. Code, Proc. § 227; Code Civ. Proc. § 635. Unlike the attachment against absent or absconding debtors under the Revised Statutes or the Stillwell act, which sequestered the property of the debtor for the benefit of all the creditors alike, this proceeding is for the benefit of the attaching creditor alone. It is not only created by statute, but has substantially none of the features peculiar to the common-law remedy. As said by a recent writer: "It amounts to the involuntary dispossession of the owner, prior to any adjudication to determine the rights of the parties. It violates every principle of proprietary rights held sacred by the common law. It is, to some extent, equivalent to execution in advance of trial and judgment. Property is taken, under legal process, at the instance of one without even a claim of title, from the possession of another whose title is unquestioned. And, though the mere taking does not work any change in the ownership of the property, it seriously affects some of the most important incidents of that ownership, and may even be the means of thwarting the owner in his endeavors to meet the just demands against him." Wade, Attachm. § 2.

Owing to the statutory origin and harsh nature of this remedy, the section in question should be construed, in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom it may be employed. *Ibid.*; *Sharpe v. Speir*, 4 Hill, 76, 80; *Waples*, Attachm. § 23. Nonresidence, departure from the state, or concealment therein, with intent to defraud or to avoid the service of process, were at first the only grounds upon which an attachment might issue. Code Proc. 1849, § 239. Afterwards the statute was so extended as to provide that, in addition to the foregoing grounds, if the defendant "has removed, or is about to remove, property from the state, with intent to defraud his creditors," or if he "has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent," a warrant might be issued. Code Civ. Proc. 1891, § 636. The section continued in this form until 1894, when the clause now in question was added in these words: "Or where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence, as to his financial responsibility or standing." Laws 1894, chap. 786, § 1. It will be observed that prior to this amendment the grounds upon which attachments might be issued were not personal to any creditor, but affected all alike. They were of two classes: (1) Those relating to the person of the defendant, such as nonresidence, departure from the state, or concealment therein; (2) those relating to his property and his fraudulent conduct in connection therewith. None of them related to the creation of the debt, and, with a single exception, all were founded upon acts done with a furtive intent, which injured one creditor the same as another, either by preventing the service of process, or depleting assets in which all were interested. The exception, nonresidence, while not

wrongful, related to jurisdiction, and applied to all creditors with the same force. As all of the grounds were general and impersonal, affecting all of the creditors in the same way, of course any creditor could take advantage of any ground that existed. By the amendment of 1894, however, a new element was introduced, which the defendants claim is personal to the creditor giving or extending the credit, but which the plaintiffs claim is general in its effect, and designed to provide immediate security for all creditors whenever the debtor is proved to have been guilty of making written misrepresentations as to his financial standing for the purpose of procuring credit. If the intention was to extend the remedy only to a creditor injured by the fraud, the statute is not a radical departure in legislation, for the practice of fraud, provided it results in lawful damages, is an authorized ground for an order of arrest. If, however, the plaintiff's contention is correct, an unprecedented rule has been made, which may destroy the credit system, and bring confusion to the transaction of business. While the statute prescribes the purpose of the false statement, it does not, in terms, prescribe the effect, nor require that the statement should result in procuring credit; yet it would be unreasonable to hold that the legislature intended that a statement which, although false and made with evil motives, was absolutely harmless, should be followed by such grave consequences. It would be an anomaly in commercial law to permit a wrongful act that injured no one to disrupt a man's business by allowing any creditor to seize his property at any time. The law furnishes a remedy only for such wrongful acts as result in injury. That is the theory upon which actions are founded, and upon which all provisional remedies are allowed, except where the debtor is not amenable to ordinary process, and it is necessary to proceed against his property, because there is no jurisdiction of his person. Wrongs not simply designed, but executed, or in process of execution, are those recognized by the law. Abstract wrongs are disregarded, because they do no harm. If a false statement is made for the purpose of procuring credit, but without having that effect, no creditor is injured. If it is made to one who does not believe it, or does not act upon it, why should it become the basis of this summary remedy? If made to a commercial

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agency, and it rests quietly upon the books without coming to the knowledge of anyone who relies upon it, no reparation is needed, because no mischief has resulted. No right has been violated, no wrong suffered, and no damages sustained. Although the statute is silent upon the subject, we think that the strict rule of construction that we have adopted requires us to hold that the false statement must be successful in procuring credit from someone in order to authorize an attachment. But suppose the specified fraud has been successfully practiced upon one creditor, does that allow another to take advantage of it, although it had not come to his notice when he gave or extended credit to the debtor? We think not, for the reasons already given, but mainly because he was not injured. He was neither deceived nor defrauded by a statement of which he had not heard when his debt was contracted. He gave no credit on the strength of a representation made at some other time to some other person. We think that the remedy, so far as it is based upon the clause under consideration, is confined to the creditor defrauded, and that no one can resort to it except those who gave an extended credit to the debtor, relying upon his statement as true. The inconvenience and injustice resulting from any other construction are so manifest as to bear strongly upon the intention of the legislature, for a statute should be so construed, when the language will permit, as to make it practicable, just, and reasonably convenient. *Rosenplanter v. Roessle*, 54 N. Y. 262, 265. It is unreasonable to suppose that the legislature intended that a single false statement should follow a man through life, and expose his property to attack by his creditors at any time they chose. This would virtually withdraw from his property for all time the safeguards which protect the property of all other persons. It would be perpetual outlawry applied to his property, and would tend not only to drive him out of business, but to expel him from the state. It would violate every precedent and all analogies, and we think that, if the legislature intended to impose such a severe penalty for possibly a single false step, it would have said so in plain terms. We are thus led to answer the question certified in the negative, and to *affirm the order* appealed from, with costs.

All concur.

FLORIDA SUPREME COURT.

Harry SINGLETON, *Pff. in Err.*,

STATE of Florida.

(.....Fla.....)

- *1. The 12th section of article 4 of the Constitution of 1885 conferred power upon the governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, to permanently remit fines and forfeitures, to commute punishment and grant pardons after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons, and the pardoning power thus conferred is exclusive, and cannot be exercised by the legislature.
2. By the amendment of § 12, article 4, adopted this year, the secretary of state, comptroller, and commissioner of agriculture take the places of the justices of the supreme court, as members of the board of pardons.
3. A full pardon of an offense not only blots out the crime committed, but removes all punishment and disabilities resulting from the conviction. When extended to a convict in prison, it relieves him and removes his disabilities, and, when granted after his time of imprisonment has expired, it removes all that is left of the consequences of conviction—his disabilities.
4. By statute the conviction of the

*Headnotes by MARRY, Ch. J.

NOTE.—Legislative power to grant pardon or amnesty.

I. After conviction.

II. Before conviction.

III. Incidental or implied pardon.

I. After conviction.

The Constitution of the United States and the constitutions of the various states, with few exceptions, confer upon the executive the power to grant pardons and reprieves without any express declaration as to the power of the legislative department in such matters. Most of the state constitutions expressly provide that the governor may grant pardon "after conviction;" in some instances the language is general and merely provides for pardon, without specifying whether it shall be before or after conviction. In a few states the pardoning power is conferred, not upon the governor alone, but upon a board of pardons.

The above case of *SINGLETON V. STATE* is the first in which the power of the legislature to grant a pardon to a particular person after conviction has been denied by a direct adjudication, although there are cases referred to in the next subdivision of this note in which legislative pardon or amnesty before conviction has been held unconstitutional.

There has been much contrariety of opinion among judges and legal writers on the question of the relation between the legislative and executive departments with respect to this subject of pardon and amnesty. As to the legislative power to grant amnesty or pardon before conviction, it will be seen in the later division in this note that the weight of authority is in favor of the power. But as to the legislative power to pardon after conviction, the decisions, while not altogether satisfactory or reconcilable, are on the whole against the power. The position of the Florida case above reported, that the express grant by the Constitution of the pardoning power "after conviction," to the

crime of larceny in the courts of this state disqualifies the convict as a witness, and his pardon for this offense has the effect to restore his competency to testify as a witness.

5. An act of the legislature provided that a party who had been convicted of the crime of larceny should be restored to civil rights. *Held*, without deciding whether a restoration to civil rights would include the restoration of competency as a witness, lost by reason of the conviction of the crime, that before the party could testify it must have such effect, and, so construed, it was not competent for the legislature to so enact.

6. An accused is entitled to be tried by an impartial jury, and when it is made to appear to the trial judge that a fair and impartial trial cannot be had in the county where the offense was committed, he should direct that the accused be tried in another county. This is a matter left largely to the discretion of the trial court, and its ruling on such matters will not be disturbed unless it appear from the facts presented that the court acted unfairly and committed a palpable abuse of sound discretion.

(November 17, 1886.)

ERROR to the Circuit Court for Hillsborough County to review a judgment convicting defendant of murder. *Reversed.*
The facts are stated in the opinion.

governor and other officers constituting a board, is exclusive, is based on well-known principles of constitutional interpretation, and is strengthened by the constitutional provision separating the departments of government and providing that no person properly belonging to one of them shall exercise powers appertaining to either of the others except when the Constitution expressly provides for it. On the other hand, the chief authority relied upon by the court is that of *State v. Sloss*, 26 Mo. 201, 69 Am. Dec. 467, which, as will appear in the next division of this note, can hardly be regarded as authority, at least under Constitutions which say the governor may pardon "after conviction."

In a later Missouri case, *Ex parte Parker*, 106 Mo. 551, the court said: "We all agree the legislature cannot pardon a defendant convicted of crime, but we think affixing an alternative punishment is wholly unlike a pardon. Changing a fine to imprisonment is not pardoning the crime." This was said in upholding a statute which gave power to a justice to commute a fine to imprisonment for a definite time.

That the legislature cannot commute the punishment fixed by law after a sentence has been given because this is a necessary incident of the governor's pardoning power is also declared in the Opinion of the Justices, 14 Mass. 472.

But in *People v. Stewart*, 1 Idaho, 546, a statute approved by the governor of the territory remitting the penalty imposed for an offense is sustained as equivalent to a pardon. This was the case of a special statute vacating a judgment on conviction of assault and battery and remitting the fine and imprisonment on the ground that the defendant had been previously convicted and punished under sentence of another court for the same offense. The opinion is very brief, and merely holds that it is competent for the legislature to pass a law remitting punishment. This, it will be noticed, was a

Messrs. Wall & Stevens for plaintiff in error.

Mr. William B. Lane, attorney general, for the State.

Mabry, Ch. J., delivered the opinion of the court:

The plaintiff in error was indicted, tried, and convicted of murder in the first degree, and from the sentence of the court imposing the death penalty a writ of error has been sued out.

An error was committed during the progress of the trial of the cause that will necessitate a reversal of the judgment rendered against the accused. The state introduced as a witness one Howard Bishop, who testified to material and damaging facts against the accused. It is not deemed necessary to set out the testimony of the witness, as there can be no doubt that it bore directly upon defendant's guilt, was calculated to influence the jury, and, if improperly admitted, was harmful, and cannot be considered otherwise than as reversible error. An objection was made to Bishop's testifying on the ground that he had been convicted in a court in this state of the crime of larceny, and under the statute he was not a competent witness. It was conceded that the witness, Howard Bishop, had been convicted at the spring term, 1889, of the circuit court for Marion county, of the crime of larceny, and was sentenced to six month's imprisonment in the jail of said county;

but to remove and obviate the objection on account of this conviction the state offered in evidence and read to the court the Act of 1895, chapter 4457, entitled "An Act to Restore Howard Bishop, late of Marion County, Florida, to Civil Rights." In the preamble to this act the conviction and sentence of Bishop, in the Marion county circuit court, for the larceny of a watch, is recited; also that about a year subsequent to the conviction it was established to the satisfaction of the party to whom the watch belonged that Bishop was not guilty of the crime for which he had been convicted, and for the last five years he had lived in the city of Tampa, served on the police force of the city, and had conducted himself uprightly as a man and officer. The provision of the act is "that the said Howard Bishop be and is hereby restored to civil rights." Section 1096 of the Revised Statutes provides that persons convicted in any court in this state of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, or buggery shall not be competent witnesses. The Constitution provides (§ 11, art. 4) that "the governor shall have power to suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days, for all offenses, except in cases of impeachment. In cases of conviction for treason he shall have power to suspend the execution of sentence until the case shall be reported to the legislature at its next session, when the legislature shall either

territorial case and no constitutional or statutory provision as to the pardoning power was referred to, although the power of the governor of a territory to grant pardons was conferred by U. S. Rev. Stat. § 1844.

So, in two Georgia cases, *Bird v. Breedlove*, 24 Ga. 623, and *Bird v. Meadows*, 25 Ga. 251, the validity of a legislative pardon was sustained by implication. In these cases the controversy was as to the right to recover compensation for services to secure the pardon from the legislature, and recovery was allowed, but no constitutional question seems to have been raised in either of them.

An act for relief from a forfeiture on a bail bond was held valid in *People v. Bircham*, 12 Cal. 50, on the ground that the judgment was property of the state, and could be released by the legislature in such form and on such conditions as it chose to prescribe. But it does not appear that any question was raised as to infringement thereby on the governor's pardoning power.

On the other hand, a statute for the repayment of money paid by sureties on the bond of a clerk to satisfy a fine was held unconstitutional in *Haley v. Clark*, 26 Ala. 439, on the ground that it amounted to a pardon and infringed upon the governor's function.

General pardons, "when found expedient, have been issued under the sanction of an act of Parliament." 1 Chitty, Crim. L. 771. But the constitutional question which is presented under our form of government cannot arise in case of an act of Parliament.

II. Before conviction.

In three cases the power of the legislature to grant general pardon or amnesty to a class of offenders, although they have not yet been convicted, has been denied. One of these is the case of *State v. Sloss* (1857) 25 Mo. 291, 69 Am. Dec. 467. The statute in this case attempted to relieve from prosecution all persons indicted for offenses under a dram-

shop act committed before a certain date, provided they should pay the costs and a certain fee to the district attorney. The court held this act unconstitutional, and said: "It is as effectually a pardon as though it were one in form." Another ground of the decision was that the act interfered also with the functions of the judicial department. The constitutional provision as to pardon was not quoted in this case, but it seems to have been decided while the original Missouri Constitution of 1820 was in force, which in art. 4, § 6, provided in general terms for "reprieves and pardons" by the governor, without specifying whether or not they could be granted only after conviction.

This was followed by the case of *State v. Todd*, in 26 Mo. 175, which was little more than a memorandum case, and followed the prior case without additional discussion.

Later Missouri constitutions expressly limit the governor's power to pardon by the words "after conviction."

The third case was that of *State v. Fleming*, 7 Humph. 153, 46 Am. Dec. 73, in which it was held that a statute prohibiting any fine, forfeiture, or imprisonment to be imposed or recovered for any offense under a certain prior statute is unconstitutional as applied to pending indictments for prior offenses, although convictions have not yet been reached. But this decision was rendered under a Constitution which gave the governor power to grant pardons "after conviction." Whatever may be the effect of constitutional grant of power to the executive to grant "pardons" without limiting it to cases after conviction, it seems unreasonable to find in a grant of power to pardon "after conviction" any restriction on the legislative power in the matter before conviction.

Such is the view taken in the Arkansas case of *State v. Nichols*, 28 Ark. 74, 7 Am. Rep. 600, where the court decided that the governor's constitutional power to pardon "after conviction" does not exclude legislative power to grant pardon and am-

pardon, direct the execution of the sentence, or grant a further reprieve; and if the legislature shall fail or refuse to make disposition of such case, the sentence shall be enforced at such time and place as the governor may direct." Provision is also made in the section for reports to the legislature by the governor of the fines or forfeitures remitted, or reprieves, pardons, or commutations granted. The 12th section of the same article, as it stood when the act of 1895, *supra*, was passed, provided that "the governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may, upon such conditions, and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment, and grant pardons after conviction, in all cases except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons." Under the amendment to this section, adopted this year, the secretary of state, comptroller, and commissioner of agriculture take the places of the justices of the supreme court. Article 2 of the Constitution divides the powers of government into three departments—legislative, executive, and judicial—and provides that no person properly belonging to one of the departments shall exercise any powers appertaining to either of the others, except in cases expressly provided for by the Constitution. In the distribution of the powers of

government the framers of our Constitution had the right to lodge the pardoning power where they saw proper in the departments of government. We know from judicial history that the pardoning power was a part of the royal prerogative in England, and Chief Justice Marshall, in speaking for the court in *United States v. Wilson*, 82 U. S. 7 Pet. 150, 8 L. ed. 640, says: "As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." As to the exercise of the power under our system of government we must look to our organic law, the Constitution. By the 11th section of article 4 the governor alone is given power to suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days, for all offenses, except in cases of impeachment, and in cases of conviction for treason the legislature can pardon on the suspension of the sentence by the governor. The 12th section of the article, as amended, confers power upon the governor, secretary of state, comptroller, commissioner of agriculture, and attorney general to permanently remit fines and forfeitures, commute punishment, and grant pardons after conviction, in all cases

nesty before conviction. The court distinguishes the cases of *State v. Sloss*, and *State v. Fleming*, *supra*, on the ground that they were decided under constitutions which did not limit the governor's power to pardon to cases after conviction, and says the language used therefore amounts to an absolute grant of all the pardoning power of the state to the executive, and therefore is an inhibition against the legislative branch interfering with it. It further distinguishes the case of *State v. Fleming* on the ground that Fleming was convicted before he knew of the legislative resolution prohibiting his punishment, and stood before the court in the light of one who had waived his pardon.

The Arkansas case of *State v. Nichols*, *supra*, was one of those which arose under statutes of various southern states granting amnesty and pardon for offenses committed during the time of the war. The Arkansas statute gave amnesty for all crimes except rape committed between May 6, 1861, and July 4, 1865, if convictions had not yet been had. A similar statute in North Carolina granted amnesty to all soldiers of the United States or of the confederate states or of the state for acts done in discharge of their duties or under orders as soldiers prior to January 1, 1866. *State v. Blalock*, Phill. L. 242.

This act is held applicable to homicide growing out of war matters. *State v. Shelton*, 65 N. C. 294.

But it is held inapplicable to any crime that did not grow out of any war duties or war passions. *State v. Cook*, Phill. L. 535; *State v. Haney*, 67 N. C. 467.

These amnesty acts are held to be irrevocable and to give a vested right which cannot be taken away by a repeal. *State v. Keith*, 63 N. C. 140; *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600.

But, to the contrary, it was held in *Michael v. State*, 40 Ala. 261, that a repeal of such a statute would preclude its operation as a defense in favor of one who had not previously accepted it.

The Kentucky amnesty act was held inapplicable 34 L. R. A.

to guerrillas or other unlicensed trespassers and limited to soldiers of either army for acts done under color of or by compulsion of military authority. *Haddix v. Wilson*, 3 Bush, 523.

In the Kentucky, North Carolina, and Alabama cases the power of the legislature to enact such amnesty laws is assumed without question.

The power of Congress to grant amnesty has been the subject of much discussion and conflict of opinion. Congress has assumed the power in many instances by special acts to remove the disabilities of certain individuals for participation in rebellion. Some of these acts of Congress named a single individual, others named a great number of individuals. Section 13 of the confiscation act of July 17, 1862, purporting to confer upon the President power to grant pardon and amnesty in certain cases. But while President Lincoln made reference to this act of Congress, in his proclamation of December 8, 1863, proclaiming full pardon and restoration of all rights of property, except as to slaves, to persons in rebellion on condition of their taking and keeping an oath of loyalty, he began his proclamation by saying: "Whereas in and by the Constitution of the United States it is provided that the President shall have power to grant reprieves and pardons," and very plainly showed that he based his authority to grant the proclamation upon the provisions of the Constitution, and not upon the act of Congress. His reference to the act of Congress was: "Whereas the congressional declaration for a limited and conditional pardon accords with well-established judicial exposition of the pardoning power." It is also matter of history that the sweeping proclamation of amnesty issued by President Johnson was based entirely upon his constitutional right, and that the attempt of Congress to limit the effect of this amnesty and pardon was held by the Supreme Court of the United States to be ineffectual. *United States v. Klein*, 80 U. S. 13 Wall. 123, 20 L. ed. 519; *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366.

But the power of the legislative department to

except treason and impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons, and we are of the opinion that the pardoning power after conviction, conferred by this section upon the board of pardons designated, is exclusive, and that the legislature cannot exercise such power. The Constitution of Missouri vested the pardoning power in the governor, and it was decided in *State v. Sloss*, 25 Mo. 291, 69 Am. Dec. 467, that such power belonged exclusively to the executive department, and could not be exercised by the legislature. The Constitution of the United States confers upon the President the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, and Judge Story says (on the Constitution, vol. 2, § 1404) that "no law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases." It was held in *Ex parte Garland*, 71 U. S. 4 Wall. 838, 18 L. ed. 366, that the pardoning power conferred on the President was not subject to legislative control. In this case it is said, in reference to the effect of a pardon, that it "reaches both the punishment prescribed for the offense, and the guilt of the offender. When the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the

offense." This has been approved in an opinion of the justices of this court (*Re Executive Communication*, 14 Fla. 818). It is settled law that the pardon of an offense not only blots out the crime committed, but removes all disabilities resulting from the conviction. "Imprisonment and hard labor are not the only punishments which the law inflicts upon those who violate its commands. Besides these are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. A pardon is supposed to be granted to one who has been improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effects would only be a half-way relief. The doctrine, now well recognized upon this subject, we believe, is that a pardon gives to the person in whose favor it is granted a new character and makes of him a new man. When extended to him in prison, it relieves him and removes his disabilities; when given to him after his term of imprisonment has expired, it removes all that is left of the consequences of conviction,—his disabilities." *State v. Baptiste*, 26 La. Ann. 131.

Under the section of the Revised Statutes referred to a conviction of the crime of larceny in the courts of this state disqualifies the convict as a witness, and there can be no question that a pardon in such a case would restore his competency in this respect. From the con-

strict the pardoning power of the executive is not within the scope of this note. It may be observed, however, that in many states the Constitution provides that the executive shall exercise the pardoning power subject to such rules and regulations as shall be prescribed by law.

By U. S. Rev. Stat. § 5294, Congress authorized the remission of certain penalties by the Secretary of the Treasury. The constitutionality of this provision was attacked on the ground that it infringed on the President's pardoning power, but the section was held valid "in view of the practice in reference to remission by the Secretary of the Treasury and other officers which had been sanctioned by statute and acquiesced in for nearly a century." *Pollock v. Bridgeport S. B. Co.* ("The Laura"), 114 U. S. 411, 29 L. ed. 147, Affirming 8 Fed. Rep. 612.

While the special acts of Congress granting pardon or amnesty have not been brought into the courts for adjudication of their constitutionality, there is a declaration in favor of the power of Congress to pass acts of general amnesty made by the Supreme Court of the United States in *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Intern. Com. Rep. 369, where the court, in upholding the act of Congress exempting a witness from prosecution on account of any transaction to which he may testify before the Interstate Commerce Commission, says: "The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Taylor, Ev. § 1455, where a large number of similar acts are collated), or in this country. Although the Constitution vests in the President power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty."

The distinction between amnesty and pardon is said by the court in this case to be "of no practical importance," and the court quotes from the opinion in the case of *Knote v. United States*, 95 U. S. 34 L. R. A.

S. 149, 152, 21 L. ed. 442, 443, as follows: "The Constitution does not use the word 'amnesty;' and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance." But the opinion in the case of *Brown v. Walker* further proceeds to say: "Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, but is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted."

III. Incidental or implied pardon.

It is perfectly plain that all the effect of a pardon or grant of amnesty before conviction, so far as the criminal is concerned, can be achieved by the legislature through the repeal of a statute creating the offense without any saving clause. The rule that all pending prosecutions fall, and all prior offenses not yet prosecuted are wiped out by such a repeal, is too well established to need discussion or citation of authorities. But there are some other cases in which statutes not so directly granting amnesty as the act of Congress upheld in *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Intern. Com. Rep. 369, have an incidental effect which has been alleged to be equivalent to a pardon. Thus, a statute providing for good-time credits to a convict was held as to all prior sentences to amount to an unconstitutional pardon in *State, Johnston, v. McClellan*, 87 Tenn. 52. (For good-time credits as affecting delinquency of sentence, see *Howard v. United States* (C. C. App. 8th C.) post., —, and note.

So, in *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 235, a statute authorizing a parole or conditional release by the board of control of persons of a prisoner sentenced for an indefinite time, whereby he remains in the legal custody of the board, although outside of the prison and subject to be taken back on the order of the board if he violates

clusions stated, it is evident that an attempt on the part of the legislature to exercise any part of the pardoning power exclusively conferred upon the board of pardons by § 12, article 4, of the Constitution, would be in conflict with that instrument, and therefore void.

The act relied on to qualify the witness, Bishop, provides for his restoration to "civil rights." There is, in a section in the suffrage and eligibility article of the Constitution, a provision that no person convicted of felony by a court of record shall be qualified to vote at any election unless restored to civil rights, and within the meaning of this provision it may be that the elective franchise is embraced within the civil rights contemplated. To accomplish the purpose for which the act of 1895 is invoked, it must have the effect to relieve Howard Bishop from the disability of not being able to testify as a witness attaching, under the law, to the conviction of the crime of larceny. This disability is as much a part of the pains and penalties of the violated law as incarceration, and after conviction it attaches as surely as any other part of the punishment. In our judgment the power to commute punishment and grant pardons for crimes after conviction has been conferred upon the governor, the secretary of state, comptroller, commissioner of agriculture, and attorney general, and it is not competent for the legislature to exercise such power. In this view it is not necessary to determine definitely whether the restoration to civil rights as provided in the

act would include the restoration of competency to testify as a witness, lost by reason of the conviction of crime, as Bishop could not testify by virtue of the act unless it had such effect, and to so construe it would place it in antagonism to the Constitution. Bishop should not have been permitted to testify, and for the error in this respect the judgment must be reversed. In addition to the authorities cited, the following bear on the subject of pardons and its proper exercise: *State v. Foley*, 15 Nev. 64, 87 Am. Rep. 458; *People v. Bowen*, 48 Cal 439, 18 Am. Rep. 148; *People, Forsyth, v. Monroe County Ct. of Sessions*, 141 N. Y. 288, 23 L. R. A. 856; *Haley v. Clark*, 26 Ala. 439; *State v. Fleming*, 7 Humph. 152, 46 Am. Dec. 78; *Ogletree v. Dozier*, 59 Ga. 800; *Halkin v. Scoggin*, 15 Ark. 427; *State v. Nichols*, 20 Ark. 74, 7 Am. Rep. 600; *Sterling v. Drake*, 29 Ohio St. 457, 23 Am. Rep. 762; *Atty. Gen., Taylor, v. Brown*, 1 Wis. 518; *People v. Moore*, 62 Mich. 496; *State v. McIntire*, 1 Jones, L. 1, 59 Am. Dec. 566, and note.

The accused made an application for a change of venue, upon which affidavits *pro* and *con*, were filed. The application was denied. There was also a plea in abatement of the indictment, alleging certain defects in the organization of the grand jury that presented the indictment, and there were certain proceedings on this plea. We do not think there was reversible error in the rulings on the application for change of venue and plea in abatement.

the condition of his parole, or release, is held to violate a constitutional provision giving the pardoning power to the governor as well as the provision giving judicial power to the courts. (With the above case is a *note* as to suspension of sentence for good behavior, and as to conditional pardons.)

But, on the other hand, in *State, Atty. Gen., v. Peters*, 43 Ohio St. 629, a statute providing that the board of penitentiary managers may establish rules and regulations for the parole of prisoners is upheld as valid against the contention that it interferes with the executive power to reprieve or pardon.

So, a statute authorizing a court to suspend sentence is sustained in *People, Forsyth, v. Monroe County Ct. of Sessions*, 141 N. Y. 288, 23 L. R. A. 856. The court denies that this statute encroaches on the governor's power to reprieve and pardon, since it holds that this power to suspend sentence is a common-law power of the court, and totally distinct and different from the power to grant reprieves and pardons; but the court says there can be no doubt that if the amendment distributed any part of the pardoning power conferred upon the executive to some other department of the government, the legislation would be in conflict with the Constitution and invalid.

So, a statute giving an appellate court power to stay sentence of death or of fine, pending an appeal, is sustained in *Parker v. State*, 135 Ind. 634, 23 L. R. A. 856, and it is held that the governor's power to grant reprieves and pardons is not infringed thereby.

So, a statute providing a board of pardons to investigate the facts on a petition for pardon and report to the governor with recommendations, if the recommendations have no binding force upon him, is sustained in *Rich v. Chamberlain*, 104 Mich. 438, 21 L. R. A. 573. The basis of the decision is that the governor's power is in fact unrestricted by the act of the board, since he is entirely at liberty to disregard their recommendations.

34 L. R. A.

So, a statute which authorizes the suspension of certain penalties of a prohibitory liquor law in any town or city upon certain conditions, including the consent of a specified portion of the electors, is held valid, and the act is held not to constitute an infringement of the governor's pardoning power. *State, Witter, v. Forkner* (Iowa) 28 L. R. A. 212. The court says: "The power to pardon must not be confounded with the power of dispensation or suspension. The former is undoubtedly a prerogative of the executive, while the latter must be exercised by the legislative department of the government." Reference is also made to somewhat similar statutes which are said to have passed unchallenged for years, such, for instance, as that which provides for the discharge of a person convicted for intoxication and the remission of his fine upon giving information under oath as to the person from whom he obtained the intoxicating liquor, and the statutory provision as to the effect of marriage to bar an indictment for seduction, and the provisions for the bar of certain prosecutions upon a compromise.

But a statute to authorize county commissioners to change the sentence of a court from work on a chain gang to the hire of the convict to a private person for private work is held to infringe on the governor's exclusive power to commute sentences. *Ogletree v. Dozier*, 59 Ga. 800.

On the other hand, a Missouri case upholds a statute giving a justice power to commute a fine to imprisonment for a definite time on the ground that such an alternative punishment is wholly unlike a pardon. *Ex parte Parker*, 106 Mo. 551.

These cases, so far as they support legislation which has the effect to relieve from punishment, are based on distinctions between the powers actually exercised and the pardoning power, without at all deciding that the legislature can exercise the power to pardon.

B. A. R.

Under the laws of this state an accused is entitled to be tried by an impartial jury, and when it shall appear to the trial judge that a fair and impartial trial cannot be had in the county where the offense was committed, he should direct that the accused be tried in another county. Under our decisions this matter is left largely to the discretion of the trial court, and its ruling on such matters will not be disturbed unless it appear from the facts presented that the court acted unfairly and committed a palpable abuse of a sound discretion. We cannot anticipate what the evidence will be on another trial of the case, and do not con-

sider the instructions of the court to the jury; but we direct attention to the general proposition stated in one of the instructions, that an aggressor in a personal difficulty can never be heard to acquit himself of liability for its consequences on the ground of self defense. Without considering now whether this portion of the charge, in the terms stated, contains a correct proposition of law under any state of circumstances, it may, so far as we can see, be omitted or modified in this case.

The judgment will be reversed and a new trial ordered.

KENTUCKY COURT OF APPEALS.

W. R. BELKNAP *et al.*, Appts.,

v.

City of LOUISVILLE *et al.*

(.....Ky.....)

1. A special election upon the question of issuing municipal bonds cannot be held where the Constitution provides that not more than one election shall be held in each year, but such question must be submitted at a general election.
2. Two thirds of the voters voting at an election to be held for that purpose, whose assent is necessary to authorize municipal indebtedness, means two thirds of all the votes cast for any purpose at the election, where but one election can be held during the year, at which all questions to be submitted to the voters must be decided.
3. An ordinance providing for the submission to the voters of the question whether or not park bonds shall be issued, at a specified general election, and authorizing the issuance of the bonds "in the event that two thirds of those voting at said election shall vote in favor," requires a favorable vote of two thirds of all those voting at the general election.

(Landes, J., dissents from Proposition L.)

(June 12, 1893.)

APPEAL by plaintiffs from a judgment of the Chancery Court for Jefferson County in favor of defendants in an action to enjoin defendants from issuing bonds for park purposes. *Reversed.*

The facts are stated in the opinion.

Mr. Randolph H. Blain, for appellants:

The question upon the issue of park bonds could only be submitted or voted on at a general election.

Ky. Const. §§ 147, 148.

Where a question is required and can only be submitted and voted on at a general election, and is made to depend on a majority of the votes cast at such election, a majority of all the votes cast at the election is required, and not merely a majority of the votes cast on the particular question.

People, Wheaton, v. Wiant, 46 Ill. 263; *People, Mitchell, v. Warfield*, 20 Ill. 160; *People, Davenport, v. Brown*, 11 Ill. 478; *Bayard v. Klings*, 16 Minn. 249; *Taylor v. Taylor*, 10 Minn. 107; *Everett v. Smith*, 22 Minn. 53; *Engart v. Hanover Twp. Trustees*, 25 Ohio St. 618; *State, Cope, v. Foraker*, 48 Ohio St. 677, 6 L. R. A. 422; *State, Jones, v. Lancaster County Comrs.* 6 Neb. 474; *People, Crowell, v. Lawrence*, 36 Barb. 186; *State v. Winkelmeier*, 85 Mo. 108; *South Bend v. Lewis*, 188 Ind. 512.

In *Armour Bros. Bkg. Co. v. Finney County Comrs.* 41 Fed. Rep. 321, it is said: "The words 'a majority of all the votes cast' do not mean cast at a poll opened for the purpose of a general election, but cast for the purpose of such assessment, at a poll opened for that purpose."

Marion County Comrs. v. Winkley, 29 Kan. 36; *State, Crooker, v. Echols*, 41 Kan. 1; *Cass County v. Johnston*, 95 U. S. 369, 24 L. ed. 417; *Walker v. Oswald*, 68 Md. 146; *Gillespie v. Palmer*, 20 Wis. 544; *Sanford v. Prentice*, 23 Wis. 358.

Courts are steadfastly opposed to the presumption that a "majority of all the legal voters" is intended, because that would lead to an inquiry outside of the ballot box and require proof as to who is a legal voter, which is the first case.

Carroll County Supers. v. Smith, 111 U. S. 556, 28 L. ed. 517.

If the ballot shows that a minority has voted on a question submitted at a general election, it shows that it is a minority and not a majority of those voting. If the lawmaker intends to confine the evidence to those voting on the question, it should so express it in the act, otherwise the rule should control.

The debates in the constitutional convention, and the statutes of Kentucky on the subject, conclusively show that by the expression "two thirds of the voters voting at an election to be held for that purpose" was meant two thirds of all voting at a general election, and not simply two thirds of those voting on any particular question submitted.

NOTE.—As to what constitutes a sufficient majority to carry an election, see note to *Lawrence v. Ingersoll* 84 L. R. A.

gersoll (Tenn.) 6 L. R. A. 810; also *People, Wells, v. Berkeley* (Cal.) 23 L. R. A. 832.

Messrs. Humphrey & Davis, with Mr. H. S. Barker, for appellees:

In testing the validity of the election to be held for that purpose to determine whether these bonds should or should not be issued, the only question to be considered is whether the votes in favor of issuing the bonds were more than two thirds of those voting for that purpose, *i. e.*, more than two thirds of those voting for and against the issue of the bonds.

When the Constitution comes to define what "elections" shall be held on the 1st Tuesday in November it carefully limits it to the election of "officers."

Fidelity Trust & S. F. Co. v. Morganfield, 96 Ky. 564.

The question whether bonds should be issued by the city of Louisville was a question which was not constitutionally to be submitted on the day in November at which the elections for officers were to be held, but could have been submitted to a vote of the people on any day and at any time that the legislature should fix.

No one would have pretended if this election had been fixed and held in August or September that the question submitted to the voters was to be decided otherwise than by adding up the total vote cast on this "question submitted to them" and seeing whether two thirds of those voting on the "question so submitted" were in favor of the issuing of the bonds.

Carroll County Supers. v. Smith, 111 U. S. 556, 28 L. ed. 517; *McCrary, Elections*, 8d ed. § 173.

The fact that the legislature or the city ordinance happened to fix, for the sake of economy, the same day on which elections were being held for other purposes or to elect candidates cannot in any manner change the principle or the result.

When a matter is submitted to the vote of the people the question of its passage or rejection is to be determined by the vote of those people who choose to express themselves upon that subject—for or against it; and is not to be determined by persons not voting upon it.

Gillespie v. Palmer, 90 Wis. 544; *Thomp. Corp.*, § 728; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 520.

Where a question is to be settled by a vote of the majority or two thirds of the "voters voting at an election to be held for that purpose," it means that it is to be settled by the votes cast on the question submitted, and not by the votes cast in elections held for other purposes or upon other questions.

Armour Bros. Bkg. Co. v. Finney County Comrs. 41 Fed. Rep. 821; *Walker v. Oswald*, 68 Md. 155; *St. Joseph Twp. v. Rogers*, 88 U. S. 16 Wall. 644, 21 L. ed. 328; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *State, Lara-see, v. Barnes*, 8 N.D. 319; *Metcalfe v. Seattle*, 1 Wash. 802; *Gillespie v. Palmer*, *supra*; *Marion County Comrs. v. Winkley*, 29 Kan. 36; *State, Durrheimer, v. Grace*, 20 Or. 154; *State, Crooker, v. Echols*, 40 Kan. 1; *Sanford v. Prentice*, 28 Wis. 558; *Holcomb v. Davis*, 56 Ill. 418; *Constitutional Prohibitory Amendment*, 24 Kan. 791; *Smith v. Procter*, 180 N. Y. 819, 14 L. R. A. 403.

Neither parol evidence, nor registration lists, nor the records of the numbers of voters in previous elections, can be looked to, to show

that the majority cast for a proposition—at a special election where it alone is voted for—is not the real majority in fact of the actual number of voters in the district.

Carroll County Supers. v. Smith, 111 U. S. 556, 28 L. ed. 517; *Douglass v. Pike County*, 101 U. S. 685, 25 L. ed. 971; *Bassett v. State, Renick*, 37 Mo. 270; *State v. Binder*, 38 Mo. 450; *Knox County v. Ninth Nat. Bank*, 147 U. S. 99, 37 L. ed. 96; *Dill. Mun. Corp.* 4th ed. § 277; *Cooley, Const. Lim.* 6th ed. 779; *McCrary, Elections*, 3d ed. 173; *First Parish in Sudbury v. Stearns*, 21 Pick. 154; *Vance v. Austell*, 45 Ark. 406; *Richardson v. McReynolds*, 114 Mo. 641; *Yeater v. Seattle*, 1 Wash. 808.

Were the language of the Indiana Constitution like ours, the Indiana court would hold the way we contend for.

Lamb v. Cain, 129 Ind. 486, 14 L. R. A. 518; *Rushville Gas Co. v. Rushville*, 121 Ind. 209, 6 L. R. A. 815.

The law does not permit the absent or indifferent to neutralize the efforts of the public spirited and enterprising, but compels every one who would make his influence effective to attend the meeting and vote in the manner provided by law.

Smith v. Procter, 180 N. Y. 819, 14 L. R. A. 408.

As the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people; and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

Exchange Bank v. Hines, 8 Ohio St. 47; *Cooley, Const. Lim.* 6th ed. 80, 81.

The proper construction of this clause had been thoroughly settled by the courts long before it was adopted into our new Constitution, and where a clause or language has received a construction by the courts of the states where it was formerly used, and it is then adopted by a convention or legislature of our state, it will be considered as adopted within the construction previously given.

Metropolitan R. Co. v. Moore, 121 U. S. 558, 30 L. ed. 1022; *Coolam v. Doull*, 133 U. S. 223, 33 L. ed. 597; *Allen v. Ramsey*, 1 Met. (Ky.) 637; *Cooley, Const. Lim.* 6th ed. 66, note; *Endlich, Interpretation of Statutes*, § 530; *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269.

The phraseology of this section of the new Kentucky Constitution has often been construed before its adoption here.

Metcalfe v. Seattle, 1 Wash. 802; *Walker v. Oswald*, 68 Md. 155; *Carroll County Supers. v. Smith*, 111 U. S. 556, 28 L. ed. 517; *Sanford v. Prentice*, 28 Wis. 558; *Knox County v. Ninth Nat. Bank*, 147 U. S. 99, 37 L. ed. 96; *Vance v. Austell*, 45 Ark. 406; *Richardson v. McReynolds*, 114 Mo. 641; *Yeater v. Seattle*, 1 Wash. 808; *Douglass v. Pike County*, 101 U. S. 679, 25 L. ed. 969; *Cass County v. Johnston*, 95 U. S. 369, 24 L. ed. 417; *South Bend v. Lewis*, 138 Ind. 512; *McCrary, Elections*, § 173; *Endlich, Interpretation of Statutes*, § 530; *Franklin*

County Ct. v. Deposit Bank, 87 Ky. 882; *People, Mitchell, v. Warfield*, 20 Ill. 168; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 692, 62 Am. Dec. 424; *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *State, Bassett, v. Renick*, 87 Mo. 270; *St. Joseph Twp. v. Rogers*, 83 U. S. 16 Wall. 644, 21 L. ed. 328; *Everett v. Smith*, 22 Minn. 58; *State v. Binder*, 38 Mo. 450; *People, Gaines, v. Garner*, 47 Ill. 253.

Du Relle, J., delivered the opinion of the court:

This suit was brought for an injunction to restrain the city of Louisville from issuing \$1,000,000 of bonds for park purposes. There were two grounds alleged for the injunction, the first and main ground urged being that at the election of November 6, 1894, the question of the issue of bonds was submitted to the voters of the city, and that the proposition to issue did not receive the assent of two thirds of the voters thereof, within the meaning of § 157 of the Constitution, and § 2854 of the Kentucky Statutes. It appears that at the election there were cast in the city of Louisville a total of 32,425 votes, and that on the question of the issue of park bonds there were cast only 9,204 votes, of which 6,483 were cast in favor of the issue, and 2,721 against it. Section 157 of the Constitution provides that "no county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." It is contended for appellants that, the total number of votes cast at the election in favor of the bond issue being less than two thirds of the whole number cast at the election, the bond issue failed to carry, upon the ground that the section referred to requires that two thirds of the total vote cast at the election shall be cast in favor of the issue. Appellees contend that the words, "two thirds of the voters thereof voting at an election to be held for that purpose," restrict us to the consideration of the total number of votes cast for and against the question of issuing bonds, and that, therefore, more than two thirds of the votes of those voting "for that purpose" were cast in favor of the bond issue. In other words, appellees' contention is that, in the "election held for that purpose," only the votes cast for that purpose—for and against the bond issue—can be considered, and that no account can be taken of votes cast for other purposes, such as the election of officers, although cast on the same day.

Great stress was laid by appellees' counsel upon the argument that the legislature might have provided for the submission of the question of the bond issue at a special election, held on a different day from the regular annual election, and at which no other question or election was determined; and as at such special election only the votes cast upon the bond issue could be considered, though the vote might, and probably would, be much less than the vote cast at the regular annual election.

therefore "a question submitted to the voters" is not in any way dependent on or connected with an election of officers, although submitted on the same day and by means of the same ballots; and, as the Constitution left it to the legislature to determine whether the question should be submitted on the day of the general election or on some other day, the action of the legislature in fixing the submission for the same day as the general election did not commingle or make them interdependent. In support of this contention the case of *Fidelity Trust & S. V. Co. v. Morganfield*, 96 Ky. 564, is relied on. In that case it was held that the submission of an issue of bonds for municipal purposes might be upon a different day from that of the general election. After careful consideration by a full bench, a majority of the court are unable to adhere to the doctrine laid down in that opinion. Section 147 of the Constitution, requiring elections by the people to be by secret official ballot, provides that "the word 'elections' in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them." Section 148 provides that "not more than one election in each year shall be held in this state or in any city, town, district, or county thereof, except as otherwise provided in this Constitution. All elections of state, county, city, town, or district officers shall be held on the 1st Tuesday after the 1st Monday in November." It is otherwise provided as to elections for school trustees by § 155, which excepts those elections from the provisions of §§ 145 to 154 inclusive, and as to elections for taking the sense of the people of a county, city, etc., as to whether liquors shall be sold therein, by § 61, which provides: "All elections on this question may be held on a day other than the regular election days." In this section the word "election" is used in the sense provided in § 147, and this provision indicates clearly that the word is used in § 148 to include questions submitted to the people, for otherwise there would be no need for the permission given by § 61. By § 152 vacancies in the general assembly may be filled at a special election. It seems clear that the provision of § 148, that not more than one election each year shall be held in this state, or in any city, town, district, or county thereof, except as otherwise provided in the Constitution, applies to questions submitted to the voters; and the only provision otherwise in the Constitution, in reference to such questions, is the one in regard to the submission of questions as to the sale of liquor. When it is considered that the manifest purpose of the framers of the Constitution, and of the people who ratified and gave it effect, was to put limitations upon the power of the local authorities in the matter of incurring debts which would result in oppressive taxation, and even to limit the power of the people themselves improvidently to authorize the assumption of such obligations, the wisdom of the restriction of such elections to the day of the general election is evident. Not only is a much larger vote usually brought out on the occasion of the general election, but the people at large are usually better informed of the matters upon which they are entitled to vote, by reason of the greater interest taken, and the fuller discussion of such matters.

We come now to the main question presented in this record. By § 157 of the Constitution it is provided: "No city . . . shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose." The object of this provision was to limit the power of the local authorities and the people to burden themselves and their posterity with taxation, except upon full consideration, and by the assent of the people, given understandingly. In order to effect that object it was provided that no city should be authorized to become indebted in excess of the current year's revenue, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose. It was sought to protect the people from their own improvidence and that of their local officials, and such a construction must be given to the Constitution as will give effect to its manifest purpose. There could be but one election in the year except in the cases specially provided for. This question was to be submitted to the people at that election. It was one election, though held for several purposes, and was in no sense a collection of elections held on the same day. One of the purposes of the election was to determine this question, which, under authority of the Constitution, the statute, and the ordinance passed in accordance therewith, was to be submitted to the voters of the city. It was required that two thirds of the voters of the city voting at such election should give their assent to the bond issue. Assent implies action, and is not mere failure to dissent. At the election held for the purpose of electing various officers, and for the additional purpose of determining the question of the bond issue, there were cast 32,425 votes, and of all those voters, voting at the election held for those purposes, but 6,483, less than one fifth of the total number, gave their assent to the proposition to impose on the city of Louisville the burden of an additional debt of a million of dollars. The authorities which to a greater or less degree bear upon this question are numerous and conflicting. It may be conceded that, under a provision like the one under consideration, it is not necessary that two thirds of those entitled to vote should actually vote in favor of the proposition, and that, as was said by the supreme court of the United States in *Carroll County Supers. v. Smith*, 111 U. S. 565, 28 L. ed. 520, "the words 'qualified voters' as used in the Constitution, must be taken to mean, not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote." To the same effect are many authorities cited by appellees, and the reason of the rule is well stated in *People, Wheaton, v. Wiant*, 48 Ill. 263, as follows: "It was held, in *People, Mitchell, v. Warfield*, 20 Ill. 160, that to give this provision of the Constitution a practical operation we must presume that it was the intention of the framers of that instrument that the voters would all vote, and that the majority of those voting should determine the question. To give it a different construction

would involve an inquiry whether there were other voters of the county who had, from any cause, abstained from voting; and this would lead to interminable inquiry, and invite contests in such elections which would be embarrassing and baneful, if it did not destroy all of the practical benefits of laws passed under these provisions of the Constitution."

But we are met with a very different question when the question is required to be submitted at a general election, is one of the purposes for which that election is held, and is required to receive the assent of two thirds of the voters of the city voting at that election. In such case the result depends on a majority of all the votes cast at the election being cast, for the proposition, and not merely a majority of the votes cast on the particular question. In the case of *People, Wheaton, v. Wiant*, 48 Ill. 263, the Constitution required that a majority of the voters should vote in favor of the removal of a county seat, and the court held, referring to the case in 20 Ill. 160: "In *Warfield's Case* there was no vote taken at that election, except upon the question of the removal of the county seat, and that vote was adopted as the means of ascertaining the number of legal voters of the county, and whether the majority was in favor of or against removal. In this case, however, there was, at the same time, an election held for circuit judge, which was a regular election. We therefore have, in this case, additional means of ascertaining the whole number of voters of the county. If the return of the various poll books of the county showed a larger number of votes cast for circuit judge or other officer than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern, where it occurs at any other election held at the same time; but it must appear that a majority of all the votes cast at that election were in favor of removal. When there is no other election held at that time, the returns of the officers of votes on that question will govern." So, in *People, Davenport, v. Brown*, 11 Ill. 478, a case of mandamus to compel township organization, under a constitutional provision that "the general assembly shall provide by a general law for a township organization . . . wherever a majority of the voters of such county, at any general election, shall so determine," the court said: "The language is clear and explicit, and admits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but majority of all the legal voters in the county. In *Everett v. Smith*, 22 Minn. 53, the Constitution provided that the question should be 'submitted to the electors of the county or county to be affected thereby at the next general election after the passage thereof, and be adopted by a majority of such electors;' and it was held that the provision required a majority of the electors voting at the election, and not a majority of those voting on the question. So, in Ohio (*Enyart v. Hanover Twp. Trustees*, 25 Ohio St. 618), the legislature had authorized the levy

of a tax with this proviso, that the levy should not be made "until a majority of the electors of said township at some regular election shall vote in favor of said levy," and it was held that a majority of all the votes cast at the regular election was required, and not a majority of those voting on the question. And in *State, Cope, v. Foraker*, 46 Ohio St. 877, 6 L. R. A. 422, a provision of the Constitution, that "if a majority of the electors voting at such election shall adopt such amendments, the same shall become a part of the Constitution," was held not to be complied with by a majority of the votes cast on the amendment. The Ohio Constitution had another provision requiring the adoption of amendments which had been agreed upon by conventions "by a majority of those voting thereon," and the court called attention to the difference in language, saying that, "if the framers had had the same intention in framing § 1 as in framing § 8, as to how the majority for the adoption of an amendment should be ascertained, they would have provided in that section, as in § 8, that it should be a majority of those voting thereon, instead of a majority of the electors voting at such election." This is directly in point in the consideration of the case at bar, for in § 256 of the Kentucky Constitution we find it provided that the passage of an amendment to the Constitution shall be determined by "a majority of the votes cast for and against an amendment," and in § 64 it is provided that no county shall be divided, etc., "unless the majority of all the legal voters of the county voting on the question shall vote for the same." So that, in two other sections of the instrument, the convention was at no loss for apt words with which to limit the decision to the determination of those only who should vote upon the question. In *State, Jones, v. Lancaster County Comrs.* 6 Neb. 474, the Constitution provided for a township organization "whenever a majority of the legal voters of such county, voting at any general election, shall so determine"; and it was held that, as the affirmative vote on the question submitted was less than a majority of those voting at the election, the proposition was defeated. In *State v. Winkelmeier*, 35 Mo. 103, authority was claimed under a legislative grant of power, "whenever a majority of the legal voters" authorized the same, and the majority of those voting on the question were in favor of the grant; but the court said: "It is evident that the vote of 5,000 out of 13,000 voters is not the vote of a majority." The case of *Hogg v. Baker* (Ky.) 81 S. W. 726, was under § 64 of the Constitution as to the removal of a county seat, which requires "two thirds of those voting" to decide. That case, however, was decided largely on the ground that the voters were misled, and nothing appears in the record of the case at bar to show that the voters of Louisville were misled, except as it may be argued inferentially from the language of the statute and the ordinance and the smallness of the vote cast upon the question.

Little weight can be given the argument drawn from the fact that at a general election candidates for various offices may be elected, notwithstanding other candidates for other offices may have received more than twice as

many votes. The statute of elections provides the person receiving the highest number of votes for any office shall be declared elected to that office, and the election is decided by a plurality of votes. Moreover, it may well be considered that there is an essential difference between the action of electors in voting for a candidate for office, and in assenting to the creation of a municipal debt. The former is the exercise of a political privilege, the mere selection of a person to perform officially duties which have been annexed to a particular office; and it is fair to presume that those who do not participate in the election consent to be governed by those who do. But the latter is the authorization of a contract by which the people of the locality incur obligations, and bind their property to the payment of a debt; and it is natural to expect that the language used in relation to it will be different, that definite action will be required of a majority of the voters, and that it will be required that their assent thereto shall be expressed. And so we find it in the Constitution and the statute. If the submission were permitted to be, and were, in fact, submitted at an election at which no votes were cast except upon the proposition, it might very well be concluded that the words "two thirds of the voters of the city" meant two thirds of those who see fit to exercise their privilege, and that the ballot box is the only test to be applied. *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 637, 63 Am. Dec. 424. In this case the test of the ballot box shows that only one fifth of the voters who voted at the election gave their assent to the proposition.

There were many authorities cited on both sides of this question, but it would be unprofitable to review them in detail. A very interesting analysis of a large number of them is given in *South Bend v. Lewis*, 38 Ind. 512. It will be found that they have turned, in some cases, upon the settled policy of the Constitution which was under consideration, as in the case of *Metcalfe v. Seattle*, 1 Wash. 302, which at first blush appears to be directly in point against the conclusion reached by this court. In most of the cases, the court's conclusions were reached by considering, not only the language of the provision in question, but all other relevant sections of the instrument, as well as its general intent. These differ in the different cases, and it is not surprising that the courts have apparently differed in the weight which they have attached to the arguments drawn from them. Several of the cases cited have been doubted or qualified in subsequent cases. One of them (*Gillespie v. Palmer*, 20 Wis. 544), much relied on by counsel for appellees, has since been referred to by the chief justice of the Wisconsin court as one of a number of cases "which have long been a reproach to the court," as "judgments proceeding upon policy rather than upon principle." *Bound v. Wisconsin C. R. Co.* 45 Wis. 543. In all of the cases the object sought was the intent of the instrument.

In the case at bar not much consideration has been given to the debates of the convention, though the members who spoke appear to have given § 157 the same construction with this court; "for, as the Constitution does not

derive its force from the convention which framed it, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." Cooley, Const. Lim. 6th ed. pp. 80, 81. "Its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it." *State, Jones, v. Lancaster County Comrs.* 6 Neb. 474. These considerations have led us to reject the construction contended for by appellees, of which it may be said, in the language of the Ohio court in *State, Cope, v. Foraker*, 46 Ohio St. 677, 6 L. R. A. 422: "But one of the most obvious objections to this construction is, that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases, so different from the apparent meaning, as to warrant the belief that it never occurred, either to the framers of the Constitution, or to the people who adopted it." And in this case we cannot believe that any considerable number of the voters who read § 157 of the Constitution before voting for its adoption thought for a moment that that provision, upon its face restrictive of the power to create additional indebtedness, could be so construed as to authorize the creation of a \$1,000,000 debt, upon the vote of some 6,000 out of thirty-odd thousand voters actually at the polls. We are not unmindful of the need for parks in a great city, and the benefits of a park system such as the one proposed and in part instituted in the city of Louisville, but the people who are to bear the burden must give their assent to the creation of the debt to be incurred for the purpose.

There is another ground upon which this conclusion might be rested. The constitutional provision is restrictive. It forbids the creation of the debt unless upon the assent of two thirds of the voters, etc. Had § 157 provided, as in § 64, that it should not be authorized unless two thirds of the voters of the city "voting on the question shall vote for the same," that would not have required the legislature to authorize the submission of the question, nor the city authorities to submit it. So, as the right to submit might have been denied altogether, it might be given with additional restrictions, as the requirement of a three-fourths vote; and when the city council, by ordinance, provided for the submission to the vote of the people, it might have imposed an increased restriction. So that, if we were of opinion that the Constitution required only two thirds of those voting on the question, we must still look to the act and the ordinance to find if they, or either of them, require any additional prerequisite to the bond issue. The statute is as follows: "Sec. 2854. For the purpose of raising money for the purchase or

improvement of lands for park property, the general council of a city may, by ordinances, submit to the qualified voters of the city the question as to whether the city shall issue bonds, with interest coupons attached, to the amount and of the character set forth in such ordinances; and when such ordinance is passed, it shall, at the next November election, be submitted to the qualified voters of the city; and if it receives assent of two thirds of those voting, the bonds so voted shall be issued by the city, and delivered to the board of park commissioners." This requires the proposition to be submitted at the November election to the qualified voters of the city, "and if it receives assent of two thirds of those voting, the bond so voted shall be issued," etc. What is meant by those voting? Clearly, those voting at the November election. The ordinance is still more explicit. It provides: "Sec. 5. At the November election of 1894, there shall be submitted to the qualified voters of the city of Louisville, the question as to whether the city shall issue said bonds, and the said bonds shall not be issued unless, at said election, two thirds of those voting shall vote in favor of the issuing of said bonds as herein provided. In the event that two thirds of those voting at said election shall vote in favor of issuing said bonds, then the fact that they have done so shall be certified to by the mayor, upon said bonds, and the said bonds shall then, but only in that event, be issued by the city, and delivered by the mayor to the board of park commissioners of the city of Louisville, to be by the said board of park commissioners used and disposed of for the improvement of lands for park property as provided by law." This requires the submission at the November election of 1894, and provides that the bonds shall not be issued "unless at said election [i. e. the November, 1894, election] two thirds of those voting shall vote in favor of issuing said bonds. . . . In the event that two thirds of those voting at said election [the November election] shall vote in favor of issuing," etc. It is obvious that both the statute and the ordinance require the favorable vote of two thirds of those voting at the general election.

Landes, J., dissents from that part of this opinion which holds that questions submitted to the people must be submitted at the regular election, being of opinion that the provision in § 157, requiring the assent of two thirds of the voters "voting at an election to be held for that purpose," requires that there shall be a special election held "for that purpose," and that such special election cannot be held on the regular election day, the words quoted being a mandatory provision otherwise within the meaning of § 148. Landes, J., concurs, however, in the other principles stated in the opinion.

The other questions raised in the record need not be considered. For the reasons given, *the judgment is reversed*, with directions to sustain the demurrer to the first paragraph of the answer, and for further proceedings consistent with this opinion.

CALIFORNIA SUPREME COURT (Department 1).

John MULLAN, *Appt.*,
v.
STATE of California, *Respt.*

(.....Cal.....)

1. The courts are charged with knowledge, under Code Civ. Proc. § 1875, of whatever is established by law, and of all public as well as private acts of the legislative, executive, and judicial departments of the state.
2. A mere concurrent resolution of the legislature to which the executive approval is not affixed, as in case of a statute, although it is passed upon the governor's recommendation to ratify his appointment of an agent for the state, and expressly directs him to allow a certain compensation, is not an "express authority of law" which can authorize a contract which will be the basis for a claim against the state, under Const. art. 4, § 32, requiring "express authority of law" therefor, and § 15 of the same article providing that "no law shall be passed except by bill."
3. A state is not estopped from denying the validity of a contract made without authority, because the contractor has in good faith performed services under it, since he must at his peril know the authority of those who seem to act for the state.

(October 24, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action brought to recover compensation for services rendered to the state. *Affirmed.*

The facts are stated in the opinion.

Messrs. Reddy, Campbell, & Metson, for appellant:

It is not the office of a demurrer to state facts but to raise an issue of law upon the facts stated in the pleadings demurred to.

Cook v. De la Guerra, 24 Cal. 287; *Wise v. Williams*, 72 Cal. 544; *Harmon v. Page*, 62 Cal. 448; *Cameron v. San Francisco*, 68 Cal. 891.

The words "authority of law" have a broader meaning than that of a valid statute law enacted in the manner prescribed in the Constitution for the passage and approval of a bill.

Miller v. Dunn, 72 Cal. 462; *Lycoming F. Ins. Co. v. Wright*, 60 Vt. 515.

The sovereignty of a state gives it inherent powers to contract.

Piqua Branch of State Bank v. Knoop, 57 U. S. 16 How. 375, 14 L. ed. 979.

The legislature cannot create law otherwise than by a formal bill passed and approved by the executive.

Brooks v. Fischer, 79 Cal. 173, 4 L. R. A. 429.

The state is now estopped from denying the validity of the contract made with plaintiff.

Davis v. Gray, 83 U. S. 16 Wall. 203, 21 L. ed. 447; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302; *Indiana v. Milk*, 11 Fed. Rep. 309; *Piqua Branch of State Bank v. Knoop*, *supra*.

Messrs. W. F. Fitzgerald, Attorney General, and *W. H. Anderson*, for respondent:
The alleged contract of employment was in each instance made without express authority of law, and was and is void.

The governor had no authority to make this employment.

People v. Talmage, 6 Cal. 256; *San Francisco & F. Land Co. v. Banbury*, 106 Cal. 130.

A joint resolution does not meet the constitutional requirements of express law.

People v. Toal, 85 Cal. 383; *Collier & C. Lithographing Co. v. Henderson*, 18 Colo. 259.

The questions involved in this case can be raised by demurrer.

San Francisco & F. Land Co. v. Banbury, 106 Cal. 129; *Branham v. San José*, 24 Cal. 604; *People v. Hagar*, 52 Cal. 188; *Whiting v. Townsend*, 87 Cal. 515; *Faekler v. Wright*, 86 Cal. 210; *Cole v. Segraves*, 88 Cal. 105; *DeBaker v. Southern California R. Co.* 106 Cal. 257.

The state is not estopped.

Martin v. Zellerbach, 88 Cal. 300, 99 Am. Dec. 365.

Van Fleet, J., delivered the opinion of the court:

Appeal from the judgment entered upon failure to amend after demurrer sustained to the complaint. The complaint is in two counts. The first count alleges the following facts: That between the 12th day of December, 1878, and the 1st day of May, 1891, the plaintiff rendered services to the defendant, at its special instance and request, as the agent of said state, in acting in its behalf in the matter of recovering certain moneys paid by the state to the United States under the provisions of a certain act of Congress approved August 5, 1861, entitled "An Act to Provide Increased Revenue from Imports to Pay Interest upon the Public Debt, and for Other Purposes;" that the defendant promised to pay plaintiff therefor 20 per cent of all such moneys collected by him from the United States; that thereafter plaintiff collected from the United States, as such agent, and caused to be paid to said state, the sum of \$216,357.87; that no part of said 20 per cent of said sum has been paid to plaintiff; and that said plaintiff has presented his claim for the sum due him to the state board of examiners, as provided by law, and said board has refused to allow said claim, either in whole or in part. The second count is upon a similar cause of action for a smaller amount. The demurrer was sustained upon the ground that the alleged employment of plaintiff was unauthorized and void, and created no valid obligation against the state. It is suggested by appellant *in limine* that this objection does not arise on demurrer; that the allegation that plaintiff was employed by the state as its agent is one of fact, and is admitted by the demurrer; that, if such employment was not legal because made in a manner not binding upon the state, that

NOTE.—As to resolution as distinguished from statute, see also *State, Cranmer, v. Thorson* (S. D.) 33 L. R. A. 582; *State, Wineman, v. Dahl* (N. D.) ante 97.

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For resolution distinguished from ordinance, see *Crawfordville v. Braden* (Ind.) 14 L. R. A. 268; *Shaub v. Lancaster* (Pa.) 21 L. R. A. 661.

question can only be raised by answer and disclosed by evidence, but does not appear upon the face of the complaint. But the court will take cognizance of the fact that there could be no valid employment of plaintiff by the state for the purpose alleged without authorization by the lawmaking power; and, as we are further charged with knowledge of whatever is established by law, and of all public as well as private acts of the legislative, executive, and judicial departments of the state (Code Civ. Proc. § 1875, subds. 2, 3), the complaint must be regarded as laying before us whatever of authority there may exist in the law for plaintiff's employment, to the same extent as if such authority were expressly alleged. *Whiting v. Townsend*, 57 Cal. 515; *Fackler v. Wright*, 86 Cal. 210; *Cole v. Seagraves*, 88 Cal. 105.

Proceeding, then, to inquire as to the authority under which plaintiff assumed to act in the premises, we find that the only thing relied upon as tending to establish any special legislative authorization for the alleged employment is based upon these facts: In his biennial message to the legislature at its twenty-fifth session the governor made a statement that he had received information with reference to proceedings before Congress looking to the reimbursement of this state for certain expenditures made by it in suppressing Indian hostilities during the Modoc war, and in repelling prior Indian invasions and hostilities, and also of certain sums assessed against this state under the act of Congress approved August 5, 1861, to pay the interest on the public debt, and for other purposes, and wherein it is stated that he had appointed Capt. John Mullan to represent this state in said matters before the authorities at Washington, and recommends to the legislature "that these appointments be ratified and confirmed by you, and that you provide for his compensation to be paid out of the sums he may recover for the state, contingent, however, upon his success, it having been expressly understood that such compensation should be left entirely to your judgment and discretion." (Volume 1. Appendix to Journal of Senate and Assembly, 25th Sess. pp. 22, 23.) Acting upon this recommendation of the governor, the legislature, on March 3, 1863, adopted the following resolution:

Assembly Concurrent Resolution No. 20, relative to directing the governor to fix the compensation for services rendered by Captain John Mullan in collections of claims due the state from the United States.

Whereas, the governor and state surveyor general of this state have heretofore appointed Captain John Mullan, of San Francisco, California, agent and attorney, to represent the interests of the state of California before the authorities of the United States at Washington, D. C., in the matter of the claim of this state to the 5 per cent net proceeds of the sales of the public lands by the United States in this state; and also in the matter of the direct tax levied upon this state by the United States, under the act of Congress of August 6, 1861; and also of her claim arising during the Modoc war in 1872; and also under the provisions of the act of Congress of June 27, 1862; therefore, be it resolved by the assembly of California,

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the Senate concurring, that the appointments so conferred upon Captain John Mullan by the governor and surveyor general, respectively, are hereby ratified and confirmed, and the governor of this state be, and he is hereby, authorized and directed to fix the compensation for the services by Captain John Mullan heretofore, and that may be by him hereafter rendered, at 20 per cent of each of the sums or claims that may be by him collected from the United States, and to pay to him such per cent out of the moneys that may be collected by him and paid to this state on account of each of the foregoing matters respectively; provided, however, that the state shall not in any event become liable for any expenses, fees, and salaries of any nature whatever other than such contingent commission.

The resolution further provides for the turning over to Captain Mullan of all papers and vouchers with reference to the claims involved, and the taking of his receipt therefor. The references in the resolution to the appointment of Mullan by the surveyor general to represent the state in its claim to the 5 per cent proceeds on sales of lands is not here involved.

It is contended by the attorney general, and we think correctly, that these proceedings did not constitute any competent basis for the contract alleged within the provisions of the Constitution of this state. Section 32 of article 4 of our Constitution, so far as pertinent to the question involved, provides: "The legislature shall have no power . . . to pay or to authorize the payment of any claim hereafter created against the state . . . under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." And § 15 of the same article provides that "no law shall be passed except by bill." That the action of the governor and legislature did not constitute the enactment of a "law" within the purview of the Constitution is quite obvious. It is, in fact, not contended that the resolution is to be regarded as a "bill" within the meaning of the Constitution, but it is urged that the words "express authority of law," as there used, have a broader signification than that of a valid statute law enacted with all the formalities requisite in the case of a bill, and that it was competent for the legislature to ratify the act of the governor in assuming to appoint the plaintiff by a resolution such as the one here quoted, and that such action constitutes "express authority of law." But we are unable to coincide in this view. The language of the Constitution is in itself a complete answer to the proposition. It provides in express terms that there shall be but one mode of enacting a "law" thereunder, and that mode is the exclusive measure of the power of the legislature in that regard. A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it. The fact that it may have been intended to subserve such purpose can make no difference. The requirements of the Constitution are not met by that method of legislation. "Nothing becomes law simply and solely because men

who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." Cooley, Const. Lim. p. 155, chap. 6. It is true, as contended, that legislation for certain limited purposes by means of resolutions or legislative orders is in use to some extent in certain of the states and in Congress. But it will be found that in most, if not all, instances, it is under a Constitution which either expressly recognizes it, as does the Constitution of the United States, or one which at least does not forbid it. And it will be usually found to take the form of a resolution, requiring the assent of the executive to give it effect. In Congress this form of legislation is regarded as a bill, and treated with the same formalities. Even if this mode of legislation were competent under our Constitution, the resolution relied upon would not arise to the dignity of law, since it lacks the essential of executive approval. In *Collier & C. Lithographing Co. v. Henderson*, 18 Colo. 259, under a Constitution containing restrictions similar to those found in that of California, it was held that a resolution adopted by both houses of the legislature for a purpose not dissimilar in principle from that intended to be subverted by the one under consideration was not "a law of the state," as it "was not passed by bill." And see *People v. Toal*, 85 Cal. 333.

The case of *Miller v. Dunn*, 73 Cal. 462, is cited by appellant as authority for the proposition that the language "express authority of law" is not confined in its meaning to a statute law enacted in the manner prescribed in the Constitution. But in that case the statute under which the contract was made and the service performed had in fact been passed with all the formalities requisite under the Constitution to a valid law, and it was held that such an act, although unconstitutional, was nevertheless a "law" in the sense that it would support an appropriation to pay for the work done under color of its apparent grant of authority, and before its invalidity had been declared by the courts. In this case the legislature did not pretend to follow the formal requirements of the Constitution in its attempt to grant authority for the contract, and its action lent no color of regularity to plaintiff's employment. Moreover, we are not disposed to extend the doctrine announced in *Miller v. Dunn*. The case of *Brooks v. Fischer*, 79 Cal. 173, 4 L. R. A. 420, merely holds that under § 8 of art. 11 of the Constitution, a city charter adopted by the freeholders of a municipality may be approved by a concurrent resolution of the two houses of the legislature, without the consent of the executive, because that provision only requires the assent of the "legislature," and does not contemplate the passing of an act for the purposes of such approval; it being expressly held

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"that the legislature is one thing and the law-making power of the state another." It is not authority for the proposition that the legislature can enact "laws" without submitting them to the governor for his consent.

There is no merit in the claim that the employment of plaintiff was authorized by § 380, subd. 5, of the Political Code, which, in defining the powers of the governor, provides that "whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to property, or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state, and may employ such additional counsel as he may judge expedient." That provision has no application to the facts of this case. The action of the governor was not attempted to be taken under that section, nor is the action brought upon any such theory. The complaint does not aver that plaintiff was employed as counsel, or even that he was an attorney at law, and so eligible for the character of employment there provided for. He was employed as a mere agent. While an attorney might be employed as agent, one not an attorney could not be employed for the service contemplated in that section. Nor is there anything in the point that the state is now estopped from denying the validity of the contract with plaintiff, since he has in good faith performed the service. The question of equity or good faith cannot affect our consideration in this case. It is not like a transaction between private individuals. As suggested in *Miller v. Dunn*, *supra*: "There is no moral obligation on the part of the state which can be enforced upon equitable principles, nor does the good faith of the party dealing with the state cut any figure in the case, if, in fact, the work was done 'without express authority of law,' for this provision was placed in the Constitution to cut off all claims based upon mere good faith and equity." And says Mr. Bishop: "The government is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known rendering such a consequence impossible. So that the government is bound only when there is an actual authorization." Bishop, Cont. § 993. One dealing with public officers is charged with the knowledge of, and is bound at his peril to ascertain, the extent of their powers to bind the state for which they seem to act. And, if they exceed their authority, the state is not bound thereby to any extent. Throop, Pub. Off. § 551. See also *State v. Horton*, 21 Nev. 466.

We think the demurrer was properly sustained, and the judgment is affirmed.

We concur: Harrison, J.; Garoutte, J.

(In Banc.)

H. W. PHILBROOK, Admr., etc., of John
Levinson, Deceased, *Appt.*,

v.

William J. NEWMAN *et al.*, *Respds.*

(.....Cal.....)

1. The basis for fixing the purchase price of a deceased partner's interest is fixed by articles of partnership at the inventory and appraisement provided for therein to be taken annually as the basis of estimating profits, where the articles further provide that in the event of the death of one partner "the inventory provided for herein shall be taken as expeditiously as possible," allowing a representative of the estate to participate in the business until all is settled, and providing that the amount ascertained to be due the estate shall be paid in twelve equal monthly instalments, but giving the surviving partners an option to continue the partnership with the estate of the decedent as a member. [*Court equally divided on this point.*]

2. A contract is not void as allowing surviving partners to fix their own purchase price of the interest of a deceased partner when it permits a representative of his estate to participate in the inventory, fixes a definite amount for the value of store and office fixtures, and provides that the merchandise shall be taken at its actual value, not exceeding the original cost, and solvent debts taken at their face value.

3. The goodwill of the business passes to surviving partners upon their purchase of the interest of the deceased at its inventoried and appraised value, under a provision of articles of association giving them and their successors the right and privilege of continuing the business under the firm name.

4. Legatees of full age, who demand and compel a distribution to them of the proceeds of a sale by an executor of the interest of a deceased partner, although protesting at the same time that they do not admit that this is all that is due, thereby ratify the sale, and cannot afterwards deny the executor's power to make it, or claim anything additional on account of the goodwill of the business for which nothing was received. [*Per Beatty, Ch. J., Henshaw and Temple, JJ.*]

(November 4, 1896.)

APPEAL by plaintiff from an order of the Superior Court for the City and County of San Francisco in favor of defendants in a proceeding brought to compel an accounting of the affairs of the partnership of which plaintiff's testator was a member. *Affirmed.*

The facts are stated in the opinions.

Mr. H. W. Philbrook for appellant.
Messrs. Reinstein & Eisner and E. R. Taylor for respondents.

Garoutte, J., delivered the opinion of the court:

William J. Newman, Benjamin Newman,

and the deceased, John Levinson, were partners in the merchandise business, and held interests therein in proportion to the amount of capital invested by each. The last articles of copartnership between these parties were entered into January 24, 1889; and, among other things, they provided in detail the manner in which an inventory and appraisement of the partnership business should be taken annually, which inventory and appraisement should form the basis in estimating the net profit going to each partner. The articles further provided as follows: "In the event of the death of one of the copartners the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay. The surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person selected, designated, and empowered by the heirs or legal representatives of the deceased partner to represent the interest of his estate in the copartnership. Such person so representing the interests of the estate of the deceased partner shall have accorded to him access to all the books, papers, and accounts of the firm, and may, at his election, remain and continue at the place of business thereof until all matters relating to the interests of the deceased partner shall have been fairly and satisfactorily arranged and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been ascertained and determined. The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the copartnership shall be paid to the heirs or legal representatives of the deceased partner in twelve successive and equal monthly instalments, commencing within one month from the time the amount due has been ascertained and determined; for the amount of which instalments the surviving partners shall execute and deliver to such heirs or legal representatives their promissory notes, payable as aforesaid, without interest, and satisfactorily secured by indorsement or otherwise; provided, however, that the surviving partners shall have the option to continue the said copartnership; the estate of the deceased partner taking the place of the decedent on such terms and conditions as may be agreed upon between the surviving partners and the legal representatives of the deceased partner, but it shall not be obligatory upon the surviving partners so to do. The surviving partners and their successors shall also have the right and privilege of continuing the business under the said designation and name of Newman & Levinson."

Levinson died February 25, 1890, and forthwith the Newmans made an inventory and appraisement of the partnership business, as provided by the articles of partnership, by which inventory and appraisement it was determined that the net amount of Levinson's

NOTE.—As to the rights of surviving partners to carry on business, see also *Stewart v. Robinson* (N. Y.) 5 L. R. A. 410, and note; *Valentine v. Wysox* (Ind.) 7 L. R. A. 788, and note.

As to transfers of goodwill, including the name of the establishment, see *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462, and note.

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As to goodwill of partnership, see *Brass & L. Works Co. v. Payne* (Ohio) 19 L. R. A. 82, and *Knoedler v. Glaszner* (C. C. App. 2d Cir.) 20 L. R. A. 728.

interest in the assets of the firm was the sum of \$30,790.88. For this amount defendants prepared, and procured to be properly indorsed, their notes, twelve in number, for the sum of \$1,782.57 each, bearing date February 26, 1890, payable at successive monthly intervals following that date, and within one month after Levinson's death tendered them to Raveley, the executor of the will of said deceased, who had then received letters testamentary from the superior court. In July, 1890, the Newmans filed a petition in the court, alleging that they were ready and willing to purchase the interest of the deceased in the partnership upon the terms stated in the articles, and had requested the executor to allow them to do so; that he had refused; and praying an order directing him to convey that interest to them. The court sustained a demurrer to such petition, on the ground that it had no jurisdiction to grant the order prayed for. Thereafter, on September 6, 1890, Raveley, the executor, being of the opinion that he had the power to accept the terms proposed by the Newmans, received the said notes, and on that day executed to them two certain papers, the first of which acknowledged the delivery of the notes "in pursuance of the provisions of the articles of partnership . . . for the interest of the estate of said Levinson in said partnership." The other paper set out the transaction more in detail, and stated that the amount of such notes was the amount of Levinson's interest in the assets of the firm, as determined by the said inventory and appraisement, and that the notes were received by the executor "in full payment and satisfaction of the amount due the estate of John Levinson, deceased, for the interest of said deceased and of his said estate in the copartnership firm as the same has been ascertained, as above stated." Levinson's residuary legatees were his mother and two sisters, all of full age. They, in writing, notified the Newmans on March 5, 1890, that they did not desire to employ any person to assist in taking the inventory of the assets of the late firm, then in progress, and the estate of the deceased had no representative in that undertaking, though the executor was often about the place of business, and both he and the legatees knew what was being done. No account of the goodwill of the firm was taken in the inventory made by the defendants, nor was it in the inventory and appraisement of the estate returned to the court by the executor. In the inventory and appraisement returned by the executor the value of the interest of Levinson in the partnership assets was stated at the same sum as that fixed by the appraisement of the defendants, to wit, \$30,790.88, and was adopted by the appraisers on the strength of that appraisement. The omission to value the goodwill as part of the estate by the executor was resented by the legatees, and on this ground they petitioned the court to remove Raveley from his office of executor. He thereupon resigned; his accounts were settled; successive administrators with the will annexed carried on the administration, until finally H. W. Philbrook was appointed, and he has been substituted as 84 L. R. A.

plaintiff of record herein. This action is essentially one in equity, sounding largely in fraud, and asking for an accounting of the partnership affairs. The case has been before us in the past upon an appeal from the judgment (107 Cal. 602), where may be found an outline of the purposes of the action and the general framework of the pleadings.

Fraud is charged in the body of plaintiff's bill, and upon that ground relief in a great measure is sought. But in the opinion of the trial judge Hon. W. T. Wallace, which opinion is set forth in the record, it is stated that there is no evidence whatever to support such a charge. And, after a careful examination of the evidence, we find nothing therein even tending to show the practice of any fraud upon the heirs and legatees of the dead partner. It follows that all question of fraud is out of the case, and the only important question remaining is: Had the executor, under the articles of copartnership, the right to consummate the transfer of the deceased partner's interest in the business to the surviving partners for the consideration specified in said articles? Although this interrogatory presents a clear-cut proposition of law, still it is well to say that, if this transfer of the partnership interest should be set aside, as is here sought by appellant, and all parties be placed *in statu quo*, as of the day the transaction was had, no substantial results favorable to appellant's interests would ensue. It would be a valueless victory, for, as said by the trial judge, upon an accounting the sum realized by the legatees would fall far short of the amount actually paid by the surviving partners to them. In appellant's brief the law is conceded to be: "Where the copartners in the partnership contract—articles of partnership—do actually contract that on the death of a partner the partnership property and business belongs to the survivor or survivors, fixing the price at which it is to be taken by the survivor or survivors, such contract is binding according to its terms." Upon such concession we are brought face to face with the articles of copartnership for the purpose of weighing and testing them by the formula furnished by appellant; and at the threshold of the investigation we are met by the objection that, at the date when those articles were entered into, the deceased partner, Levinson, was incapable, by reason of mental incapacity, of entering into any contract whatever. The mental incapacity of Levinson at the time was not even suggested in plaintiff's bill, and his mental status does not appear to be an element of the case that attracted serious attention at the trial. But some evidence came before the court upon the question without objection, which, even in the absence of direct issues raised by the pleadings, should be considered as bearing upon the question. *Crowley v. City R. Co.* 60 Cal. 628. There are various good reasons why this evidence should not be held sufficient to invalidate the articles of copartnership, and as an all-sufficient reason we suggest that the implied finding of the court was against any such contention. Appellant's principal witness to the point testified

that, if Levinson had read the articles of copartnership, he would have understood them, and there is no evidence in the record that he did not read them. As a salient circumstance bearing upon Levinson's mental capacity at that particular time, it may be noticed that some few days thereafter he executed his last will and testament, the will under which this administrator is now acting in prosecuting this litigation. It further appears that, upon his return from Europe after the execution of these articles, for several months, and up to the time of his death, he gave his personal attention to the business of the firm, as he had always done in the past. We are satisfied there is nothing in the point.

We have quoted in detail that portion of the partnership contract which declares what shall be done with the business in case of the death of one of the partners. In this respect the provision of the contract is not well drawn. It is not clear, but, upon the contrary, somewhat vague and indefinite. At the same time, when carefully read and considered, but one conclusion can be arrived at; and that is that, upon the death of one of the partners, the surviving members of the firm had at least the privilege and option of buying the interest of the deceased partner in the business upon certain terms. It is claimed upon the part of the Newmans that under the contract they were bound to do so. But to support the validity of the contract in this regard they are not compelled to go to such length; for, if they had an option by the articles of copartnership to purchase upon stated terms, then they had the undoubted right to exercise that option, and take the interest of the deceased partner, if they were so disposed. *Harbster's Appeal*, 126 Pa. 3. In that case it is said: "It requires no argument to show that the interest of the deceased partner ended when the firm gave notice that they would take it in accordance with the terms of the agreement." And in the case at bar, if the Newmans simply held an option to purchase the interest, there can be no question but that they exercised that option in favor of purchasing. If it should be held that the copartnership articles did not give the surviving partners a right to purchase, then the presence of all that portion of the contract providing for the mode and manner of payment by the Newmans for the deceased partner's interest would be inexplicable. It is provided in great detail that they should give their equal monthly instalment notes, running over a period of twelve months, in payment of the interest of the deceased partner. Such provision beyond question contemplated a sale, and that a sale to the surviving partners in case of the death of one of the firm was in the minds of all parties when the contract was made, does not admit of doubt. There can be no other reasonable construction of the contract.

It is insisted that the language here used provides no fixed and definite amount of money to be paid by the surviving partner for the interest of the deceased partner, and it is claimed that for such reason there is no contract, at least no contract sufficiently clear

and explicit to be capable of enforcement. There is no case cited by appellant that goes to the length here insisted upon. But, upon the contrary, that is certain which may be made certain, and many of the cases bearing upon this question rest upon this principle. Numberless cases might be cited where courts have recognized the right of the partners to stipulate in the copartnership articles that the purchase price for the interest of a deceased partner shall be fixed by an inventory and appraisement to be taken after the death of such partner. In the very nature of things, a fair purchase price of an interest in the firm at an indefinite future time would be incapable of ascertainment. To fix the amount in advance would be simply a speculative gamble upon the part of all parties concerned, and hardly justifiable either in morals or law.

It is further contended that there is no mode whatever provided in the articles by which to ascertain the value of the interest of the deceased partner; and it may well be conceded that the provisions of the contract in this regard are not what they should be. In this particular the instrument is unhappily drawn, and well serves the purpose of being an invitation for litigation. As we have already seen, the articles provide for an annual inventory and appraisement, in order that the actual financial status of the concern may be determined. This inventory and appraisement was provided for in order that the annual profit or loss of each partner might be known. A succeeding subdivision of the contract, which we have heretofore quoted in full, then in part declares: "In the event of the death of one of the copartners, the inventory provided for herein shall be taken as expeditiously as possible, and without unnecessary delay. The surviving partners, if requested so to do, shall admit to the place of business of the firm at least one person selected . . . by the heirs or legal representatives of the deceased partner, to represent the interest of his estate in the copartnership, . . . and may at his election remain and continue at the place of business thereof until all matters relating to the interest of the deceased partner and his estate shall have been fairly and satisfactorily arranged and settled and adjusted, and the total amount due to the estate of the deceased partner shall have been so determined. The total amount ascertained and determined to be due the estate of the deceased partner on account of his interest in the copartnership shall be paid to the heirs or legal representatives of the deceased partner in twelve successive and equal monthly instalments." If the language of the contract had included the words "and appraisement" after the word "inventory," there would have been no question of indefiniteness, and no possible technical objection as to the matter of construction. But the absence of those two words should not nullify the contract. It would be carrying the doctrine of technicality too far, if we should so hold. The true intent of the parties is plainly apparent from the language used. And that intent was that an inventory and

appraisement, as provided for in the articles, should furnish the basis for fixing the purchase price of the deceased partner's interest. Such is the fair construction of the language, taking it altogether, and, indeed, the only construction which can be given it. To say that the parties to the contract, while providing for a sale, and also providing for the manner and time for payment, never intended to provide as to the amount which should be paid, or to fix any mode by which the amount could be determined, would be going to lengths entirely unauthorized by the instrument itself. We hold that the mode and manner of fixing the amount of the purchase price are found within the language of the instrument itself, and that mode and manner is the inventory and appraisement provided for in a previous portion of the contract.

Conceding that the inventory and appraisement mentioned in the articles of copartnership were intended by the partners to be used as the basis for fixing the value of a deceased partner's interest, then appellant contends that the contract was void as placing it in the power of the surviving partners to fix their own purchase price. There is no force in this contention. The contract contemplates the presence of a representative of the deceased partner during all these times, and incidentally it may be suggested that the executor was present during the time, more or less, and that both he and the legatees had full knowledge of what was being done, and ample opportunity to be present at all times and upon all occasions, to assist either personally or by agent. Again, as to the store and office fixtures, the value is fixed at a certain and definite amount. As to the stock of merchandise on hand, it is to be appraised at its actual value, but not to exceed its original cost. All solvent debts are to be taken at their face value. We see nothing so indefinite in these facts as to nullify the contract. The actual value of a piece of merchandise can be determined, and likewise it can be determined what is and what is not a solvent account. They are matters capable of ascertainment, and every partnership in the country is constantly engaged in determining them. There is certainly nothing so indefinite and uncertain as to the valuation to be fixed upon these assets as to in any way render the contract nugatory. In *Harbster's Appeal*, cited by appellant, the purchase price was fixed at the previous annual appraisement, with the proportion of profit or loss for the present year added or deducted, as the case might be. It certainly in that case was no easier to fix the amount of the profit or loss than it was in this case to fix the actual value of the stock, or determine what debt was a solvent account. Indeed, both of those factors of the business were necessary elements to be determined before the profit or loss could be fixed. In another of appellant's cases—*Blake v. Barnes*, 26 Abb. N. C. 208,—the purchase price by the surviving partners upon the death of a member of the firm was to be determined by an inventory and appraisement to be made as follows: “(b) Accounts overdue at a fair estimate, to

be determined, if necessary, by arbitration. . . . (c) . . . Rejected machinery or any other property or merchandise for which the firm is not willing to allow the valuation inventoried, or hereinbefore provided for, at the price offered by the highest bidder. (d) For the stereo and electrotype plates, engravings, . . . a sum equal to the gross profits of the firm for the last two complete business years preceding the time of settlement.” It was not suggested that such a character of valuation avoided the contract, although the case was bitterly contested on other grounds. The case of *Simmons v. Leonard*, 8 Hare, 581, goes away beyond the cases just cited. It was there provided that the surviving partners should take the interest of the deceased partner at a valuation shown by the last annual accounting, the articles having provided for annual accounts. A partner died, and no annual accounts had been taken. The representative of the deceased partner, as in this case, contended that there could be no sale, as the purchase price was not fixed. The vice chancellor said: “The rule which justice and common sense would apply in such a case is, I think, too clear for serious argument, the proviso for sale in one event, that of the term running out, and the proviso for paying out a deceased partner's share (dying during the term) by instalments, is conclusive evidence of an intention and agreement, that the death of a partner during the term should not work a dissolution of the whole partnership, but that the survivors should have a right to carry it on, with the accommodation of paying off the executors of a deceased partner by instalments.” And, in conclusion, he held the contract for a sale good, and that the purchase price should be determined by an accounting.

In *Dinham v. Bradford*, L. R. 5 Ch. 519, it is held, in effect, that the articles of copartnership might provide that the purchase price of a deceased partner's interest in the business should be fixed by three disinterested parties. In *Quintinan v. English*, 44 Mo. 46, the value of the interest of a deceased partner was to be fixed by an appraisement made after his death, and, in case of a dispute as to the valuation of the stock, the matter was to be submitted to three arbitrators. The court held such an agreement valid and binding. Indeed, it may be suggested that the authorities are practically unanimous that any question of indefiniteness or uncertainty as to the amount of the purchase price, or the manner or mode in which such price is to be arrived at, in no way affects the right of the surviving partners under the partnership contract to buy. And it is held in many cases that such conditions only result in casting the burden upon the trial court to take an accounting and fix the price. We conclude that the contract is valid and binding in all respects; that the amount of the purchase price for the deceased partner's interest in the business was fixed by the articles with such sufficient certainty as to deny the court the right to hold a general accounting. And, in the absence of a showing of fraud, to some extent at least, in the making of the inventory and appraisal

ment which formed the basic element in fixing the purchase price, the transaction should be upheld.

While this litigation, judging by the size of the transcript and briefs before us, has now assumed somewhat mammoth proportions, there was a time in its early history when but a single matter was involved. And that matter arose upon the contention of the administrator that the goodwill of the business was not included in the inventory and appraisal of the property of the deceased returned by the executor to the probate court. Owing to the views we entertain as to the validity of the contract, this contention may be disposed of in a few words. The contract of partnership provided: "The surviving partners and their successors shall also have the right and privilege of continuing the said business under the said designation and name of Newman & Levinson." We have no doubt that the goodwill of the business passed to the surviving partners under this provision of the contract, and in no sense formed an asset of the estate. Much could be said upon this question showing the instability of appellant's claims in this regard, but we deem it unnecessary.

The order appealed from is affirmed.

We concur: **McFarland, J.; Van Fleet, J.**

Beatty, Ch. J., and Henshaw and Temple, JJ. :

We concur in the judgment. We do not think we can say, over the implied finding of the trial court, that the execution of the partnership articles was procured by fraud, or by the use of undue influence. The question is argued on the assumption that the Newmans were contracting with the expectation that they would be the survivors. We do not think we can assume that. Such a consideration was proper to be urged upon the trial court under the charge of fraud, and evidence could have been addressed to that point. It does not appear that any such question was tried. It does appear that Levinson was then ill, but we do not find that the illness was deemed mortal. He lived more than one year thereafter, and during a portion of that time was able to attend to business. But the advantages of the agreement are not all on one side. In case of a dissolution by death it would have been the privilege of the surviving partners, in case there was no provision made for such an event, to have stopped the business and to have gone into liquidation. In such case the goods would have been sold at a sacrifice, and the estate would have realized nothing for the goodwill.

As to the construction and effect of the twelfth article of the partnership agreement between the defendants and their deceased partner, our views do not coincide with those expressed in the preceding opinion. The meaning of that article is, of course, the main question in the case, and for two years after the death of Levinson it was the only question; the attack upon the validity of the agreement based upon the alleged mental incapacity of Levinson and the charge of un-

due influence by his surviving partners being an evident afterthought. So much stress, however, has been laid upon this matter in the argument, and it forms so large and so essential a part of the charge of fraud, to the elaboration of which the voluminous brief of appellants is mainly devoted, that it cannot be ignored. The fact that the validity of the partnership agreement is affirmed by the implied finding of the superior court, and that there is substantial evidence to support such finding, is sufficient, as shown in the preceding opinion, to put an end to the question so far as it is material to the decision of this appeal, but with respect to the matters so vehemently and intemperately argued upon the part of appellant, and especially with reference to the torrent of vituperation poured out upon Mr. Justice Harrison, it is important to note that never upon any occasion during the time that he was acting as attorney for executor Raveley was there the slightest hint or suggestion to the effect that the partnership articles were in any respect invalid, or that Levinson, at the time he signed them, was mentally incapacitated, or subjected to the slightest degree of undue influence. On the contrary, the whole dispute from the beginning, and for two years after the death of Levinson, was as to the construction of the agreement, and in particular whether, according to its terms, the estate of Levinson was entitled to separate and additional compensation for his interest in the goodwill of the business of the firm. The mother and sisters of Levinson—all adults—and Mr. Philbrook, their attorney, assumed as a fact unquestioned that the contract was entirely valid, and that the rights of all parties were dependent upon its proper construction. Under these circumstances it would have been strange, indeed, if the attorneys for the executor had not taken the same view. Naturally and inevitably they confined their attention to the meaning of the contract, and to the steps necessary to be taken in carrying it out according to the intention of the parties. They (the firm of Jarboe & Harrison) had been employed by the executor within a few days after the death of Levinson, and Mr. Philbrook shortly afterwards was employed by the mother and sisters of the decedent to look especially after their interests. From the very first there was an open difference of opinion between these attorneys as to the meaning of the partnership agreement with respect to the right of Levinson's estate to be paid an additional compensation for his interest in the goodwill of the business, over and above the appraised value of his interest in the stock of goods, fixtures, accounts, and other tangible assets of the firm. Jarboe & Harrison took the position, which they always maintained openly and unequivocally, that, according to the proper construction of the agreement, the surviving partners took the whole interest of the deceased partner, including the right to continue the business under the name of Newman & Levinson, upon payment of the appraised value of his share of the assets, to be ascertained by an inventory and appraisal according to the annual custom of the

house, and that no separate allowance for goodwill was contemplated or provided for. Mr. Philbrook took the opposite view, which he likewise consistently maintained. There was no other difference between the parties or their legal advisers, and, when the inventory and appraisal were made, their fairness and correctness, so far as they went, were not disputed, the only objection on the part of Mr. Philbrook and his clients being that it made no allowance for the value of the goodwill. No charge of fraud, or undervaluation of assets, or overstatement of liabilities in the appraisal, was then, or ever during Judge Harrison's connection with the case, made or suggested. The dispute was wholly upon a question of law,—i. e. the construction of a contract,—and as to this there was, as above stated, no equivocation or concealment whatever.

Mr. Philbrook, however, seems to think that Jarboe and Harrison were guilty of a species of disloyalty to his clients, because, notwithstanding their opinion to the contrary, they did not sustain him in his position, and advise their client accordingly. But this contention is utterly unreasonable. They were attorneys for the executor, who was trustee not only of the legatees, but also of the creditors of his testator, and it was their imperative duty to advise him to proceed according to the true construction of the agreement as they interpreted it, and especially to see that he wasted no portion of the estate in fruitless litigation. In view of the difference of opinion between them and the attorney for the legatees, it was natural that they should take time to consider, before deciding a question so delicate and so important, and equally natural that they should wish to submit the decision of the matter to the probate court. But when that court, in the proceedings instituted by the Newmans to compel the executor to transfer to them the interest of the deceased partner, declined to give a construction to the agreement upon the ground that it had no jurisdiction to decide upon the matter, the responsibility was thrown upon the attorneys for the executor to decide whether he should accept or reject the tender which the Newmans had made of the appraised value of Levinson's interest. Being obliged to take the responsibility of deciding, they naturally decided according to their own construction of the contract, and not according to Mr. Philbrook's. Differing, as we do, from the views which they entertained, we should never have thought of imputing a bad motive for their decision, if for no other yet for the simple reason that, if wrong, it could harm no one but themselves and their client. A large part of Mr. Philbrook's tirade is based upon the assumption that Jarboe and Harrison did not really entertain the opinion which they expressed, and that they only advised the executor to the course that he took because they were acting in collusion with, and in the interest of, the Newmans. The absurdity of this position is manifest from the fact that any settlement between the executor and the Newmans, not made in accordance with the true construction of the

contract, could only involve the parties to such settlement in loss and difficulty, and could not possibly foreclose or prejudice the rights of the residuary legatees.

By accepting the money and notes tendered by the Newmans in full payment for the interest of his testator in the firm, the executor placed himself in the position of unequivocally refusing to proceed against the surviving partners on account of the value of the goodwill, and thereby gave to the residuary legatees the right to ask, as they ultimately did, for his discharge, upon the ground that he was neglecting the duties of his trust. As to the executor, this was the sole effect of erroneous advice on this point. As to the Newmans, the effect of a settlement unauthorized by the probate court, and unwarranted by the terms of the partnership agreement, would simply be to expose them to an action for an accounting,—this very action,—in which the most rigorous and burdensome rules for computing the interest of Levinson in the assets of the firm and profits of the business would be enforceable against them at the option of the administrator with the will annexed. To suppose, as the argument does, that the attorneys for the executor were deliberately giving him advice which they knew to be bad, in order to serve the interest of the Newmans at the expense of the legatees, when the only effect of the course advised would be to expose the executor to censure and punishment, and the Newmans to certain loss, is rather too heavy a draft on human credulity. But it is not alone the acceptance of the tender made by the surviving partners, and the advice upon which the executor acted, that furnish grounds for Mr. Philbrook's suspicions. It is the secrecy of the transaction, and the fact that the receipts or acknowledgments given by the executor were in the handwriting of, and were witnessed by, a gentleman who, at the date of the settlement, had been nominated by a leading political party of the state for a seat on this bench, that excites his deepest indignation. He can see in these circumstances nothing but a deliberate attempt to defraud his clients and to corrupt this court.

As to the secrecy of the transaction, the simple truth is that Mr. Philbrook and his clients were not called in to witness the payment of the money or the delivery of the receipts, and there was no reason why they should be present. It was not necessary that they should be there to protest in order not to be bound by the settlement. Their rights were not being concluded, or in any wise prejudiced. The fact that the notes and money were in the hands of the executor was nothing to them. The time for presentation of claims of creditors had not elapsed, the time for filing a first annual account had not arrived. No part of the money in the hands of the executor could then, or for months thereafter, be applied in payment of claims or legacies; in short, neither the executor nor the Newmans could gain the slightest advantage, nor the legatees suffer the slightest loss, by concealment of the fact that the settlement had been made. And accordingly we find

that upon the very first occasion calling for a disclosure of the fact and the terms of the settlement, such disclosure was fully and unreservedly made in the most direct and certain terms. The settlement was made in September, and in November following, in response to a demand for an amended inventory of Levinson's estate, which should include the item of goodwill of the business, the surviving partners served upon Mr. Philbrook their written answer, which contained, among other things, the following passage: "And deny that said William J. Newman, or said Benjamin Newman, has not fully accounted to said executor of said estate for any and all moneys, interests, and claims due to said estate from said William J. Newman or said Benjamin Newman, or either of them, and aver, on the contrary, that they have fully accounted for any and all claims, payments, and sums due said estate in the manner set forth in said memorandum in writing, and in this behalf said William J. Newman and said Benjamin Newman aver that after the appointment of said S. W. Raveley as the executor of the last will and testament of said John Levinson, deceased, said executor requested them—said William J. Newman and Benjamin Newman—to account to him for the interest of said decedent in said copartnership, and said William J. Newman and said Benjamin Newman did thereupon account to him and exhibit to him, said executor, all the books and assets of every kind belonging to said copartnership, and it appeared therefrom that the entire interest of said decedent in the assets of said copartnership amounted to the sum of \$20,790.80; and thereupon said William J. Newman and said Benjamin Newman elected and decided, under and in accordance with the provisions of said memorandum in writing, to purchase and pay for the interest of said decedent in said copartnership, and thereupon executed to said S. W. Raveley, as executor aforesaid, twelve certain promissory notes, bearing date the 26th day of February, 1890, payable at monthly intervals thereafter, each for the sum of \$1,732.57½ (said promissory notes aggregating the sum of \$20,790.80), in full payment and discharge of the interest of said decedent in said copartnership business, as the same had been ascertained and determined by the inventory and appraisal thereof, made in accordance with the provisions of said memorandum in writing." Mr. Philbrook knows the meaning of a plain statement in plain English, and therefore it is not to be doubted that from and after the 19th day of November, 1890, he and his clients knew that executor Raveley had accepted from the surviving partners their notes for \$20,790.80, in full payment for his testator's interest in the copartnership. He knew then and ever afterwards that Raveley, acting under the advice of his attorneys, would refuse to prosecute an action against the Newmans for a further accounting, and that the legatees, if they desired to have such an action instituted, must procure the removal of the executor, and the appointment of an administrator with the will annexed, who would be guided by his advice. This is the course which was taken just one

year after Mr. Philbrook was advised of the settlement, and, since he allowed a whole year to elapse after receiving the information before taking the only action that the settlement called for, he can hardly complain that the fact was not disclosed two months sooner than it was. As to the fact that Mr. Harrison, after his nomination for justice of the supreme court, continued to advise Executor Raveley in a matter in which he had been employed long before his nomination, and the further fact that he drew up and witnessed the papers which passed upon the settlement, it seems scarcely credible that a normal mind could regard them as evidence of fraud, or as an attempt to corruptly influence the decision of this court. But it is out of these simple circumstances that Mr. Philbrook has constructed his elaborate theory of fraud and corruption. The truth is there is not only no foundation for the argument upon this point, but the fact which it seeks to establish is totally irrelevant. The motives which may have prompted Raveley's attorneys in giving their advice, the advice itself, and the action taken in consequence of it, have not in the slightest degree affected the rights of Levinson's mother and sisters. If the advice was correct, as held in the preceding opinion, there never was any ground of complaint. If it was incorrect, the settlement did not bind the estate, and the Newmans remained accountable for the true value of Levinson's interest at the time of his death, or at the option of his representatives, for the profits of the business which they continued to carry on.

If these views are correct,—and we have no doubt that they are,—the whole question of fraud and corruption so gratuitously imported into the case may be dismissed from further consideration, and attention confined to the questions upon which the decision of the appeal necessarily depends.

The agreement between the Newmans and Levinson, which by the preceding opinion is held to be a contract of sale, properly bears the construction put upon it. It was within the terms of the agreement and the contemplation of the parties that in some way a purchase by the survivors should be made. If the contract were in other respects free from objection, the case would be the not unusual one where the partners provide for the purchase by the survivors of the interest of a deceased member of the firm. Upon the exercise by the survivors of their right, the sale would be complete, and the surviving partners would become debtors to the estate of the deceased partner, with the duty of accounting with his representative for the value of the deceased partner's interest. Cases are not rare where contracts of this nature have been entered into and enforced. But, when upheld, it is because they are certain and specific in their terms, and unobjectionable upon any equitable consideration. The plan adopted by these partners for arriving at the value of their annual profits by deducting from their assets the amount of their liabilities was feasible and satisfactory while all the partners were living, but upon the death of Levinson, not the profits merely, but the

whole of his interest, was in some manner to be determined and withdrawn from the assets of the firm. While all of the partners were alive it did not matter how the assets were valued, or the liabilities estimated, for what they did not take out as profits they retained in the assets of the firm. But, when one died, it became highly important that his share, then to be wholly withdrawn, should be fairly and fully valued. The apportionment of profits involved no transfer of title, to the remaining capital; but such a transfer was necessarily involved in the transaction contemplated upon the death of a partner. Frequently, says Lindley (Partn. p. 429), in order to prevent the ruin consequent on the sale when a partnership happens to be dissolved by the death of a partner, it is provided that the share of the deceased may be taken by the survivors at the value shown by the last settlement agreed to by him, with the addition of any subsequent profit. But here a new valuation was to be made, and, either no method is provided in the contract for arriving at that valuation, or, if a method be found, it can only be the method actually adopted,—the valuation being made by the surviving partners themselves. But, in the first instance, if no mode is prescribed, there is the absence of an essential element of a contract of sale which equity cannot supply,—the price, or the manner of determining the price. If the second, and the mode adopted, be the one contemplated by the contract, then, if the contract be valid, it must result in holding that the surviving partners, trustees of the deceased partner's share, may not only purchase that share, but may fix the value which they will pay for it. But, if we understand respondents, they do not contend, nor could they successfully, for the latter proposition, but they claim that by their agreement with the executor such value was legally ascertained; and herein it is claimed that the executor, in effecting that settlement, was merely carrying into effect the contract of his testator, as expressed in the articles. But something more was necessary. The testator's contract did not determine the amount of the consideration to be rendered by the survivor for his interest, and the exercise of a further act of discretion, judgment, and assent was necessary to ascertain the amount. *Morrison v. Rossignol*, 5 Cal. 65; *Breckenridge v. Crocker*, 78 Cal. 529; *Vickers v. Vickers*, L. R. 4 Eq. 529. It is said that these were cases where specific performance was sought, while in this instance the contract has been executed. This is true, but we are now dealing with the question of power in the executor, and these cases illustrate the proposition that in making the adjustment with defendants the executor necessarily supplied the missing terms of his testator's contract by the exercise of his own will and discretion.

Had the executor that authority? Defendants claim it for him by virtue of his general powers, and independently of the articles. At the common law such power was unquestionably his, but at common law the executor or administrator held the title of the personal property of the decedent, while with

us title to personalty as well as to realty vests in the heirs, subject only to the right of the executor to take possession of it for specific purposes. At common law, then, the representative could sell personal property without restraint, so long as his acts were not fraudulent, but here his power to sell is dependent upon the assent of the superior court. Code Civ. Proc. §§ 1517, 1561; *Wickersham v. Johnston*, 104 Cal. 407; 2 Woerner, Administration of Law, § 331. The provisions of the articles for the transfer of Levinson's interest were incomplete, in that no price was fixed, and that no disinterested person was named who should fix the price. The executor, by assenting to the valuation put by the Newmans on the partnership interest, assumed to supply the omission of the contract, and to fix a sum at which they might take the interest. It is not claimed that the executor derived authority to make the sale from the will of deceased. As the articles fall short of conferring that power, he could necessarily derive it only from the court in the manner prescribed by statute. But under the statute it could be sold only "in the same manner as other personal property," namely, by authority and consent of the superior court. Had the contract of partnership determined the price, or prescribed some legal mode of ascertaining the price, the cases cited in the preceding opinion would be directly in point. Then the executor would have needed only to abide by the terms of the contract. *Janin v. Browne*, 59 Cal. 87. The wisdom or policy of the contract would have been none of his concern. But, under the facts, the necessity for the supervisory power of the court to order a sale, and for the caution of the statute that, before confirming the sale of the partnership interest the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner (Code Civ. Proc. § 1524), was as manifest as if there had been no contract.

But it is further said that the inventory and appraisement were made in the manner usual during Levinson's life, and that this established a custom by which the articles are to be interpreted. But a customary mode of valuing assets, with a view of determining and withdrawing profits, is radically different from the requisites of a fair and reasonable estimate of all assets with a view to segregating the share of a deceased partner for purchase by the others. We think the conclusion inevitable that the executor exceeded his authority in the settlement with defendants; that he did not, as is admitted, follow the statutory mode in making the settlement, and that there was no power for him to do so under the articles.

Leaving aside for the moment the question whether or not the goodwill was included in the settlement, we think the evidence overwhelmingly establishes, as the trial court held, that the sum found by the Newmans under the inventory and appraisement to be the value of Levinson's interest, and by the Newmans paid into the estate of Levinson, and received by the executor thereof, was

not only a just amount, but, indeed, a very liberal amount. The evidence seems to be without conflict, and at least is strongly in favor of the respondents, that the appraised value put by the Newmans upon the interest of their deceased partner was greater than its actual worth. It was paid over and received, with knowledge then or soon afterwards acquired of the claim of the Newmans that by the payment they took to themselves the deceased's interest and title in the assets of the copartnership, and acquired the right to continue to conduct the business under the firm name. Thereafter the heirs, who were all of age, and who were represented throughout all court proceedings by their attorney, petitioned for, and, despite the protests of the executor, obtained, a decree of partial distribution, distributing to them as of the property of the estate a portion of the moneys thus obtained from the Newmans. At the time when this decree was sought and obtained the source from which the moneys came, and the circumstances under which it had been paid over to the estate, and the claims of the Newmans in regard thereto, were well known to them. Their opposing claim during all of this time seems to have been solely the one that the goodwill had not passed to the Newmans, and was still personal property, and a part of the assets of Levinson's estate. Having, under these circumstances, demanded and received the moneys so paid by the Newmans, the price having been fair, and the transaction without fraud, we are of opinion that they are estopped from questioning the settlement while retaining the benefits of it, and from denying that there passed to the Newmans whatever would have passed under the terms of the contract had it been free from the defect above discussed. What, then, would have passed, and what are appellants estopped from denying did pass? Unquestionably there passed to the Newmans Levinson's interest in the assets, as shown by the inventory and appraisal upon which the settlement was based. But the articles provide further that the survivors shall have the right to continue the business under the firm name of Newman & Levinson. This clause may be construed either as dependent or independent of the covenant to purchase. If construed as dependent, then the contract was that, upon purchasing under the inventory and appraisal, the survivors would acquire the right to continue the business under the firm name. In this view appellants would also be estopped from denying that there passed to defendants the right to conduct the business under the firm name. If, however, this clause is to be construed as independent, it is of itself valid and operative, and conferred this right upon defendants regardless of other considerations. In either case it must follow that the right to conduct the business under the firm name passed to the defendants.

There thus comes under consideration the question which originally, and for a long time, was the sole point of difference between the parties,—the question of the disposition of the goodwill; for it appears that, while the heirs from a very early date insisted that

the goodwill still remained a part of the property of the estate, and should be inventoried and appraised as such, they made no objection to the valuation put upon the deceased partner's interest, nor to the sale of that interest, saving that therein the goodwill had not been valued. There was no concealment nor secrecy nor fraud in this. The heirs were informed that the goodwill was not included, the contention of the executor and of the Newmans under the advice of counsel being that the goodwill, under the circumstances, did not become a part of the assets of the estate, but vested in the surviving partners. While some of the earlier cases lean to the doctrine that, upon the death of one partner, the goodwill goes to the survivors, the great weight of later decisions is to the contrary. Thus, it is said by Bates (2 Bates, Partn. § 658): "It was once thought that, upon the death of a partner, his interest in the goodwill ceased, and it survived to the surviving partner as his own property. This was doubted in *Crawshaw v. Collins*, 15 Ves. Jr. 218, and it is not now anywhere regarded as the law in trade partnerships, and though inseparable from the business, is an appreciable part of the assets in which the estate of a deceased partner can participate." Lindley says: "In the event of dissolution by death, it has been said that the goodwill survives, and there is a clear decision to this effect. But this is not in accordance with modern authorities; they are wholly opposed to the notion that the value of the goodwill, as such, belongs to the survivor." 2 Lindley, Partn. *443. And our Code declares (Civ. Code, § 993): "The goodwill of a business is property transferable like any other. It is not necessary to enter upon a discussion of the character of this intangible property known as 'goodwill.'" The Code solves many doubts by defining it to be the "expectation of continued public patronage." Civ. Code, § 992. Now, the Newmans had purchased the interest of the estate in the assets as shown by the inventory, and had likewise acquired, as has been discussed, the right to continue the business under the firm name. We are unable to perceive any difference between the acquirement of a right to conduct this business under a firm name and the acquirement of the goodwill of the business. In other words, every possible "expectation of continued public patronage" to the business was gone when the right to conduct it under the firm name was parted with. If there were left anything of value, however shadowy and unreal, it might be ground for saying that the goodwill yet remained to the estate, but the interest in the assets, together with the interest in the right to conduct the business under the firm name, having passed to the Newmans, nothing in the nature of goodwill was left.

But there is another and equally convincing view which may be taken of these matters. Counsel have cited some cases in which it is said that it is the duty of the survivors to sell the property, and the business as a going business, and also to continue the business until this can be done. It may be that when a firm name is not composed of the name of the partners, but is a tradename only, differ-

ent equities may arise, but we are sure in this case the Newmans could not have been required, in the interest of Levinson's estate, to sell the right to continue the business in the firm name nor to sell the goodwill. There is not only the goodwill which belongs to the firm, but in a successful business each partner may have gained a business standing and a reputation which is of value to him. One who sells the goodwill of a business warrants by that very act that he will not endeavor to draw off any of the customers. Civ. Code, § 1776. If the surviving partners can be required to do this, they are practically prohibited from pursuing the same business at that place, and that may be their only means of gaining a livelihood. When a partnership is dissolved by death, the survivors are absolved from all obligations except to close out the partnership affairs and to account to the estate. They do not owe a duty to the estate of the deceased to abstain from business even in the same line as that in which the partnership was engaged. We are forced to believe in this case that the articles of copartnership failed to provide effectively for a transfer of the interest of Levinson's estate in the copartnership to the surviving partners. The executor and his counsel were of the opinion that it did so provide, and acted accordingly. Though we are convinced that they were mistaken, we do not doubt that the estate of Levinson realized much more from the property than would have been possible if the firm had gone into liquidation, as they must have done in the absence of the agreement. We, think, therefore, that the agreement which the parties supposed they had made was to the material advantage of all concerned, and, had they provided for a valid method of determining the value of the interest of Levinson, it would have been just as well as legal. For the lack of such method, however, the transfer to the Newmans was unauthorized and void. The legatees, however, of Levinson's estate, were all of age, and the estate was solvent. Knowing all of the essential facts, they demanded and received the proceeds of the sale over the protests of the executor and of the Newmans. These protests amounted to the claim that, unless the transfer to the Newmans was valid, the money should be returned to them. If the transfer was regarded as invalid, plainly that should have been done. The court could not distribute the money except upon the the-

ory that it properly belonged to the estate. The Levinsons solicited and obtained such an adjudication, and they received the money so distributed. No rights were or could have been reserved by the protest, styled a "stipulation," which was filed by the Levinsons. The money was not voluntarily paid after the protest was made, but the payment was forced by the legatees. The protest does show, however, that the legatees knew, or at least suspected, that the executor and the surviving partners claimed that the money in the hands of the executor was all that was coming to the estate from the partnership. It is stated, after admitting that the money was received by the executor "on account of the interest of said estate in the partnership assets," as follows: "But it is not admitted by said petitioners, or any of them, that no further sum remains due, or is to become due, from said surviving partners, or either of them, or assigns, to said estate, or to said petitioners, or any of them." There would have been no purpose in guarding against the implication if it had not been believed that the claim was that this was all. That the legatees well knew the claim made by the surviving partners abundantly appears from the other evidence. This was a ratification of the sale on the part of the legatees which can be avoided only for fraud discovered afterwards, and then only upon a rescission and a restoration of all that they have received, or a showing of some excuse for not doing so. The action is to compel the surviving partners to account for the interest of Levinson in the copartnership. But the moneys which were distributed upon the application of the legatees were paid for the entire interest of Levinson in the copartnership. To compel an accounting is to set aside or ignore that transaction. The money was not paid on account, and the legatees must have known that no such sum was due from the surviving partners to the estate, except upon the theory that they had purchased the interest of Levinson. The acceptance of the sum by the executor materially affected the condition of the surviving partners. But for that the concern would most likely have gone into liquidation, and large liabilities for goods would not have been incurred. They did not understand that they were assuming these liabilities and the risks of trade for the benefit of the estate of Levinson, but for themselves.

TENNESSEE SUPREME COURT.

MEMPHIS NATIONAL BANK

v.

Mary B. NEELY *et al.*, Exrs., etc., of William M. Sneed, Deceased, *Appls.*

(.....Tenn.)

1. The mental incompetency of an accommodation indorser at the time of

signing a note in renewal of one which he indorsed when fully competent to do so does not prevent his estate from being liable on the renewal note when the holder took it in good faith and thereupon extinguished and surrendered the old note so that he cannot be restored to his original position.

2. The knowledge of one member of the discount committee of a bank, who

NOTE.—Renewal of obligations by incompetent person.

This subject seems to be one which the courts 34 L. R. A.

have not been frequently called upon to consider, but one case having been discovered aside from the principal case, and a dictum in *Wirebach v.*

was not present when the renewal of a note was taken, and had no part in the transaction, is not enough to charge the bank with notice of the fact, known to him, that the indorser of the note had become incompetent to do business.

(June 20, 1896.)

APPEAL by defendants from a decree of the Chancery Court for Shelby County in favor of plaintiff in a suit brought to enforce the liability of decedent as indorser of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Myers & Banks, for appellants:

The two notes sued on herein must stand as original transactions as of the date of the same, to wit, October 8 and 22, 1892.

2 Dan. Neg. Inst. 4th ed. §§ 1260-1266, 1266c; 2 Parsons, Notes & Bills, 201; *Bank of the Commonwealth v. Letcher*, 3 J. J. Marsh. 195; *Nichol v. Bate*, 10 Yerg. 429; *Hill v. Bostick*, Id. 410; *Slaymaker v. Gundacker*, 10 Serg. & R. 75; *Cherry v. Frost*, 7 Lea, 5.

A lunatic signing a note as surety for an antecedent debt is not bound thereby although the other contracting party was ignorant of his infirmity.

Van Patton v. Beals, 46 Iowa, 62.

It will not do to say that the renewal of the notes and extension of the time of payment was a benefit received by the indorser, William M. Sneed, which went to increase or swell the corpus of his estate, for such is not the fact.

Leary v. Miller, 61 N. Y. 498.

A person of unsound mind is not responsible for his contract although the other contracting party did not know that he was of unsound mind at the time, and such contracts are void.

1 Dan. Neg. Inst. §§ 209, 210, and note; *Moore v. Hershey*, 90 Pa. 196; *Edwards v. Davenport*, 20 Fed. Rep. 756; *Dexter v. Hall*, 32 U. S. 15 Wall. 9, 21 L. ed. 78.

The insanity of the maker or indorser of a promissory note may be set up as a defense to an action on the note.

11 Am. & Eng. Enc. Law, p. 148; *McClain v. Davis*, 77 Ind. 419; *Hannah v. Sheldon*, 20

Mich. 378; *Rice v. Peet*, 15 Johns. 503; *Davis v. Tarter*, 65 Ala. 98; *Seaver v. Phelps*, 11 Pick. 304, 23 Am. Dec. 373; *Wirebach v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821; *Moore v. Hershey*, *supra*; 1 Parsons, Notes & Bills, 149; *Edwards*, Bills & Notes, 63, 69.

The test of the liability of a lunatic on his contracts is whether it is for necessities, or whether he actually received the money or property, whether the contract was executed or executory is not material.

Re De Silver's Estate, 5 Rawle, 111, 28 Am. Dec. 645; *Rogers v. Walker*, 6 Pa. 371, 47 Am. Dec. 470; *Seaver v. Phelps*, 11 Pick. 306, 23 Am. Dec. 372; *Clark v. Caldwell*, 6 Watts, 139; *Imhoff v. Witmer*, 81 Pa. 243; *Yates v. Boen*, 2 Strange, 1104; *Gore v. Gibson*, 13 Mees. & W. 638; *Pearl v. M'Dowell*, 3 J. J. Marsh. 658, 20 Am. Dec. 199; *Bensell v. Chancellor*, 5 Whart. 374, 34 Am. Dec. 561.

A contract of one so far deprived of his reason as to be unable to manage his affairs is not binding.

M'Elroy's Case, 6 Watts & S. 451; *Com., Euchenberg, v. Schneider*, 59 Pa. 328.

The Memphis National Bank, through its president, H. M. Neely, had notice of the condition of W. M. Sneed prior to October 8, 1892. Notice communicated to him anywhere except where he is totally dissociated from his official duties would affect the corporation with knowledge of the fact communicated.

4 Thomp. Corp. §§ 5228, 4657, pp. 5228, 3494; *Porter v. Bank of Rutland*, 19 Vt. 410; *Bank of America v. McNeill*, 10 Bush, 54.

The existence of knowledge in the agent, however acquired, when acting for the principal, is knowledge to the principal.

Tagg v. Tennessee Nat. Bank, 9 Heisk. 479; *Union Bank v. Campbell*, 4 Humph. 394; *Raht v. Union Consol. Min. Co.* 5 Lea, 63.

Notice to a director, president, or member of the finance committee as to insanity is notice to the bank.

Thomp. Corp. 5191 and note 1, 5194, 5195, 5197, 5199.

First Nat. Bank set forth below, which is exactly in point.

The case referred to is *Snyder v. Laubach*, 7 W. N. C. 464, set forth in the opinion in the principal case and followed by it, holding that a person who is a lunatic and has been so adjudged is liable on an accommodation indorsement of a promissory note made while he was insane, where it was a renewal of a note for a similar amount upon which he had also been an accommodation indorser, and there had been several renewals, at each of which, as well as at the execution of the first note, he was unquestionably of sound mind.

So in *Wirebach v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821, in which it was sought to recover upon an accommodation indorsement by a lunatic without consideration where he had derived no benefit from his indorsement, the note indorsed having been used to take up other notes of different makers upon which he had been also accommodation indorser, which was known to the holder, the lunatic was held not liable though the holder was a bona fide one and without knowledge of the lunacy, and it was said that if he were sane when he indorsed the prior note, and insane at the time he indorsed the note in suit, he would not be liable on the latter as it was not a mere renewal note.

Owing to the scarcity of judicial expression on the subject, a few other cases which might be

deemed to have some bearing upon it have also been included, though they might not ordinarily be considered as strictly within its boundaries.

Thus, in *Page v. Krekey*, 43 N. Y. S. R. 468, it was held that where a person was sober at the time he agreed to sign a paper the fact that he was under the influence of liquor when he actually signed it is immaterial and no defense to an action based thereon.

In *Bush v. Breinig*, 113 Pa. 310, 37 Am. Rep. 469, however, it was held that one who buys real estate at a public sale and afterwards signs a contract to complete the purchase, and pays a part of the purchase money while so intoxicated as not to know what he was doing, may avoid the contract and recover the money so paid though his intoxication was voluntary.

And in *Schmidt v. Ittman*, 46 La. Ann. 888, in which an action was brought in an account for goods sold for which notes were afterwards given which became due, but remained unpaid, insanity having been alleged as a defense, a recovery was had on the ground that the purchaser had not been interdicted and was not notoriously insane at the time of the purchasing; but it was said that had the action been brought on the notes no recovery could have been had as the maker was notoriously insane on the day they were made.

F. H. B.

In order to sustain an action on a note made by a lunatic, such a consideration must be shown to have been received that justice and equity would require the debt to be paid out of the lunatic's estate.

Hicks v. Marshall, 8 Hun, 327; *Sentance v. Poole*, 8 Car. & P. 1; *Dunnage v. White*, 1 Wils. Ch. 67; *Hall v. Warren*, 9 Ves. Jr. 605.

No consideration having been shown or benefit to Sneed in this case the complainant should fail.

Seaver v. Phelps, 11 Pick. 304, 23 Am. Dec. 372; *Rice v. Peat*, 15 Johns. 503; *LANCASTER COUNTY NAT. BANK v. MOORE*, 78 Pa. 407, 21 Am. Rep. 24; *La Rue v. Gilkyson*, 4 Pa. 375, 45 Am. Dec. 700; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573.

Messrs. William M. Randolph & Sons, for appellee:

An indorser for the accommodation of the drawer or maker of the note is liable to a bona fide holder for value, although he received no consideration for his indorsement.

Harris v. Bradley, 7 Yerg. 810; 1 Parsons, Notes & Bills, 184; *Marr v. Johnson*, 9 Yerg. 1; *McDonald v. Magruder*, 28 U. S. 3 Pet. 475, 7 L. ed. 746; *Edwards, Bills & Notes*, 819; *Byles, Bills*, 94; 1 Dan. Neg. Inst. §§ 167, 790; 2 Parsons, Notes & Bills, 436, 438; *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Goodman v. Simonds*, 61 U. S. 20 How. 853, 15 L. ed. 934; *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508.

Where a contract is executed upon a valuable consideration on the one side of which the alleged lunatic has in legal contemplation had the benefit, and the parties cannot be placed in *statu quo*, the courts will enforce the contract regardless of the fact of insanity, if it turns out that it did exist when the contract was made.

Niell v. Morley, 9 Ves. Jr. 478; *Price v. Bergrington*, 7 Eng. L. & Eq. 258; *Molton v. Camroux*, 2 Exch. 487, 4 Exch. 17; *Wilder v. Weakley's Estate*, 84 Ind. 181; *Addison*, Cont. 1033, 1034; *Smith*, Cont. 5th ed. 843, 844; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *LANCASTER COUNTY NAT. BANK v. MOORE*, 78 Pa. 407, 21 Am. Rep. 24; *Snyder v. Laubach*, 7 W. N. C. 464; *Wirebach v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821; *Moore v. Hershey*, 90 Pa. 196; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 203; *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggs v. American Tract Soc.* 84 N. Y. 887; *Re Beckwith*, 3 Hun, 443; *Canfield v. Fairbanks*, 63 Barb. 461; *Sims v. McLure*, 8 Rich. Eq. 286, 70 Am. Dec. 196; *Behrens v. McKenzie*, 23 Iowa, 338, 92 Am. Dec. 428, and note; *Ashcraft v. De Armond*, 44 Iowa, 229; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Loomis v. Spencer*, 2 Paige, 153; *Matthiessen v. McMahon*, 38 N. J. L. 543; 2 Pom. Eq. Jur. 2d ed. ¶ 946; *Abbott v. Creal*, 56 Iowa, 175; *Gribben v. Maxwell*, 84 Kan. 8; *Jackson, Cadwell, v. King*, 4 Cow. 207, 15 Am. Dec. 356.

In order to charge the principal with knowledge of an agent, and especially so in regard to corporations, the agent must have acted for his principal in the particular transaction.

Union Bank v. Campbell, 4 Humph. 394; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. 479; 1 Morawetz, Priv. Corp. ¶ 540c.
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The court should consider the notes sued on in the position or occupying the place and stead of the notes originally given, and will enforce them accordingly.

First Nat. Bank v. Buchanan, 87 Tenn. 32, 1 L. R. A. 199.

Beard, J., delivered the opinion of the court:

The complainant in this cause, by its bill, sought to recover on two promissory notes, one for \$7,500, dated 3d of October, 1892, due at ninety days, and the other for \$3,000, dated 22d October, 1892, and due at four months, made by W. A. Sneed, to the order of and indorsed by W. M. Sneed. At maturity the notes were presented for payment to the maker, and, this being refused, they were protested, of all which the indorsee had due and legal notice. No defense was made by the maker of this paper, but Mrs. Neely, the executrix of W. M. Sneed, resisted recovery upon the ground that her testate was *non compos mentis* at the time he indorsed the same. Upon the trial, the chancellor rendered a decree, not only against the maker, but also against the estate of the indorser. From this decree, the executrix alone prosecuted an appeal to this court.

The notes sued on were renewal notes, the last of two series made and indorsed by the same parties, the originals of which were discounted for the maker by the complainant bank in 1890. On all these notes W. M. Sneed was an indorser for the accommodation of W. A. Sneed, without any interest whatever in the proceeds of the discount. So far as the facts are concerned on which rests the contention of the executrix that her testate was of unsound mind when he entered into these two contracts of indorsement, it is sufficient to say that he had been for more than twenty years an active and prosperous member of the Memphis bar, and at the same time was interested in, and for a considerable period controlled, large enterprises outside of his profession. He was a man of energy, integrity, and sound business judgment, as the result of which he succeeded in acquiring a high reputation in the commercial community, and in accumulating a large fortune. Unremitting attention to his various duties, according to the testimony of experts, finally brought on an attack of paresis, a disease which is described as attacking the organic brain structure, which, though slow in its progress, culminated on or about 15th of October, 1892, in serious mental disturbance. Up to that time we think it is clear from this record, whatever may have been the course of the disease, that he was in possession of his mental faculties, and was fully able, at the time he indorsed, to bind himself by contract on the \$7,500 note, of date the 3d of October. After the 15th, up to and including the 22d of that month, his mind was the subject of delirium; and while he continued his daily visits to his office, and his attention to his numerous business interests, yet we think the testimony in the case shows that on the 22d of October, 1892, when he indorsed the \$3,000 note, he was, to a considerable degree, *non compos mentis*. Of this fact, however, the bank had no notice when it canceled

and delivered the old note, maturing that day, to the maker, and took from him this new note in its room and stead.

Upon the finding of the facts, there is only the question left for determination whether the estate of W. M. Sneed can escape liability in the indorsement on the ground that he was insane at the time of making it. It is admitted that, as a general rule, the contract of a lunatic may be avoided. To this, however, there is this well-recognized exception: That where a contract has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original positions, it will not be set aside by the court. 5 Lawson, Rights, Rem. & Pr. § 2889; 3 Pom. Eq. Jur. § 946. It is said that such a contract is enforced against the party *non compos mentis*, not so much upon the idea that it possesses the legal essential of consent, but rather because, by means of an apparent contract, he has secured one advantage or benefit, which cannot be restored to the other party, and therefore it would be inequitable to permit him, or those in privity with him, to repudiate it. *Lincoln v. Buckmaster*, 82 Vt. 652; *Matthiessen v. McMahon*, 88 N. J. L. 536. The reports are full of cases which seem to illustrate this exception to the general rule. A few only will be referred to. In England, *Molton v. Camroux*, 2 Exch. 489, affirmed in 4 Exch. 17, is a leading case on this subject. In the opinion of the court reported in 2 Exch. 489, it is said: "We are not disposed to lay down so general a proposition as that all executed contracts bona fide entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him." This rule, or rather this exception to the general rule, is recognized and applied by the chancery courts in a great variety of cases. In *Wibler v. Weakley's Estate*, 34 Ind. 181, an action was maintained against the estate of a lunatic on an account for whiskey, etc., sold to him in good faith, and without knowledge of his lunacy. The court there said: "It is laid down by an elementary writer, that, 'if a party to a contract was, at the time he entered into the engagement, a lunatic or of unsound mind, and any imposition appears to have been practiced upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void as having been procured by fraud; but if the contract is a fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract. . . . An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages,

or servants, cannot be defeated by showing that the defendant had been found by inquiry to be a lunatic at the time he received the goods, or had the benefit of the work or the use of the horses, carriages, and servants.'" In *Beals v. Ses*, 10 Pa. 56, 49 Am. Dec. 573, the plaintiff as administrator of one Dom, sought to recover the value of certain goods purchased by Dom from the defendant, on the ground that his intestate was a widow at the time of the purchase. The testimony showed that the goods were unsuited to the object for which they were bought; that the price agreed upon exceeded their market value; and that the plaintiff had tendered them back to the defendant. On these facts, the court found for the defendant, and, in its opinion, distinctly based its conclusions upon this exception to the general rule. *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24, was a case where a bank in good faith, and without any knowledge of his infirmity, discounted a note for a lunatic, and paid over the awards, and in it the same principle was applied.

While conceding that these cases were properly decided, and that the doctrine announced by them is sound within proper limitations, it is insisted by appellant that as all of them involved the purchase of property by, or the loan of money to, the lunatic,—transactions by which something was added to his estate,—they afford no authority for the contention of complainant in this case. As we understand these cases, their underlying principle is this: A lunatic or his privies will not be permitted to repudiate a contract from which he has received a clear benefit, where the other contracting party acted in good faith, without notice of the infirmity, and where, upon repudiation, the *statu quo* of the parties cannot be restored. That this is a sound distinction, we entertain no doubt. The question, then, is: Did Mr. Sneed, the insane accommodation indorser of this note, receive any benefit from the transaction, and if so, in the event it is set aside, can the parties be placed back in their original positions? In reply to the first part of this question, we say that it is apparent to us that he did receive a benefit, which was a consideration to him for his indorsement. He was of sane mind when he put his name on the back of the original note and of all the intervening renewal notes, including that which matured on the 22d of October. By his indorsement he undertook that the paper would be honored by the maker when it fell due, and that, if dishonored, then, upon due presentment, non-payment, and notice, the holder might proceed at once against him (the indorser). Tiedeman, Com. Paper, § 259; 2 Randolph, Com. Paper, § 742. This promise or undertaking, while conditional, was none the less a binding, legal obligation, maturing on the same day as did the positive obligation of the maker. Now, when the bank surrendered the note which fell due on the 22d, and took in its stead the one in controversy, the effect of which was to give a further indulgence of four months, it conferred a valuable benefit upon both maker and indorser so far as this record discloses. The benefit or advantage which accrued to the indorser was quite as great as that to the maker, because there is no suggestion here that the

latter was either able or ready to meet the note that fell due that day. If he did not, then, upon proper steps being taken, it would have been the duty of the indorser at once to have discharged it. We think there can be no doubt, in the light of the authorities, if the indorser had gone to the bank on the 23d, and, by his solicitation, had obtained a renewal of this paper, in order that he might be saved from making good his obligation, which was likely to mature that day, and it had granted him indulgence without notice of his infirmity, that neither he nor his executrix would be heard to say that as he was insane that day, and received no benefit in the way of goods purchased or money borrowed from the bank, there should be no recovery on his indorsement. And we can see no difference, as a matter of principle, between that case and the one presented at the bar, where the same result is accomplished for him by the maker. He has been placed in position on this indorsed paper, in order that it might be used to that end. Not only was there a benefit conferred upon the indorser in this matter, but it is evident that it is impossible for the original positions of the parties to be restored. The old note has been extinguished and surrendered. It cannot be revived, and, if it could be, the day for payment and protest is long since past. The result is that unless the bank can hold his estate upon this renewal paper, which he contributed to induce the bank to take, by indorsing it, and intrusting it to the maker, from which he derived the benefit already mentioned, then the bank must lose its claim against his estate. It acted in good faith and in accord with sound business principles.

The diligence of counsel, supplemented by a careful search by the court, has been able to discover but one case that furnishes an analogy to the one at bar. That is the case of *Snyder v. Laubach* tried in a common pleas court of Pennsylvania, and reported in a law periodical published in Philadelphia. 7 W. N. C. 464. As that publication is not generally accessible to the profession, it is thought proper to state the facts of the case and the conclusion of the court with some fullness: "On June 9, 1873, J. H. Lilly borrowed from the Dimes Saving Institution of Bethlehem the sum of \$1,500, upon his promissory note, to the order of Robert Yost, which was indorsed by Yost as an accommodation indorser. To secure Yost against his indorsement Lilly upon the same day confessed judgment to Yost for the amount of the note, which was entered up on the next day. The note was renewed every three months until sometime in February, 1875, when Lilly sold the store and lot of ground upon which the judgment was a lien to William H. Buss, who, assuming Lilly's indebtedness, took up the old note and gave the bank in its place his own note for \$1,500 to Yost's order and with Yost's indorsement, the latter consenting to indorse for him. At the same time there was a written agreement between Lilly and Buss that the judgment given to secure the old note should remain a lien on the above real estate, as collateral security for future indorsements of the note, it being the same debt. Lilly on his part agreed to indemnify Yost against his indorsements for the note,

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Yost continued to indorse for Buss up to February 16, 1876, the date of the last renewal. Upon that day when Buss took the note to Yost for his indorsement, although he noticed that there was something wrong with Yost, he did not from his conversation think him crazy. Buss took the note to the bank, which accepted it and returned the old note canceled." The note was protested by the bank for nonpayment; and suit afterwards brought thereon, against the administrator of Yost. The administrator refused payment, on the ground that his testator was insane at the time of indorsement. The court found as a fact: "There was no evidence to charge the bank with notice of his lunacy." The opinion of the court is very brief, and is as follows: "However it might have been had the note in suit been an original note indorsed by the alleged lunatic for the accommodation of Buss, yet the case was different when it appeared that it was a renewal of a note for a similar amount, upon which he was also an accommodation indorser. There had been several renewals, at each of which, as well as the execution of the first note, Yost was unquestionably of sound mind. He had taken and held a judgment against the original maker as collateral security for the note. Yost was clearly liable on the note of which the note in suit was a renewal. There was full consideration therefor, and the case is directly within the decisions of this court in *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24 [referred to *supra*]." But it is insisted that that case is not an authority in the one at bar, because the court there rested its conclusion in the fact that the indorser, Yost, had recovered, in the judgment lien, collateral security for his indorsement. It is true that the common pleas court, in its opinion, did emphasize this, and did speak of it as a consideration passing to the indorser. Subsequently, however, that case was referred to, and by clear implication approved, by the supreme court, in *Wirebach v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821, and that court ignored a controlling element in the case,—the fact that Yost had received collateral security. It said: "*Snyder v. Laubach*, 7 W. N. C. 464, is where Yost's indorsement of the note was merely a renewal of an indorsement made when he was unquestionably of sound mind; and it was held that he was clearly liable on the note of which the note in suit was a renewal; there was full consideration, and the case was within the decision of *Lancaster County Nat. Bank v. Moore*, *supra*. The consideration is a debt for the amount of the renewal note." The case of *Van Patton v. Beuls*, 46 Iowa, 62, relied upon by the testatrix, is altogether different from the present case. In that it was held that a lunatic signing a note as surety for an antecedent debt was not bound thereby, although the other contracting party was ignorant of his infirmity. This was evidently a case where a lunatic undertook to bind himself for a debt on which he was not antecedently bound, and the court there properly declined to hold him.

Upon a careful consideration of the case at bar, we are satisfied that it falls under the exception to the general rule, which has been heretofore stated, and that the chancellor prop-

erly held the estate of the indorser upon the note in question, unless it be true, as urged by the testatrix, that the bank had constructive knowledge of Mr. Sneed's condition when it accepted this renewal note. This contention rests upon the fact that Mr. Neely was the president of the bank, and a member of the discount committee which passed on this note, and that at that time he was advised of Sneed's insanity. That Mr. Neely did sustain these official relations to the bank, and was informed of the fact in question, when this new note was

taken, is clear; but it is equally clear that he was not present with the committee when it was received, and the old note extinguished, and had no agency whatever in the transaction, and, in fact, only obtained knowledge of it the day after it was consummated. Under such conditions, his knowledge could not affect the bank. 1 Morawetz, Priv. Corp. p. 450c; *Union Bank v. Campbell*, 4 Humph. 894.

It follows that the decree of the chancellor is in all things affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

Charles S. ORR, Appt.

(63 Conn. 101.)

1. An ordinance prohibiting the collection or transportation of garbage without a license therefor is authorized by a charter giving power to regulate by ordinance the collection and removal of garbage, although it makes no express provision for licenses.
2. The fact that garbage is not a nuisance or detrimental to health does not exempt it from the police power or entitle a citizen to engage in its transportation without a license.
3. Any occupation comes within the range of the police power which is such as to be naturally liable to create a nuisance unless subjected to special regulations, whether it be so conducted as in fact to create a nuisance or not.
4. The wrongful refusal to a person of a license for transportation of garbage does not entitle him to pursue the business without a license in violation of an ordinance, but his remedy is by mandamus.
5. "Refuse matter," within the meaning of an ordinance prohibiting the transportation without a license of "such refuse matter as accumulates in the preparation of food for the table," includes only what is abandoned as worthless; but such materials as may be properly utilized for other purposes, when they do not constitute a nuisance, remain property which may be sold or otherwise disposed of at the will of the owner.

(June 25, 1896.)

A PPEAL by defendant from a judgment of the Criminal Court of Common Pleas for Fairfield County convicting him of violating an ordinance of the city of Bridgeport which prohibited unlicensed persons from collecting and transporting garbage. *Affirmed*.

The facts are stated in the opinion.

Messrs. David B. Lockwood and Alfred B. Beers, for appellant:

The garbage in this case was fresh, and its

removal not dangerous to the public health. A by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such are not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages.

Cooley, Const. Lim. 6th ed. 247, 485, 486; *Austin v. Murray*, 18 Pick. 121; *Corfield v. Coryell*, 4 Wash. C. C. 880; *Vansant v. Waddel*, 2 Yerg. 280; *Com. v. Towles*, 5 Leigh, 748; *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19; *Hudson v. Thorne*, 7 Paige, 261; *State, Treman, v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 809; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

A by-law which prohibits one person from carrying on a certain business, and allows another to carry on the same business, is void.

Hudson v. Thorne, *supra*; *Cooley*, Const. Lim. 6th ed. 244-246.

The board of health has not the power to assume in advance what is or will become a nuisance or dangerous to public health, and contract for its removal.

Gregory v. New York, 40 N. Y. 278.

Those who make the laws "are to govern by promulgated established laws not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow."

Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511; *Lewis v. Webb*, 3 Me. 328; *Durham v. Lewiston*, 4 Me. 140; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *People v. Frisbie*, 26 Cal. 185; *Davis v. Menasha*, 21 Wis. 491; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Godcharles v. Wigeman*, 113 Pa. 431; *Cooley*, Const. Lim. 6th ed. 483, 733.

The Constitution, art. 1, § 1, clearly prohibits the legislature from delegating the power to a city to grant to any individual the special privilege of carrying on any ordinary business or calling.

State v. Conlon, 65 Conn. 478, 31 L. R. A. 55; *Norwich Gaslight Co. v. Norwich City Gas*

NOTE—As to monopoly in contract for removal of garbage, see *Smiley v. MacDonald* (Neb.) 27 L. R. 34 L. R. A.

A. 540, and note; also *Walker v. Jameson* (Ind.) 28 L. R. A. 679.

Co. 25 Conn. 84; *Re Lowe*, 54 Kan. 757, 27 L. R. A. 545; *Logan v. Pyne*, 43 Iowa, 524, 22 Am. Rep. 261; *Cooley*, Const. Lim. 6th ed. 485; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 859; *Millett v. People*, *supra*; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 856; *Wally v. Kennedy*, *supra*; *Durkes v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500.

The privilege of contracting is both a liberty and a property right of which one cannot be deprived without due process of law.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789; *People v. Marz*, 99 N. Y. 887, 52 Am. Rep. 34; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257; *Cooley*, Const. Lim. 6th ed. 451-483, 485; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 823; *Tiedeman*, Pol. Power, 489-493; *Citizens' Sav. & L. Assn. v. Topeka* ("Loan Association v. Topeka"), 87 U. S. 20 Wall. 655, 22 L. ed. 455.

Municipal ordinances placing restrictions upon lawful conduct or business or the use of lawful property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business or the use of such property; and must not admit of the exercise of any arbitrary discrimination by the municipal authorities as between citizens who will comply.

Richmond v. Dudley, 129 Ind. 112, 18 L. R. A. 587; *Yick Wo v. Hopkins*, 118 U. S. 856, 30 L. ed. 220; *Newton v. Belger*, 143 Mass. 598; *Baltimore v. Radecke*, 49 Md. 217, 38 Am. Rep. 239; *Re Frazee*, 68 Mich. 396; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *Trotter v. Chicago*, 38 Ill. App. 206; *Barthel v. New Orleans*, 24 Fed. Rep. 563; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261; *Grafty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128; *Cooley*, Const. Lim. 6th ed. 484, 485; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853; *Braceville Coal Co. v. People*, 147 Ill. 66, 23 L. R. A. 340; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386.

Nor will the board of health prohibit the carrying on of a lawful business not necessarily a nuisance, but which may be conducted without injury or danger to the public health.

Weil v. Ricord, 24 N. J. Eq. 169; *Ex parte Sing Lee*, 96 Cal. 854.

Ordinances must be reasonable, and not inconsistent with the policy of the state.

Hayden v. Noyes, 5 Conn. 397; *State v. Speyer*, 67 Vt. 502, 29 L. R. A. 573; *People v. Armstrong*, 73 Mich. 248, 3 L. R. A. 731; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *Cooley*, Const. Lim. 6th ed. 240-247; *Tugman v. Chicago*, 78 Ill. 405; *River Rendering Co. v. Behr*, 77 Mo. 91, 48 Am. Rep. 6; *Ward v. Greenville*, 8 Baxt. 228, 35 Am. Rep. 700; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 889; *Caldwell v. Alton*, 33 Ill. 416, 75 Am. Dec. 282; *Bloomington v. Wahl*, 46 Ill. 489; *Bethune v. Hughes*, 28 Ga. 560, 78 Am. Dec. 789; *Kip v. Paterson*, 26 N. J. L. 298; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 463; *Hudson v. Thorne*, 7 Paige, 261; *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225.

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The right to regulate a business does not include the right to prohibit.

Ex parte Burnett, 30 Ala. 461; *Austin v. Murray*, 16 Pick. 121; *Portland v. Schmidt*, 13 Or. 17; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; *Cooley*, Const. Lim. 6th ed. 246.

A municipality cannot create a monopoly. *Altgelt v. San Antonio*, 81 Tex. 436, 18 L. R. A. 883; *Tiedeman*, Pol. Power, 815, 816.

The defendant could not be deprived of the privilege of contracting for or removing merchandise which the finding shows was not dangerous to life or health.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789.

If the ordinance unfairly discriminates against the defendant, it deprives him of a constitutional right and is void.

Caldier v. Bull, 8 U. S. 8 Dall. 387, 1 L. ed. 648; *Durkes v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Oincinnati v. Steinkamp*, 54 Ohio St. 284.

Messrs. John H. Light and V. R. C. Giddings, for appellee:

The ordinance was clearly within the power of the common council to enact.

1 Dill. Mun. Corp. 4th ed. §§ 815, 816.

The exercise of municipal authority through by-laws to regulate and suppress nuisances is ancient.

Pierce v. Bartrum, Cowp. 269; *Com. Dig. By-Law*, B 8.

A section providing that no person should collect garbage and offal without a permit from the board of health is valid.

Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; *Re Nightingale*, 11 Pick. 163; *Com. v. Stodder*, 2 Cush. 574, 48 Am. Dec. 679; *People v. Gordon*, 81 Mich. 306.

The people of this state have not by the Constitution parted with any portion of their power to protect themselves, nor have they put any limitation upon themselves as to the exercise of it. It is now as fully in the legislature as at the beginning it was in the people.

State v. Wordin, 56 Conn. 226; *Dunham v. New Britain*, 55 Conn. 378; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1086; *Coates v. New York*, 7 Cow. 535.

The legislature can invest municipal bodies with the same police power it has itself.

Ex parte Shrader, 33 Cal. 279; *Johnson v. Simonton*, 43 Cal. 242.

The benefit of a by-law is generally the touchstone of its validity.

Zylstra v. Charleston, 1 Bay, 332; 1 Dill. Mun. Corp. 4th ed. § 869.

The courts will not interfere with the legislative exercise by municipal bodies of their police powers by which the peace, health, comfort, and general welfare are secured or promoted.

Weil v. Ricord, 24 N. J. Eq. 169.

Ordinances having for their purpose the protection of the public health and of the same exclusive scope as this garbage ordinance have been universally upheld.

Ex parte Cusinello, 62 Cal. 538; *Green v. Savannah*, 6 Ga. 1; *State v. Freeman*, 38 N. H. 426; *Chicago v. Bartee*, 100 Ill. 57; *St. Louis v. Knox*, 74 Mo. 79; *Cronin v. People*, 82 N. Y. 818, 37 Am. Rep. 564; *Carthage v. Frederick*,

122 N. Y. 268, 10 L. R. A. 178; *State v. Schlemmer*, 42 La. Ann. 1166, 10 L. R. A. 185; *Com. v. Patch*, 97 Mass. 231; *Taunton v. Taylor*, 116 Mass. 254; *Ashbrook v. Com.* 1 Bush, 139, 89 Am. Dec. 616; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551.

Where a municipal corporation can pass ordinances in regulation of the doing of anything in its tendency prejudicial to health, the doing of such thing can be prohibited unless in accordance with a permit or license issuable by some officer or board.

Com. Dig. By-Law, B 3; *Welch v. Hotchkiss*, 89 Conn. 140, 12 Am. Rep. 883; *People, Larabee, v. Mulholland*, 83 N. Y. 324, 87 Am. Rep. 563; *Chicago v. Bartee*, 100 Ill. 57; *Kinsley v. Chicago*, 124 Ill. 359; *Boehm v. Baltimore*, 61 Md. 259; *St. Louis v. Knox*, 74 Mo. 79; *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 781; *Johnson v. Simonton*, 43 Cal. 242; *Charleston v. Pepper*, 1 Rich. L. 364; *Frankfort & P. Pass. R. Co. v. Philadelphia*, 58 Pa. 119; *Johnson v. Philadelphia*, 60 Pa. 445; *Atterton v. Chicago*, 6 Fed. Rep. 558; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

The validity or invalidity of the refusal to issue such a permit is not relevant to this criminal prosecution.

Even a contract with a municipal corporation whereby the contractor shall have the exclusive right to collect, remove, or dispose of all garbage or offal, does not tend to create a monopoly, but is consonant with a valid exercise of the police powers relative to health.

Smiley v. MacDonald, 42 Neb. 5, 27 L. R. A. 540; *Walker v. Jameson*, 140 Ind. 603, 28 L. R. A. 679; *Louisville v. Wible*, 84 Ky. 290; *Swift v. New York*, 83 N. Y. 528; *Alpers v. San Francisco*, 32 Fed. Rep. 503; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458; *State v. Payson*, 47 La. Ann. 1029; *State v. Fisher*, 52 Mo. 174; *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Rae v. Flint*, 51 Mich. 526; *Re Lowe*, 54 Kan. 757, 27 L. R. A. 545.

The general assembly has the most plenary power as to all matters relative to the protection of the lives, health, and general well being of the citizens of the commonwealth.

Woodruff v. Catlin, 54 Conn. 277; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63; *Scovill v. McMahon*, 62 Conn. 878.

For the purpose of exercising and carrying out this police power authority can be delegated to such bodies as the legislature thinks best. Every city charter contains such a delegation. So the power can be delegated to any committee or board already existing or thereto expressly constituted.

Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; *Woodruff v. New York & N. E. R. Co. supra*; *State, New York & N. E. R. Co. v. Asylum Street Bridge Commission*, 63 Conn. 91.

Any contract made under legislative authority is of binding force.

Hartford v. Hartford Electric Light Co. 65 Conn. 324; *Train v. Boston Disinfecting Co.* 144 Mass. 580, 59 Am. Rep. 118; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; 2 Hare, Am. Const. Law, 779; *Com. v. Tewksbury*, 11 Met. 55; *La Claire v. Davenport*, 18 Iowa, 210; *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Blair v. Kilpatrick*, 40 Ind. 312; *State v. Brennan's Liquors*, 25 Conn. 278; *Met-*
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ropolitan Bd. of Excise v. Barrie, 34 N. Y. 657; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *State v. Addington*, 77 Mo. 118; *Wynehamer v. People*, 13 N. Y. 378; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929.

Baldwin, J., delivered the opinion of the court:

The charter of the city of Bridgeport conferred upon the common council ample power to regulate by ordinance the collection and removal of garbage and offal. The ordinance brought in question upon this proceeding deals only (§ 2) with "such refuse matter as accumulates in the preparation of food for the table." "Refuse matter," as the term is thus employed, can embrace nothing which has not been refused or rejected as unsuitable for table use. It may be thus rejected because it has little or no value for human food, or because it is decayed or unwholesome. It must, in its nature, be perishable, and can include little which is not liable to become decomposed or offensive if left where it falls. The common council therefore had authority to regulate its disposition in such a way as to prevent it from becoming the occasion of a nuisance. Much, however, that is of the nature of garbage and offal, and has slight value for table use, may be not unsuitable for the food of animals, for manure, or as materials for manufacture. Construing this ordinance with the strictness properly applicable to municipal legislation of a penal nature, the term "refuse matter" can only extend to matter which is in fact noisome, or which has been refused and rejected by the owner as worthless. Meat trimmings, potato parings, specked apples, and many other things of a like character, might be thrown aside in preparing table dishes, and yet properly utilized afterwards for other purposes. The mode of regulation of the disposition of kitchen refuse which is contained in this ordinance seems to be one of an alternative character. The board of health is empowered to take such measures as it may deem effectual for the removing of this refuse from the whole city or any portion of it, and to this end to employ or make contracts with one or more persons, subject to certain rules, of which the following are the leading ones: No person shall collect and transport such refuse in the city without first having obtained a permit from the board. It shall all be carried through the city in water-tight, covered carts, so loaded as not to spill; each to be plainly marked "City Garbage Cart," with the name of the contractor, and number of the cart, and of the ward, and to be used only when inspected, approved, and licensed by the clerk of the board. All such refuse is to be placed by the person on whose premises it originates in suitable covered vessels, set there in a position convenient for removal, or in some place designated by the clerk of the board, so that it "may be called for by the garbage contractor of said city; provided, however, that any person may be excepted from the provisions of this section upon obtaining a permit to that effect from the clerk of the board of health." No other matter whatever can be placed in such a vessel. "The garbage contractor or other person employed by the board of health shall call regularly

at all dwellings, tenements, hotels, restaurants, or other buildings designated by the said board, and remove promptly and in as cleanly a manner as possible all garbage or offal that may be offered, and shall return the receptacles to the place on such premises from which the same were taken. All garbage and offal which shall be removed through said city shall be carried and deposited in such places as may be designated and approved by the board of health, and shall be disposed of in such manner as not to create a nuisance, and the covers of all carts, wagons, or vessels used for the purpose of removing such garbage or offal shall be kept tightly closed while they are being transported through the streets of the city. No deposit of garbage or offal shall be made within the limits of the city of Bridgeport, or upon any wharf, or upon any vessel lying at any wharf, except by permit from the board of health." The clerk of the board is to enter in a record book "all contracts entered into, or licenses issued by authority of said board." -

Under these provisions and the authority of the special act of 1895, the board of health might contract with a single person to collect and remove garbage from the entire city, or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to part of the city, or to certain buildings in part of the city, and leave the collection and removal of garbage from other places open to those who obtained from its clerk a proper permit, and provided proper means of transportation. By neither method of procedure would any monopoly be created by which the common rights of citizenship would be infringed upon. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 894; *Alpers v. San Francisco*, 32 Fed. Rep. 508; *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458. Nor did the absence in the charter of any express provision as to the grant of licenses to engage in this business prevent the common council from resort to that mode of regulation, since it was a business which, as usually carried on, is in its nature dangerous to the public health; and as carried on in Bridgeport might, under the act of February 28, 1895, have been made by the board of health the subject of a public contract. Over any such occupation a strict watch must be kept, and the general police powers vested in the city by § 24 of its charter, in connection with the act of 1895, justify the implication of a right to limit the number of those who pursue it. *State v. Wordin*, 56 Conn. 216, 226; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 851.

The defendant offered evidence to show that he had been for many years engaged in the business of collecting and removing garbage in Bridgeport, in carts so constructed as to satisfy the requirements of the ordinance; and that he had applied to the clerk of the board for a license or permit, and met with a refusal. He also offered evidence, which was excluded, that permits had been previously issued to others; but that, before he applied, the board had instructed its clerk to issue no more to anyone. This evidence was properly excluded. The board of health having the right to limit the number of those engaged in this

particular occupation, the defendant had no absolute title to a license. If the number which it had issued was unreasonably small, and if an inquiry into that subject was open to him in any proceeding, it was certainly not open in this, to which the board was not a party. He could not thus assume to take the law into his own hands, and pursue the business without a license, because a license had been wrongfully refused. His remedy, if he had any, would be to apply by mandamus to compel the board to grant him one.

The defendant offered evidence to show that all the garbage collected by him came from certain restaurants, with the proprietors of which he had contracts for its removal. This also was properly excluded. It was not claimed, and cannot be assumed, that such engagements had been entered into before the adoption of the ordinance. Without inquiring whether, had the fact been otherwise, the law would have been otherwise, it is sufficient, as the case stands, to say that no contract to perform an unlawful act can justify its performance.

The defendant further offered evidence to prove, and claimed that it did prove, that the garbage he collected was fresh, and some of it fit for food; and there was no evidence on either side tending to show that any of this garbage "was sour or putrid, and for that reason dangerous to the public health." In view of this, the defendant asked the court to instruct the jury that "the privilege of contracting to transport garbage is a liberty and property right, of which one cannot be deprived without due process of law, unless the jury find that such garbage, at the time of its transportation, is a nuisance, and detrimental to health." Such instructions were properly refused. It was a violation of the ordinance to collect and transport the kitchen refuse which was its subject, whether such of it as was being transported at the time of the act complained of was noxious or innoxious. It was enough that it was "such refuse matter as accumulates in the preparation of food for the table." There is so much of this kind of matter that is offensive and dangerous to the health of the community that all may be properly made the subject of public supervision and control. The ordinance does not extend to everything that is separated and thrown aside in the preparation of food for the table. Whatever of this description is not abandoned as worthless, remains property which, so long as it does not constitute a nuisance, may be sold or otherwise disposed of at the will of the owner. If the evidence had shown both that the contents of the defendant's cart, while they had been rejected for table use, were not offensive, and that they were in his possession as the agent or vendee of the original owners, he might have been entitled to a verdict, for he could not then have been engaged in the business for which a license was required.

The court of common pleas was requested, but declined, to instruct the jury that, "the board of health has no power to assume in advance that garbage is or will become a nuisance, and detrimental to public health, and so contract arbitrarily for its removal, or prohibit its removal by purchasers thereof; that the board

of health cannot prohibit the carrying on of a lawful business not necessarily a nuisance, and which may be conducted without injury or danger to the public health; that the common council has no power, under the charter of the city of Bridgeport, to refuse a citizen the right to exercise a lawful calling, or to prohibit his exercise of the same when not dangerous to public health or safety." There was no error in refusing these instructions. Ample authority is found in the charter and the act of 1895 for dealing with the business of disposing

of garbage and offal as one dangerous to the public health. Any occupation comes within the range of the police power which is such as to be naturally liable to create a nuisance unless subjected to special regulations, whether it be so conducted as, in fact, to create a nuisance or not. The prevention of nuisances is quite as important as their abatement. *Raymond v. Fish*, 51 Conn. 80, 96, 50 Am. Rep. 8. *There is no error in the judgment appealed from.*

The other Judges concur.

FLORIDA SUPREME COURT.

John M. HENDRY *et al.*, Appts.,

v.

Samuel BENLISA, Admr., etc., of Moses E. Levy, Deceased.

(31 Fla. 609.)

1. The generic term "money" covers everything that by common consent represents property, and passes as money in current business transactions; and the payment of a debt or judgment during the late Civil War in Confederate money, and accepted, will be regarded as a full settlement, not subject to be again opened.
2. If, at the time and place of payment in Confederate money, it was generally received in business transactions, and was in fact the current money of the country, an agent's authority to receive it, in the absence of directions to the contrary from a resident principal, will be presumed.
3. The receipt of money due on a judgment, by an officer authorized by law to accept it, will satisfy the debt.
4. Clerks of the circuit court were not authorized by statute, in this state, in 1864, to receive payments of judgments, or to accept money on judgments as paid into the registry of the court, without a judicial order for that purpose; and the payment to such officers on a judgment, without prior authority, or subsequent ratification on the part of the judgment creditor, was no payment to him.
5. Money made on execution can, by statute, be paid to an attorney of record of a party in whose favor the execution issued; but such attorney has no authority, by virtue of such relation, to authorize a clerk of the circuit court, in his official capacity, and standing in no previous relationship of agency to the attorney or the judgment creditor, to accept money on a judgment.
6. A contract for the purchase of real estate was made in 1854, payments to be in three annual instalments. The purchasers did not go into possession, nor make any improvements. Suit was instituted and judgment obtained on the purchase-money notes in 1863, and no valid payment of the judgment was made during the late Civil War, nor any effort to pay

since; and the land has greatly enhanced in value, and the purchasers have become insolvent. Held, that specific performance of the contract to convey will not be decreed, on account of the long period of time since the making of the contract, the changed condition of the property as to value, and the laches of the purchasers in not complying with the contract.

7. Generally, when the specific performance of a written contract to convey land is denied, its rescission will be decreed.

(May 19, 1896.)

A PPEAL by defendants from a decree of the Circuit Court for Alachua County in favor of complainant in a suit brought to cancel an agreement for the sale of real estate. *Modified.*

The facts are stated in the opinion.

Mr. Angus Paterson for appellants.

Messrs. Cooper & Cooper for appellee.

Mabry, Ch. J., delivered the opinion of the court:

David L. Yulee, as administrator of the estate of Moses E. Levy, deceased, filed a bill against appellants, John M. Hendry, Archibald and Norman Campbell, for the purpose of canceling a written agreement for the sale of several sections of land situated in Alachua county, entered into by and between the decedent Levy and appellants. The written contract to convey the land was made in March, 1854, and Levy agreed thereby to sell the sections of land described, for \$7,000, in three instalments, evidenced by promissory notes executed by the purchasers, and due, respectively, January 1, 1855, January 1, 1856, and January 1, 1857. The agreement was to convey the lands by warranty deed when the last payment of the notes was made.

The material parts of the bill, as amended, allege the contract of sale from Moses E. Levy to the purchasers, Hendry and the Campbells; the death of the former, and the appointment of David L. Yulee as his administrator; that the defendants wholly failed to pay their said notes when they became due; and that Yulee, as administrator, brought suit in Columbia county on the notes, and obtained judgment

*Headnotes by **MABRY**, Ch. J.

NOTE.—As to note payable in foreign money, see *Hogue v. Williamson* (Tex.) 20 L. R. A. 481.

As to contracts specifically calling for payment 34 L. R. A.

in coin, see note to *Skinner v. Santa Rosa* (Cal.) 29 L. R. A. 512.

against the Campbells. The date of the judgment was in the year 1863, during the late Civil War. It is further alleged that the judgment record and the notes were burned in the court-house of Columbia county in the year 1866, and that no part of the judgment or notes had even been paid, either to Levy in his lifetime, or his administrator since, and that said defendants were insolvent,—without means out of which to collect the purchase money agreed to be paid by them for the lands; that, on account of the failure of defendants to pay the purchase money for the lands, they had forfeited all rights or claim under the contract of purchase, and that complainant was willing and offered to cancel the said judgment obtained, if the court should so direct; that defendants had never been in possession of the lands under the contract, but Levy and his representatives had at all times since the sale been in possession, paid taxes, and exercised ownership, and that the lands, since the contract of sale, had greatly increased in value, and were then worth greatly more than when the agreement to sell was made; that all the other lands belonging to the estate had been sold, under order of court, for division among the heirs, and the lands in question were held by the administrator, under an order of court, to pay a balance due certain of the heirs on account of their distributive portions, and it was important that the estate be closed up at an early day. It is also alleged, on information, that defendant Hendry claimed to have paid certain paper bills or notes, known as "Confederate currency," on the said judgment, to the clerk of the circuit court of Columbia county, which, if true, was not authorized or consented to by complainant, or any person for him, and such pretended payment, if made, was never received or recognized by him; and, further, that said Confederate currency was not such money as he was authorized to receive, or could legally and properly receive, as administrator, in the payment of said debt.

The answer of defendants admits the death of Levy, and grant of letters of administration on his estate to David L. Yulee, and also the written agreement of sale of certain lands, as alleged in the bill, except as to the description of the lands given, and as to this the answer sets out what is alleged to be the correct description of the lands agreed to be conveyed by Levy upon the judgment of the notes given for the purchase money of the same. It is alleged that, upon the execution of the contract, defendants went into possession of the lands, and have held possession ever since. It is admitted that suit was instituted on the notes, and judgment obtained thereon, in Columbia county, in the year 1863; but it is alleged that defendants paid the judgment in full on the 25th day of January, 1864, and had the same fully discharged and satisfied.

Defendants further answered that Moses E. Levy died before either note became due, and when they became due defendants were informed that Levy left a will, and there existed at the time grave doubts as to whether David L. Yulee was authorized to receive payment of the notes and execute a deed, and for that reason tender of payment was not made; that when the judgment was obtained on the notes the

currency of the country was Confederate money, and, when levy was about to be made, defendants offered to turn over the lands for the judgment, or pay the same in Confederate money, and that complainant refused to take the lands, but agreed to accept Confederate money; that defendants sold a stock of cattle for Confederate money, and with it paid the judgment in full to James Banks, the attorney of record of complainant, and the money was deposited in the clerk's office, in the registry of the court, by order of said attorney, after taking out his fees and costs.

Defendants allege that they had paid the taxes on the lands, and complainant had not, and that in the year 1864, after the judgment was paid, they were informed that complainant refused to pay the taxes on the lands, and referred the tax collector to the defendants for payment.

It is admitted that the court-house and records in Columbia county were destroyed by fire, but it is alleged that the judgment was paid prior to that time.

Defendants also filed a cross bill, in which they allege fully all the material facts set up in their answer, and pray for the affirmative relief of the specific execution of the written agreement to convey the lands.

The answer to the crossbill admits the allegations as to the agreement to sell the lands, and the judgment rendered in Columbia county in 1863. The allegation as to possession of the lands by complainant in the cross bill is denied, as well as all the other material allegations as to the agreement to accept Confederate money in payment of the judgment, or the authority of anyone to accept the same for defendant. It is alleged that defendant could not, in the execution of his trust, accept Confederate money in payment of the purchase money for the lands, and that he did not insist on, or press, the payment of the said judgment. It is also alleged that complainant was barred by lapse of time and the staleness of his claim, as well as by the statute of limitations, from attempting a specific performance of the contract after so long a time.

After the issues were made up, but before proof taken, David L. Yulee died; and Samuel Benlisa was appointed administrator *de bonis non* on the estate of Moses E. Levy, deceased, and was admitted as a party in the proceedings, in the place of deceased administrator.

On final hearing the cross bill was dismissed, and the contract for the sale of the lands was canceled, on the allegations and proofs under the original bill.

A material and controlling question on the appeal in this case relates to the alleged payment with Confederate money of the judgment obtained in Columbia county. If this payment was ineffective to discharge the debt, appellants were in great laches in not paying, or offering to pay, for the lands, as it is not shown, or attempted to be shown, that any other payment was made, or offered to be made, on the land notes. It is alleged and not denied, that appellants were insolvent, and had no effects out of which the purchase money could be made; and we think it is clear from the evidence that they were not in

possession of the lands before the bill was filed against them. The lands were wild and unimproved, and there is no evidence of any actual possession on the part of appellants before suit was brought. Subsequent to the war, some of the lands were sold for taxes, and parties other than appellants obtained possession under tax deeds; and the administrator sued for, and recovered possession of the lands held under such deeds. It is also shown that he paid taxes on the lands, and had an agent to protect them from depredations. Appellants, it appears, paid some taxes on the lands, and looked after them to some extent; but there was no possession or improvement of the lands on their part, and they have no status on this account, as was the case in *Tate v. Pensacola, Gulf, L. & D. Co.* (decided at this term) 37 Fla. 439.

The contract for the sale of the lands was made in 1854, and it is alleged, and not denied, that the property had greatly increased in value at the time the bill was filed. On account of the long period of time since the making of the contract of purchase, and the changed condition of the property as to value, there can be no basis of any equity for a specific performance of the contract, unless the judgment on the notes, and the alleged payment with Confederate money, changes the case. *Knox v. Spratt*, 23 Fla. 64. In proof of the payment of the judgment, appellants put in evidence a receipt as follows:

Lake City, Florida, Jan'y 25th, 1864.

State of Florida, Columbia County.

Be it remembered that, on this day, received into the registry of this court the full amount of principal, interest, and costs in a suit pending in said court, to wit, David L. Yulee, administrator of Moses E. Levy, vs. John M. Hendry, Archibald Campbell, and Norman Campbell, at the hands of John M. Hendry.

Witness my name and seal of office, day and date above written.

[Signed] Samuel R. Mattair,

Clerk C. C. C. C.

It appears, both from the pleadings and proof, and is conceded by counsel for appellants, that the amount received by the clerk and referred to in the receipt, was in Confederate money; and the first contention is that the payment of the amount due on the judgment, to the clerk was of itself a valid payment and satisfaction of the same. It is not contended that the administrator ever received the money from the clerk. The proof is clear that he never received it, and that he informed Hendry, within three months after the payment to the clerk, that he could not and would not accept it. There is no showing that the administrator himself gave any directions to the clerk to receive the money. The authorities cited by counsel, in support of the contention that payment, of itself, to the clerk was a discharge of the judgment, sustain the view that the receipt of money due on a judgment, by an officer having authority, in his official capacity, to accept it, will satisfy the debt. In the case of *Governor v. Read*, 88 Atl. 252, where a payment to a clerk was held to be a discharge, he was authorized by statute to re-

ceive payment in money after the judgment was rendered. And so in the cases of *Harvey v. Walden*, 23 La. Ann. 162; *Royd v. Suits*, 39 Ga. 73, and *Henly v. Franklin*, 8 Coldw. 472, 91 Am. Dec. 296, where payments were made to sheriffs, they were authorized officers to receive payment. In the present case it is left in doubt whether any execution ever issued on the judgment in question, but, however that may be, there was no payment to the sheriff; and we need not consider the effect of such a payment, if it had been made. We find no statute existing at the time authorizing the clerk to receive payment of judgments, or to accept money as paid into the registry of the court on judgments, without a judicial order for that purpose; and our conclusion is that the clerk had no authority, by virtue of his capacity as clerk, to accept the money and discharge the judgment.

The allegation in both the cross bill and answer of appellant is that the Confederate money was paid to the attorney of record of Levy's administrator, and deposited in the clerk's office, in the registry of the court, by order of said attorney. It is now further contended that the Confederate money was paid to the clerk under the direction of the attorney of record of the administrator, and that such attorney was authorized to satisfy the judgment. In reference to the right of an agent to receive paper currency issued by the Confederate government, the decisions have not been harmonious. No court, since the war, has held, so far as we know, that Confederate treasury notes were issued by lawful authority; but "money" has been recognized generally by the courts as a generic term, covering anything that by consent is made to represent property, and pass as such in current business transactions, and that when a judgment or debt has been paid in Confederate money, and accepted, the transaction must be regarded as settled, and cannot be opened. Several decisions go to the extent that if at the time and place of payment Confederate money was generally received in business transactions, and was in fact the current money of the country, the agent's authority to receive such money, in the absence of any directions to the contrary, may be presumed. This rule has been applied, not only when the creditor and debtor were within the same state, but when the creditor resided in a state not a member of the Confederacy, and the debtor was within the Confederate lines. *King v. King*, 37 Ga. 205; *Westbrook v. Davis*, 48 Ga. 471; *Rodgers v. Bass*, 46 Tex. 505; *Burford v. Memphis Bulletin Co.* 9 Helsk. 691; *Pidgeon v. Williams*, 21 Gratt. 251; *Hale v. Wall*, 29 Gratt. 424; *Robinson v. International L. Assur. Soc.* 42 N. Y. 54, 1 Am. Rep. 400; *Glasgow v. Lips*, 117 U. S. 827, 29 L. ed. 901; *Martin v. United States*, 2 T. B. Mon. 90, 15 Am. Dec. 129. Other decisions hold that the rule should not be applied where the creditor was within the Federal lines, with communication between him and his agent in the Confederacy destroyed. In such a case it has been held that no implied authority to receive Confederate money existed, and that a payment to the agent or attorney did not discharge the debt. *Harper v. Harvey*, 4 W. Va. 539; *Alley v. Rogers*, 19 Gratt. 366; *Waterhouse v. Louisiana*

Citizens' Bank, 25 La. Ann. 77; *Fryer v. Storer*, 89 U. S. 23 Wall. 198, 22 L. ed. 769. In the present case the receipt for the money—the record evidence of the payment made at the time of the transaction—does not disclose any agency of any attorney in connection with it. The clerk who executed the receipt states, as a witness, that he received the money under the directions of James Banks, as the attorney; and his recollection was that Banks was the attorney of record, if signing the docket, and having the direction and control of the case, make him an attorney of record. The witness had no recollection as to what lawyer or lawyers signed the præcipe for the writs when the suit was commenced. He repeats that he took the money under the directions of Banks, whom he regarded as the attorney of record managing the case, and that, after asking if it was right for him to receive the money, Banks said it was, and that he governed the case; that he (Banks) dictated the receipt, made the calculation, and, after costs and fees were paid, the balance was left with the witness, in what Banks called the "registry of the court." Hendry testified that the money was paid into the registry of the court, as evidenced by the receipt under the instructions of James Banks, attorney for the administrator, and that the attorney was present, and consented to the payment. On cross examination, in answer to the question to whom he paid the money, he said "the clerk was representing the sheriff at the time. He said the sheriff was out of town. Col. Banks was present, as I have stated, and the money was left in the clerk's hands." The testimony of George R. Fairbanks establishes the fact that he was the attorney of record who instituted the suit of the administrator against appellants. He produced an original summons in the case, which had been left in his hands, with his name indorsed on it as sole attorney. It is true he did not obtain the judgment and was absent when it was rendered, but it is evident from his testimony that he was the attorney who originally commenced the suit. The statute (Thomp. Dig. p. 359, § 9) provides that "all moneys made upon executions in this state shall be paid to the attorney of the party in whose favor execution shall have issued. . . . And in any case when the name of more than one attorney shall appear upon the records of the court, the money shall be paid to the attorney who originally commenced the suit, or to him

who made the original defense." We think the testimony is not sufficient to overcome the answer to the cross bill, and establish the fact that the money was paid to James Banks as attorney for the administrator. If he intended to receive the money, it is strange that he did not accept it, and execute a receipt for it in his own name. He died before the present suit was instituted, and his testimony could not be produced, but, on the showing made, the most that can be affirmed is that he consented to, or directed the clerk to receive the money. Knowing the fact that he was not the attorney who originally instituted the suit, it may have been his purpose not to receive the money himself, but have it deposited with the clerk, for the administrator to accept. If it be conceded that Banks was the attorney for the administrator when the judgment was obtained, we do not see that he had any authority, express or implied, to authorize the clerk to receive the money. The latter stood in no previous relation of agency to either Banks or the administrator, and was not authorized by law to receive the money. *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677. The decree dismissing the cross bill must, in our judgment, be affirmed.

The failure of appellants to show any valid payment of the judgment leaves them, as before stated, in great laches in not complying with their contract of purchase. Aside from the fact that judgment was obtained on the notes, the court would not hesitate to cancel the contract. Under the circumstances of the case, and in view of the insolvency of appellants, as shown, we are of the opinion that the court was right in canceling the contract.

Appellants are in no condition to ask for a specific performance of the contract, and, in general, when a specific performance is denied a rescission will be decreed. *Kirby v. Harrison*, 2 Ohio St. 826, 59 Am. Dec. 677. The complainant in the original bill offered to cancel the judgment, and the decree should have so directed, and to this extent it will be modified. The judgment record was burned in 1866, and has never been re-established, so far as is shown, but the decree in the present case should provide against any possible claim under the judgment.

The decree is affirmed, with the modification indicated, and an order will be entered accordingly.

GEORGIA SUPREME COURT.

John D. BAGLEY, *Plff. in Err.*,

v.

COLUMBUS SOUTHERN RAILWAY
COMPANY.

(.....Ga.)

*1. A justice's court has no jurisdiction of an action for damages to realty.

*Headnotes by SIMMONS, Ch. J.

NOTE.—How far crops are personal property for the purpose of levy and sale is considered in a note to *Polley v. Johnson* (Kan.) 23 L. R. A. 258, 84 L. R. A.

2. Fences permanently affixed to land constitute a part of the realty; and, as a general rule, unmaturing crops growing upon land belonging to the owner of the crops are to be regarded as part and parcel of the land.

3. It follows that a justice's court has no jurisdiction of an action for damages alleged to have been occasioned by the negligence of a railway company in setting fire to and burning fences inclosing the plaintiff's

For sale or mortgage of future crops, see note to *Dickey v. Waldo* (Mich.) 23 L. R. A. 442.

land, and causing damage to his pasture and to a crop of unmaturing cotton growing in his field.

(June 18, 1896.)

ERROR to the Superior court for Chatham County to review a judgment reversing a judgment of a justice of the peace in plaintiff's favor in an action brought to recover damages for injuries caused by fire set out by one of defendant's locomotives. *Affirmed.*

The case sufficiently appears in the opinion.

Mr Leonidas McLester, for plaintiff in error:

When trees, either growing or matured, are destroyed by the wrongful act of another, the owner may bring his action, either for the value of the trees so destroyed, or for the injury to the real estate, or his interest in it. Several remedies were open to the injured party. He might elect under either remedy to treat the real estate as personalty and sue for value of same.

Bailey v. Chicago, M. & St. P. R. Co. 3 S. D. 581, 19 L. R. A. 658; *Smith v. Gonder*, 22 Ga. 353; *Yahoola River & C. O. Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 482; *Coody v. Gress, Lumber Co.* 82 Ga. 793; *Heard v. James*, 49 Miss. 245.

Messrs. Miller, Wynn, & Miller, for defendant in error:

Under the Constitution of Georgia a justice of the peace shall have jurisdiction in all civil cases arising *ex contractu*, and in case of injury or damage to personal property when the principal sum does not exceed \$100.

Code, §§ 51, 52.

Under the Constitution of 1868 the justice of the peace had jurisdiction to try cases of damage to realty as well as personalty if not involving a sum beyond his jurisdiction, but under the Constitution of 1877 a justice of the peace has no jurisdiction as to damages to realty.

Cartersville v. Lyon, 69 Ga. 577.

A justice's court has no jurisdiction of a claim for damages to a steamboat company by reason of the detention of one of its steamboats at a river bridge.

White Star Line S. B. Co. v. Gordon County, 81 Ga. 47.

A judgment rendered by a justice of the peace where he has no jurisdiction of the subject-matter is void.

Baxter v. Bates, 69 Ga. 587; *Williams v. Butler*, 76 Ga. 356.

Simmons, Ch. J., delivered the opinion of the court:

1. Under the Constitution of 1877, the jurisdiction of a justice's court over actions arising *ex delicto* is confined to "cases of injuries or damages to personal property." Code, § 5153; *James v. Smith*, 62 Ga. 845, 347; *Cartersville v. Lyon*, 69 Ga. 577, 580; *White Star Line S. B. Co. v. Gordon County*, 81 Ga. 47. It follows that a justice's court has no jurisdiction of a case in which the plaintiff seeks to recover damages for an injury to realty caused by the wrongful act of the defendant.

2. In the present case, which was commenced in a justice's court, the plaintiff alleged that the defendant railway company "did carelessly set fire to and destroy and burn a cer-

tain cow pasture, and about 800 yards of fencing, and about $\frac{1}{4}$ acre of cotton growing in the field, the property of complainant, and all of the value of \$25." Whether the magistrate had jurisdiction to entertain the suit must depend, therefore, upon whether the property alleged to have been thus destroyed is legally to be considered and characterized as personalty or as realty.

The burning of the plaintiff's "cow pasture" can scarcely be regarded as anything less than an injury to realty. Indeed, to characterize such an injury merely as damage to personalty would appear to be a euphemism unwarranted under the strict rules of law. If the plaintiff really intended to aver that the grass or other natural herbage growing upon his pasture lands was destroyed by fire, still such damage is to be legally considered as an injury to realty. "Growing crops, if *fructus naturales*, are part of the soil before severance." 4 Am. & Eng. Enc. Law, 894. "It is generally held that growing trees, fruit, and grass are parcel of the land." Tyler, *Fixtures*, 735. As we shall hereinafter more fully discuss the nature of growing crops and their legal status, we may dismiss for the present further consideration of the plaintiff's claim of injury to his pasture, and pass to a discussion of the character of the damage he sustained by reason of the burning of his fences.

"A fence is generally considered to be a part of the realty." 7 Am. & Eng. Enc. Law, pp. 905, 906, citing cases. And, to the same effect, see Tyler, *Fixtures*, 116, 132, 133. Certainly, where the owner of land builds or maintains thereon a substantial fence, as a permanent structure, constituting an improvement of the premises, such fence becomes as much an integral part of the realty as would a house or brick wall erected thereon. Our Code settles this question, for it is declared in § 2319 that "anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty." So, the burning of the plaintiff's fences is likewise to be regarded as damage to realty.

Our main difficulty in disposing of the question of jurisdiction raised in this case has been to properly determine the legal character of the third item of damage claimed by the plaintiff, arising out of the destruction of unmaturing cotton growing in his field. Many of the modern text-books and numerous adjudicated cases have been adverted to during the course of our investigation, but with a result tending rather to confusion than practical aid, so far as concerns a correct determination of the question whether, at common law, growing crops were characterized as personal or as real property. For instance, Mr. Freeman says: "Crops, whether growing or standing in the field, ready to be harvested, are, when produced by annual cultivation, no part of the realty." 1 Freeman, *Executions*, § 113. And, in support of his text, he cites cases to show that unmaturing crops are "liable to voluntary transfer as chattels," "may be seized and sold under execution," and pass "to the executor or administrator of the occupier [of the land], if he die before he has actually cut, reaped, or gathered the same." On the other hand, it is

broadly stated in the American & English Encyclopedia of Law (vol. 4, p. 887) that "growing crops, before maturity and unsevered from the soil, are part and parcel of the land on which they grow, and pass with a conveyance of the land." Cases almost innumerable are cited as showing that this rule obtains in nearly every state in the Union. This text is then immediately followed by the statement (p. 891) that "crops ripe for harvest are personal property; they pass to the executor, and not to the heir. They are liable to be seized on execution; and the officer may enter, cut down, seize, and sell the same as other personal estate." On the succeeding page it is said: "Although growing crops are part of the realty, unless severed from the soil, yet, for the purpose of levy and sale on execution, they are suffered to be treated as personalty." Again, we find it stated in 6 Lawson, Rights, Rem. & Pr. § 2681, that "crops, until they are gathered, are things immovable, or real estate, because they are attached to the ground," but, when "crops are gathered, they become movable or chattels personal, because they are no longer attached to the soil. . . . Corn, ripe, but standing cut in the field, passes by deed of the freehold. Unharvested crops go to the devisee of the land, and not to the executor; but, as against the heirs at law, they go to the executor." This statement is met by the assertion to be found in 3 Ballard, Real Prop. § 128, that "annual crops sown by the owner of the soil or by his tenant, and which are the produce of industry and care while growing and immatured, are personal property;" whereas in the first volume of the same work (§ 111) it is said that, "as a general rule growing crops, which have been planted by the owner of the soil, constitute a part of the realty; . . . but this rule is held not to apply to crops which have matured and are ready to be harvested." Mr. Kerr says: "Growing crops planted by the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance. . . . And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past. . . . It is the general rule that a crop growing on land at the time of a sale under execution passes to the purchaser; and the same is true on a sale under a mortgage foreclosure. . . . And growing crops are a part of the realty as between the successful plaintiff in an action of ejectment and the evicted defendant, where the crops were planted after the commencement of the action in ejectment. But the rule is otherwise where the grain was sown and harvested by one on lands to which he claimed title, and of which he was in actual possession. Crops planted by a tenant who holds under the owner of the soil are, as between the landlord and his tenant, personal property; and the tenant has the right to remove them; they become part of the realty, however, should the tenant voluntarily abandon or forfeit possession of the premises." 1 Kerr, Real Prop. §§ 50, 51. In the second volume of the same work (§ 958) the author says: "Where there are annual crops upon the lands assigned to a widow as her dower, which were growing at

the time of her husband's death, they will belong to her, and not to the heirs or executors of the husband; but if there has been a severance by the husband, as where he has assigned the crops to pay his debts, the wife will not be entitled to have dower assigned therein." So far as the offense of larceny is concerned, Mr. Bishop says that standing grain was at common law considered as realty, and it required statutory enactment to constitute an unauthorized taking of crops larceny in the several states where such act is made a crime. 1 Bishop, New Crim. L. § 577. In *Preston v. Ryan*, 45 Mich. 174, Justice Cooley said: "While it is quite true that the growing crops are a part of the realty, yet, for the purposes of levy and sale on execution, they are suffered to be treated as personalty." And there are numerous cases in which it has been held that where the owner of crops has undertaken to sell the same at private sale, before they matured, or while ripe, though ungathered, such crops, if grain or other agricultural produce raised annually, are to be treated as personalty for the purposes of such sale. The question as to whether such crops were personalty or realty arose in considering the effect of the statute of frauds upon sales of this character. These decisions were confined, however, to sales of such crops only as were termed "emblems" at common law. Clark, Cont. 106. Says Mr. Kerr, in dealing with this subject: "A distinction is to be observed between *fructus naturales*, or the natural growths of the soil, such as trees, grasses, herbs, fruit on trees, and the like, which at common law are part of the soil, and *fructus industriales*, or fruits or products the result of the annual labor of man in sowing and reaping, planting and gathering, which, though strictly a part of the realty, as much as those products which the soil brings forth without man's intervention, are treated as personal property for many purposes." 1 Kerr, Real Prop. § 58. Mr. Bishop doubts much the soundness of the distinction made in regard to crops of the latter kind, but says: "The exception of deeming them personalty for most civil purposes, even while attached to the soil, is probably established too firmly in authority to be overthrown." Bishop, Cont. § 1296. For a full discussion of the subject, and a review of the leading cases, English and American, see Browne, Stat. Fr. 5th ed. §§ 235 *et seq.*; 1 Benjamin, Sales, §§ 118 *et seq.*; 4 Am. & Eng. Enc. Law, pp. 893 *et seq.*; Blackburn, Sales, 5; 1 Addison, Cont. § 206; Baker, Sales, § 153; Tiedeman, Real Prop. § 799; Tyler, Fixtures, 732 *et seq.*; 8 Washb. Real Prop. 364 *et seq.*; 2 Addison, Cont. §§ 656 *et seq.*; 2 Schouler, Pers. Prop. §§ 448 *et seq.*; Tiedemann, Sales, § 59. In summing up, the author of the work last cited says: "The better opinion, independent of the authorities, would seem to be that any contract which undertakes to pass title to anything annexed to the soil, without severance, is a contract for the sale of an interest in land, whatever may be the character of the thing to be severed, and falls within the fourth section of the statute."

Anyone wishing to further entangle himself in the mystic maze of uncertainty and contradiction in which the law governing growing

crops has become involved may profitably direct his attention to the legion of cases cited by the various text-writers to whom we have above referred. The field thus open to him is promising even unto distraction. Such a rich mine of abstruse legal learning is, doubtless, of untold value. It has not, however, proved helpful in the decision of the present case, nor led us to an understanding of the general principle underlying the whole subject. Indeed, we are free to confess that about the only deduction we have been able to draw therefrom is that a growing crop is a sort of legal species of chameleon, constantly changing color to meet the emergency of each peculiar class of cases in which the question arises whether it is to be considered as personality or as realty. Amid all this glare of legal light, we have not been so fortunate as to find any case, or class of cases, like the present, in which this creature of the law has thus arbitrarily volunteered to assume its distinguishing hue. Like a man with many aliases, it presents itself sometimes under one name, at other times under quite another; so that we may not know how, upon special occasion, to address it. Being thus thrown upon our own resources, we feel at liberty, and shall endeavor to classify the plaintiff's unhappy crop of cotton agreeably to our own understanding of the legal status of growing crops at common law, and without regard to the conflicting views entertained by the several authors from whom we have above quoted.

We may at the outset remark that, in our opinion, growing crops, before actual severance from the soil, were consistently regarded at common law as realty. Whatever incongruities may have crept into the law upon the subject as now understood in many jurisdictions we believe attributable alone to a misconception on the part of courts of the present day of the rules which governed this species of property under the feudal system prevailing in England at an early period of its history. Especially would it seem that the principle which underlies the doctrine of emblements has been too often overlooked, disregarded, misunderstood, or misconstrued. Blackstone tells us that in feudal times, when a common recovery suffered by the tenant of the freehold had the effect of annihilating all leases for years then subsisting, estates for years were necessarily of a precarious nature, and of short duration. 2 Bl. Com. 148. The hardship attending a thus sudden termination of the lessee's estate before he could reap the fruits of his toil, by gathering his crops, appealed strongly for his protection. Relief was justly afforded by the courts upon the doctrine of emblements, designed to meet an emergency thus occasioned, whereby the tenant for years was given a right to gather that which he had in good faith planted. Not so, however, if a tenant whose term was certain sowed a crop he could not reasonably expect to be able to harvest before his term expired, or by his own act terminated his estate before his crops were matured and gathered,—in the one case, because "it was his own folly to sow what he could never reap the profits of;" and, in the other case, because his estate terminated by reason

of his own default or caprice. 2 Bl. Com. 145. And in like manner was the doctrine applied as to tenants at will. Id. 146. It is proper to further observe that the right established by the doctrine of emblements was something more than a mere naked privilege accorded to the outgoing tenant to sever from the soil his ripened crops (thus converting the same into personality), and carry them off, along with such chattels belonging to him as might happen to be upon the premises at the termination of his estate. Growing and immature crops were also covered by this doctrine, which further gave to the tenant "the right of ingress, egress, and regress so far as needful for due attention to and gathering" the same. 1 Kerr, Real Prop. § 652. "The right to emblements includes the right to the land to cultivate and harvest them." 6 Lawson, Rights, Rem. & Pr. § 2682. So, it will be seen that the effect of the doctrine was to give the departing tenant a right to the use and sustenance of the soil for a period sufficiently long to mature his crops; thus, to this extent, extending the term of his original estate, and, in consequence, depriving his successor in estate of the unrestricted use, and of all profits, of such lands as were necessary to the growing of the crops, until the same matured and were harvested. If the doctrine of emblements extended no further, the tenant at will, the tenant for years, or the tenant *pur autre vie*, would be fully protected, provided he remained in life; otherwise, his very natural failure and omission to demand and enforce his right would inure to the benefit of his successor in estate, thus unjustly depriving the family and creditors of such tenant of the fruits of his toil. Neither creditors nor his heirs could enter upon the land and gather the crops without committing trespass, were this a right restricted to the tenant himself, although, had the tenant himself exercised this right before his death, his heirs and creditors would have gained a just benefit and advantage by reason of such exercise, the result of which would have been to convert the crops into personality, and render the same capable of due administration and distribution agreeably to law. But this emergency was foreseen. The maxim of the law, *Actus Dei nemini facit injuriam*, was invoked, and the representatives of the deceased tenant were given the right to enter upon the land and gather the crops, after which, of course, having thus become converted into personal estate, they were subject to administration as such. See 2 Bl. Com. 122. Subsequently, the doctrine of emblements was still further extended to include crops planted by a tenant in fee who died before time for harvest, principally for the protection of creditors (Id. 404); and with much reason, for, as against creditors, the heir to the inheritable estate had no just claim to profits derived therefrom before he succeeded to its possession, certainly not when, indeed, his ancestor may have been enabled to plant and tend such crops solely by reason of credit extended to him by such creditors.

The whole doctrine of emblements was based upon two reasons: (1) Upon natural justice and equity; (2) upon grounds of public policy. The substantial merit of the first reason assigned is apparent. How public policy was

subverted by an application of the doctrine is explained by Blackstone when he says: "The encouragement of husbandry, . . . being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it." 2 Bl. Com. 122. We have already shown that, where the reason of the doctrine fails, it has no application; as where, for instance, a tenant terminates his estate through his own default or misconduct. In such case the law as it existed prior to the establishment of this doctrine was suffered to apply in all its rigor, whereby a growing crop, until actually severed from the soil, was regarded as a part of the land itself, and passed accordingly. That this is true is evidenced by the fact that the courts of England have uniformly held that, at common law, growing crops were not considered personally before severance, and were therefore not the subject-matter of larceny. 1 Bishop, New Crim. L. § 577; 2 Bishop, Crim. L. 7th ed. § 768; 12 Am. & Eng. Enc. Law, pp. 781, 782, and notes; 2 Bl. Com. 404. Indeed, if, at common law, standing crops were regarded as personal property, the doctrine of emblements was needlessly devised, so far, at least, as ripened, though ungathered, crops were concerned; for we apprehend it was always the right of a tenant, upon a sudden and unexpected termination of his estate, to demand a reasonable time within which to gather up his household goods and other personal effects before vacating the premises, and, if his ungathered crops constituted a part of his chattels, he would have a reasonable time in which to gather and carry them away. The truth of the matter is, however, that, before the introduction into the law of the doctrine of emblements, the tenant had no right to the usufruct of the land a single day beyond his term, nor to any profits thereof not arising strictly within the period of his right of occupancy. Consequently, after his estate had become fully determined, he would have no better right to claim standing crops than he would plowbote, although, had he gathered his crops or exercised his right as to plowbote before the expiration of his term, his right to carry the one or the other off as personally would certainly exist. The doctrine of emblements is based, and proceeds solely, on the idea that the tenant is justly entitled to gather his crops, even though his term has expired, and without regard to whether such crops are to be considered as in the nature of personality or realty. Nor is the fact that at common law the executor of a deceased tenant was entitled to claim emblements any test as to the legal character of such crops while yet standing in the field. Here we disagree with the conclusion drawn by Mr. Freeman and other writers. Formerly, under the common-law rules of succession, the title to crops severed from the soil could not pass into the executor. Under the doctrine of emblements, however, he was given the right to enter upon the land, in the name of the deceased tenant, and convert the crops into personality, by gathering the same and carrying them away, whereby the rules of succession governing personality were given opportunity to ultimately take effect upon this species of property.

Again, as has been seen, many text-writers

call attention to the fact that at common law an execution could be levied on a growing crop—evidently regarding this as persuasive authority for the statement that such crops were considered personality. In this view we cannot concur. As is well known, under the feudal system alienation or encumbrance of estates was strictly prohibited. Even a tenant in fee had no power to sell, mortgage, or otherwise incumber the estate of inheritance held by him; and, so long as this restraint upon alienation continued, the owner in fee was, in effect, no more than a life tenant. Creditors had therefore to look solely for payment to property of their debtor, in which he could, because having a right under the law to alienate the same, claim an unqualified and exclusive interest, and as to which the heir to the inheritable estate had no vested rights. Crops raised by the tenant in fee, being profits arising from the estate of freehold to which he was solely entitled, were, of course, no part of the inheritance. They were therefore held subject to his debts; not upon the idea that they were personality rather than realty, but upon the theory that they were a species of property in which the debtor had an unqualified and exclusive ownership. We believe the doctrine that all the property of a debtor, of every kind and description, of which he is sole owner, should justly be held subject to the payment of his debts, obtains even in this degenerate day. In this regard we find no inconsistency in the common law as to its treatment of growing crops as realty. On the contrary, the distinction between this class of property and mere chattels belonging to the debtor seems to have been strictly observed. The writ of fieri facias was restricted in its operation to the seizure of the "goods and chattels" of the debtor. To reach the profits of his lands (which consisted chiefly of crops grown thereon or rents issuing therefrom), the writ of levavi facias was requisite, which writ remained in use until the writ of elegit (established by statute), conferring greater rights upon creditors, naturally displaced it in general practice. 3 Bl. Com. 417-420. It is, perhaps, proper to note in this connection that, by special enactment in this state (Code, § 3642), it is provided that growing crops shall be exempt from levy and seizure under execution until matured and fit to be gathered, unless the debtor absconds or removes from the county or state. The purpose of this statute was merely to provide against a sacrifice of the debtor's property. In view of the fact that realty, as well as personality, is subject in this state to seizure under execution, it would, of course, be absurd to draw the conclusion that this change in the law as previously existing was a recognition that, at common law, growing crops were considered personality, and that the effect of the statute was to give such crops the character of realty.

We think the whole troublesome subject is pretty satisfactorily explained and relieved of much difficulty by the following extract, which we take from 2 Bl. Com. 404. Says Blackstone: "Emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testaments before the statute of wills, and at the

death of the owner shall vest in his executor, and not his heir, they are forfeitable by outlaway in a personal action; and by the statute 11 Geo. II. chap. 19, though not by the common law, they may be distrained for rent *errere*. The reason for admitting the acquisition of this special property by tenants who have temporary interests was formerly given; and it was extended to tenants in fee, principally for the benefit of their creditors; and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlaway, and distrainable for rent, they are not in other respects considered as personal chattels; and, particularly, they are not the object of larceny, before they are severed from the ground." We understand this distinguished writer to mean, when he says, "Emblements are distinct from the real estate in the land," that they constitute no part of the inheritance, as between the heir thereto and the legal representatives of the tenant in fee, but are to be regarded as merely profits arising out of the land, rather than an integral part of the land itself, considered as a vested estate; or, as between a lessee and the owner of the freehold estate, that emblements never become attached to the land in such manner as to constitute a permanent part of the realty comprising such freehold estate, but, as profits to which the lessee alone is entitled, are distinct from the land itself, and vested exclusively in him. In fact, the doctrine of emblements was designed for the very purpose of effecting such a separation, and declaring emblements "distinct" from the "real estate in the land," no matter in whom such estate vested by reason of the sudden expiration of the tenant's term. It will be noted that Blackstone does not say that growing crops are distinct from the land upon which they are grown, but only that they are so after they become "emblements." Of course, where the doctrine of emblements has no application, growing crops cannot be considered as "emblements" at all. As, for instance, when, at the present day, the owner of lands in fee simple has an unqualified and exclusive interest therein, himself plants the crops, and remains in undisturbed possession of the premises, no such distinction between the land and unharvested crops growing thereon is properly to be observed. Thus, it is the almost universal rule in this country that where such owner voluntarily sells his lands, without expressly reserving a right to enter and gather growing crops planted thereon, such crops are to be regarded as realty, and, as such, pass to the purchaser. See the collection of cases cited in 4 Am. & Eng. Enc. Law, p. 897.

It will further be observed that Blackstone seems very studiously to avoid characterizing even "emblements" as personality, but very happily, we think, remarks, instead, that they are "subject to many, though not all, the incidents attending personal chattels." And herein we believe he has struck the keynote explaining how, in later times, growing crops have come to be considered personality, simply because, the law having placed upon them many incidents common alike to chattels, no reason ordinarily exists for observing their true status as realty; and therefore the distinction which really still survives between

them and mere chattels has not been clearly and consistently kept in view. Under various rules of law, many "incidents" attend, and are alike common to, both real and personal property. For instance, a new and special tax upon property might be laid upon both realty and personality, irrespective of their inherent character, and yet this would really make them no closer kin than they were before. We have already seen that at common law, while estates of inheritance were not subject to be levied on under execution, growing crops were held liable for the claims of creditors, simply because the exclusive ownership of such crops was vested in the debtor, and the heir to the inheritance had no interest therein. As crops raised by the debtor were, perhaps, the only species of realty of which this was true, and as all chattels were held subject to execution, it is not strange that, in course of time, the impression should take root in the minds of those not familiar with or not recalling the history of this rule of law, and the reasons upon which it was based, that no distinction existed between these two kinds of property, especially as in other respects no difference in the treatment of either was observed. That growing crops were subject to forfeiture upon outlaway may likewise be explained upon the idea suggested why crops were subject to execution, *viz.*, that the debtor had an alienable, and therefore exclusive, interest therein. In the initial or preliminary proceedings to outlaway, if the recreant debtor persistently failed to obey the summons of the court, a writ was issued "commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called 'issues,' and which he forfeits to the King if he doth not appear." 8 Bl. Com. 280. So, it will be seen that his crops were reached and forfeited, not as chattels, but as "profits of his lands."

We have already explained how emblements came to be vested in the executor, instead of descending to the heir. The remaining "incident" referred to by Blackstone, *viz.*, that emblements "were devisable by testament before the statute of wills," will readily be understood as a natural sequence of the doctrine of emblements. As thereunder the executive was empowered to reduce his testator's crops to possession, the latter could very properly direct in his testament what disposition should be made of the same after they had been so reduced to the executor's possession, and had thereby become converted into personality belonging to the testator's estate.

We shall not in the present case undertake to enter upon any discussion of the effect of the statute of frauds upon private sales of growing crops made by the owner thereof; preferring to make no attempt to successfully cross this dangerous legal bridge until necessity brings us to it. As it would appear an unpromising and impracticable task to try to reconcile the many decisions, English and American, in which this question has been dealt with and discussed, we could hope to gain no fuller light as to how, in point of fact, growing crops were classified at common law. So we may dismiss the topic, merely remarking that if, "for the purposes of such sales, emblements are suffered to be

treated as personality," the case with which we are now dealing does not fall within this exception to the general rule, nor, indeed, within any other of the "exceptions" referred to by text writers, of which we are aware.

We cannot refrain from remarking in this connection the embarrassment we have experienced arising out of the practice, which seems to have sprung up in some jurisdictions, of arbitrarily regarding growing crops as personality for one purpose, and as realty for another. In the very nature of things, this species of property, being tangible in form, and possessing many marked inherent characteristics, is capable of being properly classified, and should be given a fixed legal status. Of course, where there is no imperative necessity for strictly observing and remarking the distinction existing between two entirely different species of property,—as where rules of law operating alike upon either class are merely to be construed and enforced,—no vicious consequence or positive harm immediately results from "treating" them as though they were identical in character, or even inaccurately styling something "personality" which should properly be referred to as "realty." But the importance of preserving, if possible, absolute consistency in the entire fabric of our law,—thus rendering the same unequivocal, and therefore more readily and more clearly comprehended,—should by no means be overlooked. The justice of this critical observation is evidenced by the utter confusion in which we find the law upon the subject, with which we are now dealing, to be involved.

That growing crops cannot properly be "treated" as personality under the law as understood in this state seems indisputable, in view of the definition of "realty" contained in § 2218 of the Code, which purports to be declaratory of the common law, and which reads as follows: "Realty, or real estate, includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of, or dependent thereon." Following this definition, it was held in *Cody v. Gress Lumber Co.* 82 Ga. 798, that "trees growing upon land constitute part of the realty; and a sale of them, under the statute of frauds, must be in writing." And in *Frost v. Render*, 65 Ga. 15, wherein it appeared that a sheriff sold, under execution, land upon which was growing a crop of cotton, it was held that, "a levy being on certain land as the property of the defendant in *fi. fa.*, a sale under such levy carries with it the crop growing on the land, and the sheriff cannot limit the sale by an announcement that the rent of the current year is reserved;" for the reason that the law considers growing crops part and parcel of the land itself, following its ownership as a mere element of value incident thereto. This is certainly the general rule which obtains in this state, and we know of no exceptions thereto which have gained any foothold in our law on the subject. A review of the decisions previously rendered by this court in cases wherein the question as to the legal character of growing crops arose shows that they are all in harmony with the conclusion reached in the present case. In *Pitts v. Hendrix*, 6 Ga. 452, it was held that "a growing

crop of corn, after it is laid by, and before maturity, passes to the purchaser of the land." This case was cited and followed in *Ferguson v. Hardy*, 59 Ga. 758, wherein the question arose as to whether the title to crops growing on lands sold under execution passed to the purchaser, as against the defendant in *fi. fa.* In the more recent case of *Dollar v. Roddenberry* (decided at the March term, 1895) 25 S. E. 410, the question was presented whether such a purchaser also acquired title as against a tenant who planted the crops, and whose estate was terminated thus suddenly by a sale of the lands; and, upon the doctrine of emblements, this question was decided in the negative. This decision was, of course, rendered without regard to whether the crops were to be considered as personality or as realty, being based solely upon the idea that the tenant was entitled to the crops as emblements, which, even though a part of the realty, were, nevertheless, not included in the sale of the land; for no greater interest than the landlord had therein could be sold under execution as his property, and, of course, the purchaser got only that which was in fact sold. Again in the case of *Scolley v. Pollock*, 65 Ga. 389, wherein there was a contest between a judgment creditor of a tenant and one who claimed cotton levied on by virtue of a prior purchase from the tenant of his immatured crop, and who had accordingly entered upon the land, cultivated the crop, and harvested it when ripe, the decision in *Pitts v. Hendrix*, *supra*, was cited approvingly, and it was further said: "Before maturity the crops only constitute an element of value, and are not themselves distinct chattels. We know of no ruling to the contrary by this court."

There only remains to be noticed the decision in *Hamilton v. State*, 94 Ga. 770, wherein the accused was charged with having fraudulently sold and disposed of personal property upon which she had previously given a mortgage, contrary to the provisions of § 4600 of the Code. The indictment against her alleged that, having mortgaged her crops in May, she, in the following November, fraudulently sold and disposed of the same, without the consent of the mortgagee, and with intent to defraud him, whereby he sustained loss. The point was raised that a mortgage given upon a growing crop could not properly be regarded as a mortgage upon personality. The decision of the court in that case was pronounced by the writer of this opinion. In dealing with the question thus raised, the distinction drawn between growths that are "*fructus naturales*" and those termed "*fructus industriales*" was stated, and to a limited extent discussed; 1 Corbin, Benjamin, Sales, § 126, and note to *Norris v. Watson*, 55 Am. Dec. 162, being referred to as showing that this distinction had been recognized and followed by many courts of high repute. The subject did not then, however, receive the careful and laborious investigation which this opinion evidences; and it was not necessary, for we did not rest our decision on the ground that the crops were to be deemed personality at the time the mortgage upon the same was given, but called attention to this widely-recognized distinction merely as persuasive argument tending to show that, in any view of the case,

the conviction of the accused was right. As will be perceived from the concluding remarks of the opinion then delivered, the ground upon which we rested our decision was that whatever might be the character of the crops when mortgaged, if the accused fraudulently disposed of the same after maturity, so that they were removed from the land and carried beyond the reach of the mortgagee, the offense with which she was charged would unquestionably be complete. The record before us did not disclose whether she gathered the crops herself, and afterwards carried them off and sold them, or whether the sale took place while the crops yet stood, ripe but ungathered, in the field. But we did not then, nor do we now, think this would make any difference. Even in the latter event, the produce of these matured crops being the subject-matter of sale, and their separation from the land being necessarily contemplated and included in the terms of sale, severance from the soil would be an essential incident to an effectual delivery; and, until actually delivered, the sale would remain executory and incomplete. Unquestionably, the lien of the mortgage adhered to the crops as effectually after severance as before. 1 Cobby, Chat. Mortg. § 380. "A mortgage of a growing crop follows the matured and harvested grain." Id. § 381. And a mortgage lien on a crop is not lost by any natural change in its condition. Id. § 379. Therefore, we concluded that, irrespective of whether such crops should properly be considered as personality while yet immatured and growing in the field, "the crop in question being personality when sold, and being then subject to the mortgage, it does not matter whether it was personality or not at the time it was mortgaged."

The foregoing comprise all the cases of

which we have any knowledge in which this court has dealt with the subject presented by the case at bar.

In the foregoing discussion we have faithfully endeavored to dissipate the darkness which overhangs and envelops the subject at the present day, and to show that at common law no inconsistency in the treatment of growing crops as realty, in fact, existed, even though "emblements" were subjected to many of the "incidents" which attached to chattels. Whether or not this attempt has been successful we leave to the reader to determine. That the proper result in this particular case has been reached we are entirely convinced, and cannot regard as even debatable. The plaintiff was the owner, not only of the crop destroyed, but also of the land upon which it was growing. His crop, therefore, cannot possibly fall within the term "emblements," nor properly be considered as even constructively constituting a species of property distinct from the land upon which it was growing at the time it was destroyed by fire.

8. Our conclusion, therefore, is that the justice's court had no jurisdiction to entertain the plaintiff's action. In reaching this result, we have endeavored not to be unduly swayed in our judgment by the importance of this particular case, nor deterred by the thought of the consequences which must inevitably ensue. After deliberate reflection, and after a most painstaking investigation of the law, we are constrained to hold that the recovery of \$6 which the plaintiff obtained in the magistrate's court, cannot legally be upheld.

Judgment affirmed.

Atkinson, J., providentially absent, and not presiding.

INDIANA SUPREME COURT.

LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY, *Appt.*,

Michael LYNCH.

(.....Ind.....)

1. An objection that an allegation is not sufficiently full, clear, and specific cannot be reached by demurrer, but requires a motion to make it more specific.
2. Time for repairs after notice of the unsafe condition of a locomotive boiler cannot be claimed by a railroad company so as to excuse it from liability for injury to a person near the railroad caused by an explosion of the boiler, if it could have avoided the explosion by discontinuing the use of the locomotive.
3. Facts gathered from several findings of a special verdict, although not stated in logical or consecutive order, must be considered as an entirety, and not in fragmentary parts.

4. When the jury has found that defects existed in an engine of which the owner had knowledge a sufficient time to have remedied them before an explosion which injured a bystander, it need not find further facts which raise the inference that the accident arose from the want of some precaution which the owner of the engine ought to have taken, since the question of his duty to have avoided the injury becomes one of law.

5. General instructions as to the ultimate conclusion of negligence are not proper where a special verdict is required.

6. An instruction which was not influential because no finding was made on the point involved therein by the jury which rendered a special verdict is not ground for reversal.

(October 15, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Starke County in favor of plaintiff in an action brought to re-

NOTE.—As to municipal regulation of boilers, see *State v. Robertson* (La.) 20 L. R. A. 601.

As to the explosion of the generator of a refrigerating machine, see *Ryan v. Los Angeles Ice & C.*

S. Co. (Cal.) 32 L. R. A. 624.

cover damages for injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. C. Field, W. S. Kennan, and Walter Olds for appellant.

Messrs. J. C. Nelson, Steis & Hathaway and G. W. Beeman, with Mr. Q. A. Myers, for appellee:

It is immaterial whether the complaint is defective or not if the special verdict is sufficiently broad.

Jenkins v. Fisher (Ind. App.) 42 N. E. 954; *Woodward v. Mitchell*, 140 Ind. 406; *Douthitt v. Douthitt*, 133 Ind. 26; *Stephenson v. Boody*, 139 Ind. 60.

If appellant desired to know more particularly the character of defects it could have reached that question by a motion to make more specific.

Appellant was bound to know the tendency of machinery to wear out; it was bound to use ordinary care in maintaining it in safe and fit condition for the use to which it was put; it undertook and impliedly agreed that the locomotive was sound and safe for use, free from inherent defects and dangers in its use, and fit for the use to which it was put.

Louisville, E. & St. L. Consol. R. Co. v. Ute, 133 Ind. 265.

Appellant owes no less duty to the public or third persons.

Siak v. Crump, 112 Ind. 504; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; *Lake Erie & W. R. Co. v. Lowder*, 7 Ind. App. 537; *Whart. Neg. § 349*; *Chicago & E. Co. v. Smith*, 6 Ind. App. 262; *Hunt v. Missouri R. Co.* 14 Mo. App. 160; *Savannah, F. & W. R. Co. v. State*, 92 Ga. 891; *Shearm. & Redf. Neg. 1st ed. § 590*; *Spencer v. Campbell*, 9 Watts & S. 82; 16 Am. & Eng. Enc. Law, p. 419; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Henry v. Dennis*, 98 Ind. 452; *Worster v. Forty-Second Street & G. S. F. R. Co.* 50 N. Y. 208; *Cooley, Torts*, 660.

It is not necessary that the particular acts of negligence should be averred.

Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181; *Louisville, E. & St. L. Consol. R. Co. v. Hicks*, 11 Ind. App. 588; *Cleveland, O. C. & I. R. Co. v. Wynant*, 100 Ind. 160; *Deller v. Hofferberth*, 127 Ind. 414; *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. Rep. 812; *Ohio & M. R. Co. v. Smith*, 5 Ind. App. 560.

A complaint for personal injury in this state is sufficient to withstand a demurrer when it characterizes the act which resulted in the injury as having been negligently or carelessly done without alleging the specific facts constituting negligence.

Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551.

The finding that while in the condition found defendant with full knowledge of such condition "carelessly and negligently permitted said engine to run over its said road" involves both actual and constructive notice.

Evansville & T. H. R. Co. v. Duell, 134 Ind. 156.

Where the evidentiary fact and the ultimate fact are identical the ultimate finding is properly stated by a jury.

Zigler v. Menges, 121 Ind. 99; *Heick v. Voight*, 110 Ind. 279; *Perkins v. Hayward*, 134 24 L. R. A.

Ind. 445; *Braden v. Lemmon*, 127 Ind. 9; *Deller v. Hofferberth*, 127 Ind. 417; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 543.

Negligence is usually a mixed question of law and fact.

16 Am. & Eng. Enc. Law, p. 463, note 3, p. 465, § 1.

Whether the defendant exercised ordinary care under the circumstances is always one for the jury.

See *Id.* note 4, 465; *Baltimore & O. & O. R. Co. v. Walborn*, 127 Ind. 142; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Mann v. Belt Baltimore R. & Stock Yard Co.* 128 Ind. 138; *Cleveland, O. C. & I. R. Co. v. Harrington*, 131 Ind. 426.

The duty of remedying the defect was affirmative and absolute. Notice to the defendant of the defect was not necessary. It was their duty to know it.

Worster v. Forty-Second Street & G. S. F. R. Co. 50 N. Y. 205.

Such condition as this locomotive is found to have been in need not be shown for any particular lapse of time.

Indiana Car Co. v. Parker, 100 Ind. 193; *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 563; *Cincinnati, I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 447; *Ohio & M. R. Co. v. Percy*, 128 Ind. 205; *Louisville, E. & St. L. Consol. R. Co. v. Ute*, 133 Ind. 269.

An available error cannot be predicated upon either the giving or refusal of instructions as to the law of the case, for the reason that the law is applied to the verdict and where the law is correctly applied to the facts instructions given or refused are immaterial.

Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 18; *Wollen v. Wire*, *Id.* 251; *Craig v. Fraiser*, 127 Ind. 286.

Negligence may be inferred from the explosion or the casualty itself.

Gerlach v. Edelmeier, 15 Jones & S. 293; *Cosulich v. Standard Oil Co.* 23 Jones & S. 384; *Goll v. Manhattan R. Co.* 25 Jones & S. 74, *Affirmed*, 25 N. Y. 714; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418; *Larry v. Ashton*, L. R. 1 Q. B. Div. 314; *Kearney v. London, E. & S. C. R. Co.* L. R. 6 Q. B. 759; *Houser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154; *Whart. Neg.* 421; *Walsh v. Missouri P. R. Co.* 102 Mo. 582; *Lane v. Illinois C. R. Co.* 48 La. Ann. 833; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234; *Illinois C. R. Co. v. Houck*, 72 Ill. 285; *Cooley, Torts*, 661, 662.

These cases go upon the theory that the injurious thing was inherently and intrinsically dangerous, hurtful, and insecure, and that it was hence necessary for the defendant to show that he was exercising reasonable care at the time of the accident.

Wabash, St. L. & P. R. Co. v. Locke, 113 Ind. 404; *Mullen v. St. John*, 57 N. Y. 567; *Pollock, Torts*, 421; *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 9 L. R. A. 750; *Ohio & M. R. Co. v. Troubridge*, 126 Ind. 391; *Brunmit v. Furness*, 1 Ind. App. 401; *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213.

If there be an explainable cause the duty is imposed upon a defendant to furnish that explanation.

Mullen v. St. John, *supra*; *Allen County*

Comrs. v. Bacon, 96 Ind. 81; *Wabash County Comrs. v. Pearson*, 120 Ind. 426; *Snetthen v. Memphis Ins. Co.* 3 La. Ann. 474, 48 Am. Dec. 462; *Ulrich v. McCabe*, 1 Hill. 251.

Hackney, J., delivered the opinion of the court:

The appellee sued the appellant, and recovered a judgment for damages on account of personal injuries sustained from a missile thrown against him by the explosion of the appellant's locomotive boiler. The allegations of the complaint charging the negligence of the appellant were as follows: "That the locomotive engine thus used by the defendant, and which exploded as heretofore mentioned, was at the time it so exploded, and for a long time prior thereto, defective, unsafe, and unfit to use for the purposes intended by the defendant, in this, to wit: That the same was old and worn out; that the stay bolts of the boiler were worn out and burned in two; and that the same was otherwise defective, unknown to plaintiff, and of which defectiveness, unsafeness, and unfitness the defendant had full knowledge, or by reasonable diligence could have known the same. And plaintiff avers that the defendant negligently and recklessly used and attempted to use the same, as aforesaid, with full knowledge of its defectiveness and unsafe condition, or of which he could have known by reasonable diligence, and by reason of which negligence and carelessness of the defendant the said locomotive engine exploded, as hereinbefore mentioned, causing the injury of the plaintiff herein complained of." The appellant insists that its demurrer to the complaint should have been sustained for the reason, as here urged, that it does not appear from the facts alleged that the explosion resulted from any of the defects mentioned. On behalf of the appellee it is urged that the allegations sufficiently connect the result with the causes so alleged; that a motion to make more specific was the proper practice for presenting the appellant's objection to the complaint; and that the special verdict returned distinctly connects the causes alleged, the defects in the locomotive, with the explosion, and thereby cures any weakness in that respect which might be urged against the complaint. A fair construction of the allegation is that the locomotive was defective, including worn-out and burned stay bolts of the boiler, and that by the use of the locomotive in that condition the explosion occurred. The condition with the use alleged was the cause, and the explosion the effect. If, as we think it may, the allegation in question may be regarded as a general allegation of negligence resulting in injury, and the appellant's objection were, as we think it is in effect, that such allegation is not sufficiently full, clear, and specific, such objection could not be reached by demurrer, but required a motion to make more specific. *Cleveland, C. O. & I. R. Co. v. Wynant*, 100 Ind. 160; *Doller v. Hofferberth*, 127 Ind. 414; *Louisville, N. A. & C. R. Co. v. Berkeley*, 136 Ind. 181, and cases cited in each. We conclude, therefore, that the objection urged against the complaint is not available.

Some of the special findings of the jury were as follows: "(3) We find that the plaintiff,

Michael Lynch, was at the time of the explosion of said engine engaged in handling hay near a certain barn situated about 100 feet west and off the defendant's right of way, and that the engine exploded when almost opposite and due east from where the plaintiff was engaged at his said work." "(5) We find that the said engine was at the time of said explosion out of repair, unsafe, and defective, and in a dangerous condition. (6) That the boiler, fire box, and part of stay bolts between said boiler and said firebox of said locomotive engine were worn out, weakened, and broken prior to said explosion, and so remained until said explosion, and thereby said boiler and fire box were insufficient, and unable to retain or hold or resist the pressure of steam in the boiler of said locomotive engine. (7) We further find that said engine, numbered 60, that exploded on January 3, 1893, while being handled by defendant company at Francesville, Indiana, had broken bolts, called 'stay bolts,' and that such broken bolts gave no support or strength to the boiler of said engine at the time it exploded; that said broken bolts were located at the left side of the fire box of said engine; and that the explosion occurred at that part of the boiler where such broken bolts were located. (8) That the defendant did know, or could have known, prior to the happening of the explosion, in time to have remedied the same, that said bolts were broken. (9) We further find that defective stay bolts can be detected by placing a piece of iron on one side, and tapping the same with a hammer on the other; that, if the bolts are broken or defective, they give a dull sound; that said bolts can be removed, and new ones put in. (10) That there were at the time of the explosion forty-five broken bolts in the left-hand fire sheet, which were in that condition for at least four weeks prior to the accident. (11) That a boiler having that number of broken bolts in a fire sheet on one side is not of sufficient strength to resist the pressure of 140 pounds of steam." "(15) We find that said engine, numbered 60, was at the time of said explosion old and much worn, and was before said explosion out of repair; that her boiler and pipes were old and worn and leaky; that the stay bolts of the boiler and fire box were rusty, corroded, and broken before said explosion; and that the defendant company had full knowledge of the worn-out and defective condition of said engine as aforesaid during said time, and carelessly and negligently permitted said engine to run over its said road."

By the fifteenth finding it appears that the appellant had knowledge of the condition of the locomotive "during said time." The quoted words evidently refer to the period found in the tenth finding, "four weeks prior to the accident," during which there were forty-five broken stay bolts in the fire sheet. The fact that actual knowledge, prior to the explosion, was proved to have been possessed by the appellant is earnestly denied by its counsel. We find that one witness testified to having served the appellant, as engineer, in running the locomotive in question, from the 15th to the 22d of December, 1892, the explosion having occurred on the 8d day of January, 1893; and that during that period he observed that there were leaks in the flues, flue sheets, and joints and in

crown bolts, which extended from the crown sheet to the fire box. This knowledge would probably be sufficient to charge the company, as to one not connected with the company, and not upon its right of way; but it is further shown that each day during said period, said engineer reported the condition of the locomotive to the company. As suggestion is made by counsel as to the requirement that appellant should have notice of the defects a sufficient time in which to remedy them. Our attention has not been called to reason or authority supporting the proposition that time for repairs is an element in considering the duties or liability of the appellant to the appellee with reference to the care and use of its locomotives.

There is nothing in the relations of the parties requiring the use of the locomotive one hour after its defects were known, nor is there any presumption that the interests of the general public would suffer from the discontinued use of the locomotive temporarily or permanently. This may not be true with reference to the discontinued use of some part of the roadbed of a railway company, operating as a quasi public corporation. It may not be true with reference to defects in the public streets of a city or town where their discontinued use is a public inconvenience; and it may not be true where the relations between the parties are those of master and servant, and the servant continues to use a defective appliance which the master has promised to repair. Of the rule which may apply in any of these cases, we are not concerned further than to say that, whatever it may be, it has no application to the present case. We think it may be safely said that notice of the defects, so far as these parties were concerned, was sufficient if for such time that the appellant might have avoided the explosion, either by repairs or by discontinuing the use of the locomotive.

It is objected that the special verdict did not find that the explosion was the result of the defects in the locomotive, found by the jury. It is found that at the time of the explosion, and for four weeks prior thereto, there had been forty-five broken bolts in the fire sheet; that the broken bolts gave no support or strength to the boiler, thereby rendering said boiler insufficient to resist the pressure of steam therein, and was dangerous; that the explosion occurred in that part of the boiler where such broken bolts were located. It is true that these facts are gathered from several of the findings, but there is no requirement that they should have been stated in logical or consecutive order, and it is our duty to consider the findings of the verdict in their entirety, and not in fragmentary parts. The facts so found raise the irresistible inference that the broken bolts, with the use of the locomotive, caused the explosion.

The verdict is challenged, further, as not finding facts from which the inference fairly arises that the accident resulted from the want of some precaution which the appellant ought to have taken. This proposition, we presume, was advanced upon the theory that none of the alleged defects caused the explosion, and that appellant had no notice, prior to the occurrence, of such defects as caused the explosion.

34 L. R. A.

However, when it appears that the defects existed, and that appellant knew of them a sufficient length of time to have avoided the explosion, it then becomes a question of law as to whether the appellant owed the duty to the appellee to exercise a reasonable care to avoid it. That such was its legal duty is not questioned. She owed the duty to the public, whose privileges she exercised in moving her trains by locomotive power, to so exercise that privilege as to not unnecessarily extend the hazards of any member of the public. The question here is unlike that in *Louisville, N. A. & C. R. Co. v. Schmidt*, 134 Ind. 16, where the injury resulted from the proper use of a proper appliance, a safety valve, in proper condition.

At the trial, the appellant asked the following charge to the jury: "You are further instructed that the fact that the boiler of the engine numbered 60 exploded when in use by the defendant is, of itself, no evidence of negligence on the part of the defendant, either as to the inspection or repairing of the engine, or in the management of the engine." The court refused that charge, and, instead, gave, of its own motion, the following: "The fact that the boiler of the engine exploded when in use by the defendant is not sufficient evidence of negligence on the part of the defendant either as to the inspection or repairing of the engine, or in the management of the same; but it is a fact that you may consider, in connection with all the other facts established by the evidence, in determining whether the engine was defective, and that the defendant acted carelessly and negligently in allowing said engine to be run in its then condition." The appellant insists that it was error to refuse the first, and error to give the last, of these instructions, and the argument is directed to the question as to what presumptions arise from the mere fact of the explosion. It will be observed that either instruction is as to the force of a fact leading to the ultimate conclusion of negligence on the part of the appellant. It may be said, also, that the special verdict did not return this ultimate conclusion. The ultimate conclusion as to that question, upon the special verdict, was for the court, and not for the jury; and its return by the jury would have left no question for decision by the court. The special verdict would have been, in effect, but a general verdict. The instruction refused was one of a series of general instructions asked, and that given was one of a series of general and special instructions given by the court. It is manifest that general instructions, where a special verdict is required, are inappropriate. As said in *Elliott, App. Proc. § 645*: "As there is no propriety in giving general instructions, and as the law of the case must be pronounced upon the facts contained in the special verdict, general instructions cannot, as a rule, be influential." *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18; *Johnson v. Outter*, 116 Ind. 278; *Slayner v. Joyce*, 120 Ind. 99; *Woolen v. Wire*, 110 Ind. 251; *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L. R. A. 549; *Toler v. Keiher*, 81 Ind. 388. Since the ultimate conclusion was not returned, it is apparent that the instruction given was not influ-

tal; and, since instructions upon the subject were inappropriate, there was no error in refusing that asked.

It is contended, further, that the damages assessed were excessive. This contention rests upon the appellant's construction of the evidence that the appellee was not permanently and seriously injured, but that his alleged injuries were feigned. We are not at liberty to adopt this construction of the evidence, since, upon the whole evidence, there was conflict upon this question. There was testimony that the appellee had endured intense pain and suffering; that he was permanently disabled from performing manual labor; that he could

never again walk actively, but that he must walk with a dragging or shuffling motion of the feet; that he was but twenty-six years of age, and depended upon daily labor for his support; and that prior to the injury he was able-bodied, strong, healthy, and had an earning capacity of \$30 per month. Upon the theory that the injuries sustained were not magnified or feigned, we cannot say that at first blush the damages appear to be so large as to suggest that the jury were overreached, or acted corruptly.

No available error having been disclosed by the record, the judgment is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS

Lewis, C. POTTER and Wife, *Appts.*,
v.

Arthur E. BERRY, Guardian of Samuel Dally.

(53 N. J. Eq. 151.)

***A person of advanced years devised certain lands to his daughter, and, in-**

***Headnotes by BRASLEY, Ch. J.**

forming her and her husband of the fact, put them in possession, stating that he desired them to hold the property during his own life. A few years afterwards, the father having become a lunatic, his guardian notified the daughter and her husband to yield up the premises. *Held*, that a court of equity would protect the daughter and her husband in their possession, thus giving effect to the purpose of the father as expressed during his sanity.

NOTE.—Using lunatic's property to carry out his presumed wishes or to fulfil his equitable obligations in the absence of a legal liability.

- I. Power generally.
- II. In support of his family.
- III. In support of illegitimate children, etc.
- IV. For allowances to persons entitled to inheritance.
- V. For allowances to collateral relations.
- VI. For allowances to persons not related.
- VII. For charitable and religious purposes.
- VIII. To continue arrangements made while sane.

I. Power generally.

The court of chancery has power out of the surplus income of the estate of a lunatic to provide for the support of persons not his next of kin and whom the lunatic is not under legal obligation to support, where it specifically appears that the lunatic himself would have provided for such support had he been sane. *Re Heeney*, 3 Barb. Ch. 284.

And where the income of the estate of a lunatic is much more than sufficient for his support and those members of his family for whom he is bound by law to provide, the court may make an allowance out of the income to his near relatives who are in need of assistance. *Re Willoughby*, 11 Paige, 57.

So, in *Re Windsor*, Shelford on Lunacy, 180, Lord Chancellor Brougham recognized the doctrine that an allowance might be made out of the estate of a lunatic for persons other than those whom the lunatic was bound by law to provide for, but refused to make the allowance asked for upon the ground that the surplus income of the lunatic was required for contingent expenses.

The court in making such allowances acts for the lunatic as it supposes he himself would have acted if he had been of sound mind. *Re Willoughby*, *supra*.

And the amount and proportion of allowances

thus made rest entirely within the discretion of the court. *Ex parte Whitbread*, 3 Meriv. 90.

The origin of the practice of granting an allowance for the relations of a lunatic other than those whom the lunatic is bound by law to provide for has been traced to the order of Lord Chancellor Thurlow in *Re Cotton* reported in a note to 2 Meriv. 100, which was made upon an objection to a report allowing maintenance generally without specifying the proportions, which was referred back to a master for review, who thereupon certified that the sum allowed was appropriated, and after specifying the sum allowed for the lunatic himself, stated that the remainder is to be divided among his immediate relations. And Lord Thurlow confirmed the report and directed the allowance to be made. Shelford, Lunacy, 187.

In *Re Blair*, 1 Myl. & C. 300, 5 L. J. Ch. N. S. 150, however, it was said that the practice of granting allowances to relations of lunatics for whom the lunatic was not legally bound to provide was one which could not be regarded with too much caution, and the principle involved in it ought to be narrowed rather than extended in its operation, and that such jurisdiction should never be exercised without the greatest possible jealousy and caution. But see same case, *infra*, IV.

II. In support of his family.

Where the father of a family becomes a lunatic the court does not look to the mere legal demands which his wife and children may have upon him, which amount perhaps to no more than to keep them from being a burden upon the parish, but considers what the lunatic would probably do and what it would be beneficial to have done, and makes an allowance for them proportioned to his circumstances. *Ex parte Whitbread*, 3 Meriv. 90.

Thus, in *Re Freak*, Shelford on Lunacy, 180, the net annual income of a lunatic was divided into thirty-two equal parts, seventeen of which were allowed for the support of the lunatic, his wife, and

(June 17, 1895.)

APPEAL by defendants from a judgment of the Chancery Court requiring defendants to surrender possession of certain real estate belonging to plaintiff's ward of which they had taken possession under a contract with him.

Reversed.

Statement by Beasley, Ch. J.:

In the latter part of the year 1886 or 1887, Samuel Dally, of the township of Woodbridge, then about seventy-eight years old, being about to make his will, asked his son-in-law, Lewis C. Potter, to make choice for his wife, Anna M. Potter, among the several parcels into which he had divided his real estate for distribution among his children by will. Potter chose a parcel consisting of three tracts, one of said tracts being a clay bank; and Dally, assenting to such choice, made his will accord-

ingly, which is still in existence, unrevoked. At the same time, and incidental to the testamentary gift, Mr. Dally told his son-in-law, Potter, who was then and still is in straitened circumstances, to take possession of these tracts, and make what he could out of them in the testator's lifetime, without compensation to the testator, and paying only the taxes. Potter accordingly gave up another clay bank which he was then working, and took possession of the bank of his father-in-law, Dally, which he has ever since held, and continued to work as his only means of livelihood down to the filing of the bill and subsequently, making large expenditures for draining and other permanent improvements of the clay banks, in reliance upon said agreement of Mr. Dally. During this period, at one time when it was supposed that a railroad would be built through the property, Potter applied to his father-in-law for some writing to confirm him

two unmarried daughters, and the remaining fifteen parts paid to his four married daughters and to the children of a deceased child.

And in *Re Drummond*, 1 Myl. & C. 627, 6 L. J. Ch. N. S. 58, the allowance made out of a lunatic's estate for the maintenance of himself and daughters was increased in consideration of the intended marriage of one of the daughters, and a portion of such increased allowance was appropriated to the general establishment of her and her husband, and was directed to be settled to her separate use, and a sum of money provided by the master was also ordered to be paid to her out of her father's estate by way of outfit on her marriage.

And in *Re Evans*, Shelford on Lunacy, 166, an annuity belonging to an insane wife was ordered to be paid to her husband as committee of her estate where she had two sons and the annual income of her husband was insufficient to support her and to educate her children in a proper manner.

So, the wife of a lunatic who had an ample estate is entitled to an order directing his guardian to pay her out of his estate the money necessary to redeem her jewels, which were pawned by the husband with her consent while sane to pay his personal expenses, the proceeds of the loan having been so applied. *Re Harrall's Estate*, 81 N. J. Eq. 101.

But allowances made to a family of a lunatic greater than is required by law are not made because the family would be entitled to his estate on his death, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for his personal use. *Ex parte Whitbread*, 2 Meriv. 99.

See also *infra*, IV., *For allowances to persons entitled to inheritance.*

III. In support of illegitimate children, etc.

The right to appropriate the lunatic's property would seem to extend to appropriations for the support of his illegitimate children, but the propriety of such provision for the mother of such children would appear to be doubtful.

Thus, in *Ex parte Haycock*, 5 Russ. Ch. 154, it was held that an allowance should be made out of the lunatic's estate for his illegitimate children, but not for their mother.

And in *Ex parte Galpin*, and *Ex parte Spurrell*, set forth in 5 Russ. Ch. 154, allowances were made out of the estate of a lunatic for the benefit and maintenance of his illegitimate children.

And in *Re Jodrell*, Shelford on Lunacy, 161, the lord chancellor declared that the natural child of a lunatic whom he intended while sane to give a liberal education, whose mother had not sufficient

means for the purpose of carrying such intention into effect, ought to be maintained and educated out of the estate of the lunatic, and referred it to the master to inquire and certify what would be a fit and proper sum to be allowed for the past and future maintenance and education of the child.

So, where the commission of lunacy acting in accordance with law finds the fact of the unsoundness of mind of a party and also who are the persons composing his family, and orders the maintenance of the lunatic and such family, it is the business of the committee to obey such orders, and having done so he is entitled to protection, and his duty and rights are not affected by the fact that the lunatic had another wife living, and that the woman provided for was not his lawful wife and the children were not legitimate. *Halsey's Appeal*, 120 Pa. 209.

IV. For allowances to persons entitled to inheritance.

Allowances out of the estate of a lunatic larger than the law would require are made almost as a matter of course with reference to the children of the lunatic or other descendants who are presumptively entitled to his estate in case of his death, where there is but little or no hope of his recovery. *Re Willoughby*, 11 Paige, 257.

Thus, in *Re Blair*, 1 Myl. & C. 300, 5 L. J. Ch. N. S. 150, an allowance was made out of the income of a female lunatic for the benefit, support, and maintenance of her nephews where they would, upon her death intestate, become entitled to her property, and there was no probability that she would ever recover the use of her reason or become entitled to the management of her estate, and the incomes of the nephews were insufficient for their support having regard to their expectations in life.

And in *Re Croft*, 33 L. J. Ch. N. S. 481, an allowance was made out of the income of a lunatic to a first cousin the next of kin who was in needy circumstances and obliged to subsist upon charity, where the lunatic's income was much larger than was necessary to satisfy his wants.

And in *Re Frost*, L. R. 5 Ch. 699, 39 L. J. Ch. N. S. 508, 18 Week. Rep. 998, 23 L. T. N. S. 233, weekly allowances were ordered out of the surplus income of a wealthy lunatic to needy persons who were supposed to be her next of kin and for whom she had while sane expressed an intention to make some provision though their title as relatives had not been established.

Allowances out of the income of a lunatic are made, not because the parties benefited thereby are his next of kin or entitled to his property after his death or as such have any right to an allowance.

in possession, at which Dally became quite irritated, and told him to go and make what improvements he saw fit, and he never should be disturbed. In November, 1892, the complainant, Berry, was appointed, by Middlesex county orphans' court, guardian of said Samuel Dally, who had been duly found to be of unsound mind (and to have been so since the 1st day of June, 1892), under a commission out of the court of chancery; his mind having wholly failed from senile dementia. On the 28th of February, 1893, said guardian served upon Potter and his wife notice to quit and deliver possession of said premises on the 1st day of June then next to said guardian, and further to desist at once from digging any clay or sand on said premises or committing any other waste. The Potters not having obeyed said notice, the bill in this cause was filed by said guardian, joining with him the said lunatic as complainant, for an injunction and account

and general relief. The defendants answered, setting up the above facts, and also, by way of cross bill, prayed specific performance of the verbal agreement, and also that the arrangement should be continued as a scheme of benevolence initiated and persevered in by the lunatic, and on the principle that the court should do for him in the administration of his estate what presumably he would do himself if sane, alleging that he has ample income aside from the clay bank for support of himself and his wife, who are all his family. The decree appealed from is for an accounting and injunction, and that defendants surrender possession.

Mr. Alan H. Strong for appellant.
Mr. Ephraim Cutler for respondent.

Beasley, Ch. J., delivered the opinion of the court:

This case was decided in the court of chan-

cell because the court will not refuse to do for the benefit of the lunatic that which it is probable he himself would have done. *Re Whitbread*, 2 Meriv. 99.

In *Re Earl Lanesborough*, 7 Ir. Eq. Rep. 606, however an allowance out of the estate belonging to a lunatic to assist in educating children entitled to the estate in remainder after the lunatic, upon petition of the mother, who was entitled to a jointure which would after a coverture be chargeable on the estate, was refused on the ground that it would be taking one man's money to give another.

And a first cousin whom a lunatic had voluntarily aided while sane is not a dependent upon him within the meaning of a statute providing for payment for the support of insane persons in an asylum when their incomes are sufficient, beyond what is needed for the support of persons dependent upon them. *Re Hybart*, 119 N. C. 359.

V. For allowances to collateral relations.

Allowances may be made in a proper case out of the estate of a lunatic, not only to his children and grandchildren but to brothers and other collateral kindred. *Ex parte Whitbread*, 2 Meriv. 99.

And where a large property devolves upon an elder son who is a lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former upon the principle that it would naturally be more agreeable to the lunatic and more to his advantage that they should receive education and maintenance suitable to his condition than that they should be sent into the world to disgrace him as beggars. *Ibid*.

So, in *Re Heeney*, 2 Barb. Ch. 323, the committee of a wealthy lunatic was authorized and directed to allow and pay to a surviving sister of the lunatic an annuity which she had theretofore been accustomed to receive from her brother out of the income of his estate, and to pay her physician's bills and such other occasional sums as her brother had been in the habit of giving her from time to time.

And in *Re Cotton*, 2 Meriv. 100, note, an allowance was made out of the lunatic's income a part of which was appropriated for the support of the lunatic's family and the remainder was divided among his immediate relations.

So, in *Elwyn's Appeal*, 67 Pa. 397, a sum was allowed out of the lunatic's estate, for the support of his sister who was not one of his family but for whom he had himself provided while sane, without objection upon the part of the committee.

Expenses incurred by the committee of a lunatic

in the transfer of property bought by the lunatic for the benefit of his sister, however, will not be allowed against the estate where it does not clearly appear that the lunatic if in the possession of his faculties would in all probability have paid them himself. *Re Stephens v. Marshall*, 23 Hun, 642, distinguishing *Re Heeney*, *supra*, upon the ground that in that case the allowance appeared to be one which the lunatic would have made if sane.

VI. For allowances to persons not related.

The power of the court also extends to allowances for persons not related, the presumed wishes of, or what the lunatic himself would do if sane, being the sole test as to its exercise.

Thus, where the income of the estate of a lunatic is much more than could be expended for the comfort and support of the lunatic and his family in the style in which they ought to be supported, the court has power to make an allowance for the benefit of the daughter of the wife by a former marriage out of the estate in the hands of his wife as committee where it appears that the lunatic would make a provision for her support if he was legally competent to do so. *Re Willoughby*, 11 Paige, 257.

But such an allowance will not be made where the court is not satisfied that the lunatic would consider her as having such a claim upon his bounty if he were restored to reason, and that he considered her as entitled to support from him or as standing in the situation of an adopted child, and there is reason to suppose that she had property of her own which would be sufficient for her support with the addition of what she could obtain by her own exertions. *Ibid*.

So, where a person while in possession of his faculties placed himself in the situation of a father to two young ladies, supporting them as members of his family and sending them to boarding school, where one of them completed her education and again became a member of his family leaving the other still in school, when he became insane, the court will direct the committee to let those young ladies remain in the family and be supported as they had theretofore been, until their marriage or the death of the lunatic, and to continue the one in school for the same length of time that the other had been kept there by the lunatic, and pay the same allowance for her education. *Re Heeney*, 2 Barb. Ch. 323.

And in the same case the committee was directed to allow to three aged ladies whom the lunatic while sane had sustained in their younger days and again after the death of their husbands until the time he became insane, the same sum which the lunatic had been in the habit of giving them as a

cery on the ground of its purely legal aspect. It was found that the defendants were in the occupation of the lands in question as the licensees of the lunatic, and that the licensor having become of unsound mind, and his guardian having notified them that such license was revoked, they were ordered by the decree to remove from the premises in question, and to account for the profits. Looking at the affair in this aspect, it is difficult to see how a court of equity could take cognizance of the case, for in such a situation an action of ejectment would appear to be the appropriate remedy. But as a cross bill has been incorporated in the answer, presenting for the consideration of the court of chancery certain equities that enter into and modify the strict legal status of the transaction, it has appeared to this court to be the proper course to retain the case, so as to give due force to such conscionable characteristics.

The equities referred to are those inseparable

from the fact that the lunatic, who is represented by the respondent in this appeal, had expressed during his sanity, in an unquestionable form, his purpose that the appellants should remain in the possession of the premises in dispute during his own life. This property, by his will, he had devised to his daughter; and, in turning it over to her husband, he said, according to the testimony of the latter: "If I ever needed it, I needed it now. He intended it for his daughter, and he wanted her to be benefited while he was alive." For several years before the father-in-law's lunacy, the appellants continued in the occupation of the premises, spending considerable money in putting them in a productive condition. The son-in-law and the daughter, who were thus provided for, had a large family, and were in somewhat straitened circumstances; and the father, who thus established them, was possessed of an estate that fully warranted his generosity. The question, therefore, arises

fixed allowance, and to pay the arrears of such allowance from the time it had been suspended by the incapacity of the lunatic.

And in *Re Earl Carysfort*, 1 Craig & Ph. 73, an annuity was allowed out of the income of a lunatic's estate as a retiring pension to an old personal servant of the lunatic who was obliged to retire from services by reason of age and infirmity, upon the statement of his committee that they were satisfied that the allowance was one which the lunatic if he should ever recover would approve of.

VIII. For charitable and religious purposes.

The same rule applies to donations for charitable and religious purposes.

Thus, the committee of a wealthy lunatic may be authorized by the court to place at the lunatic's disposal small sums of money for the purpose of charity, so long as the lunatic is competent to judge of the claims of applicants. *Re Heeney, supra*.

And a woman found by inquisition to be of unsound mind, and for whom a committee had been appointed, may be permitted by the court to make a gift out of her property for the support of certain indigent brothers and sisters, where it appears that she knew there was enough money to enable her to make the gift without encroaching upon her means of support, and it does not appear that her contemplated gift was the fruit of any importunity or undue influence upon the part of the donees. *Re Gilbert*, 3 Abb. N. C. 222.

But the committee of a lunatic will not be allowed personally to expend any part of the lunatic's estate for general charity or objects of benevolence or piety for which the lunatic himself had not been in the habit of contributing specifically and regularly while sane. *Re Heeney, supra*.

So, the court may authorize the committee of a wealthy lunatic to pay for the support of an institution of religion in the church where the lunatic and his family had been accustomed to worship, such sums from time to time as the lunatic may desire him to pay for that purpose, not exceeding the amount which the lunatic had been in the habit of paying annually before he became insane. *Ibid*.

And the committee may provide for the payment of the lunatic's customary contributions to the church which she had been in the habit of attending. *Re Knapp's Estate*, 18 Misc. 285.

And in *Re Strickland*, L. R. 6 Ch. 226, 24 L. T. N. S. 530, 19 Week. Rep. 615, the committee of a lunatic who was tenant for life of a large number of houses all in the same neighborhood the rental from which produced a large surplus after providing him with every comfort, the committee being

also his heir at law and sole next of kin, was permitted to contribute out of the lunatic's income after a sale of three of the houses for a church site to a new parish, a reasonable sum with reference to the amount of his income towards building a church and parish schools in connection with it.

VIII. To continue arrangements made while sane.

The doctrine of the principal case that the court will give effect to the intentions and carry out the projects of a person expressed and commenced while sane, after he becomes insane, is supported by the cases found bearing upon the subject.

Thus, where an elderly widower without children having a large estate engages his nephew and his family to live with him and take care of him and his estate, taking the nephew from a lucrative business and paying him a salary and supporting him and his family as part of his household, and subsequently becomes afflicted with senile dementia and is adjudged a lunatic, and a committee of his estate is appointed and the nephew is appointed committee of his person and fulfils his duty satisfactorily, the nephew is entitled to receive from the committee of the estate a sufficient monthly allowance to continue the household in the same manner as before the lunacy, and to pay his salary as before upon the ground that it might reasonably be supposed that the lunatic would have continued to do so had he retained his sanity, and that it was apparently best adapted to his peace and comfort. *Hambleton's Appeal*, 102 Pa. 50.

So the wife of an insane man who lives in his mansion house is not prevented from remaining there and using such supplies provided for the family as may be necessary to maintain her and the family according to their condition in life, by a statute providing for sending insane persons to an asylum and requiring their guardians to support them so long as their incomes may be sufficient for that purpose. *Re Hybart*, 119 N. C. 359.

And the committee of a lunatic cannot maintain ejectment against the lunatic's wife for the purpose of ejecting her and his children from the home he had provided for them while sane, though it is the only property he owns, especially where she is in possession under the husband not pretending to hold adversely to his title. If in the judgment of the committee the interest of the lunatic and his family would be best promoted by leasing the homestead or a part of it and providing for them elsewhere, he can represent the facts to the court and ask instructions. *Shaffer v. List*, 114 Pa. 486.

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whether, the father having lost his mind, this benefaction of his towards his own child is to be frustrated and revoked by his guardian. No case has been observed in which a court of equity has permitted such a cruel dispossession. The cases strongly enforce the opposite doctrine. The general rule on this subject is that the court will do that in these matters which it is reasonable to believe the lunatic himself would do if he had the capacity to act. The decisions are numerous, and all to this effect. The following are illustrative cases: *Ex parte*

Whitbread, 2 Meriv. 102; *Re Willoughby*, 11 Paige, 257; *Re Lacey*, 2 Barb. Ch. 826; *Campbell v. Mackay*, 1 Myl. & C. 624. The result is that the appellants should not, under present circumstances, be disturbed in the possession and use of the property in question, and a decree should be entered to that effect.

Consequently let the decree appealed from be reversed, and a decree entered in accordance with the foregoing view, with costs to be paid out of the estate.

KENTUCKY COURT OF APPEALS.

AMERICAN ACCIDENT COMPANY OF LOUISVILLE, *Appl.*,

A. CARSON.

(.....Ky.....)

1. **Intentional killing by a third person**, of an insured person without the latter's connivance or foreknowledge, is an accident within the meaning of an accident insurance policy.
2. **The omission of the word "death"** from a clause in an accident policy providing that it shall not "extend to or cover intentional injuries inflicted" by "any other person," when it is used in other excepting clauses immediately contiguous, will make the insurer liable in case of the murder of the insured.
3. **One suing for the full amount of an accident insurance policy** which classifies risks and promises the full amount only when insured is engaged in certain business at the time of injury, must allege that he was employed in such business at the time of injury.

(June 13, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. O'Neal, Phelps, Pryor, & Siligman and Bullitt & Shields for appellant.

Messrs. R. C. Warren, M. C. Saufley, W. G. Welch, and D. W. Sanders for appellee.

Haselrigg, J., delivered the opinion of the court:

In April, 1891, the appellant company, in consideration of certain agreements, statements, and warranties made in the application of one Stephen M. Carson, and the sum of \$7, issued to him, under division A, wherein Carson's occupation was described as that of a druggist, a policy of insurance known as an "accident

policy," by which, for the term of three months, the applicant was insured against bodily injuries, effected through "external, violent, and accidental means"—First, which wholly disabled him; second, such injuries as partially disabled him; third, such as resulted in the loss of an eye; fourth, loss of a hand or foot; and lastly, loss of both hands or feet, etc., in which event the full principal sum of \$5,000 was to be paid to the insured, if he survived, or, if he died, then to his father, A. Carson, the appellee here. In the body of the policy it was provided that, if the insured was injured or killed in any occupation or exposure classed by the company as more hazardous than that recited in the application, the insured or his beneficiary should be entitled only to such sums as are named in the division so classed as more hazardous. And on the back of the policy, among many other conditions under which the policy was issued, we find the following: "This insurance does not cover disappearances; nor suicide, while sane or insane; nor injuries, whether fatal or otherwise, of which there is no visible mark upon the body; nor accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by hernia, fits, . . . ; nor extend to or cover intentional injuries inflicted by the insured or any other person, or injury or death happening while the insured is insane, or under the influence of intoxicating drinks or narcotics," etc. It appears that the insured met his death in May, 1891, and under circumstances to be presently considered. The company denying any liability, the beneficiary, A. Carson, brought this action in the Jefferson circuit court for the principal sum indicated in the policy; and upon peremptory instructions, at the conclusion of the testimony, a verdict was rendered in his favor. From the judgment thereon the company appeals.

After certain preliminary statements, the petition avers that "on the 8th day of May, 1891, and before the said term of insurance had expired, the said Stephen M. Carson was shot through the body by a ball from a gun or pistol, and thereby instantly and intentionally

NOTE.—The prior cases construing the proviso against liability for intentional injuries are found in the note to *Fidelity & C. Co. v. Johnson* (Mis.) 30 34 L. R. A.

L. R. A. 206, on the question What constitutes an accident within the meaning of an accident insurance policy?

killed, by one Jesse Burton, in the vicinity of Branford, in the county of said Carson's residence, in the state of Florida;" that "the said shooting and killing by the said Jesse Burton was not done in a mutual affray, was not provoked by any misconduct on the part of said Carson, and was not foreseen by him in time to have been avoided, but was wanton, causeless, unprovoked, and unexpected by him." It is evident, and it is so argued, that the pleader's object in setting out the fact that the insured came to his death by a shot fired through his body intentionally by another (thus anticipating the probable defense) was to provoke a demurrer, and thus present fairly to the court for construction the meaning of the words, "nor extend to or cover intentional injuries inflicted by the insured or any other person," found on the back of the policy, and therefore not necessary to be adverted to in declaring on the contract. The expected demurrer was filed and overruled, and thus are presented for our consideration two questions: First, were the "means" producing the death of the insured "external, violent, and accidental?" and second, was the death of the insured "an intentional injury inflicted by another," within the meaning of the policy? On the first point little need be said. While our preconceived notions of the term "accident" would hardly lead us to speak of the intentional killing of a person as an accidental killing, yet no doubt can now remain, in view of the precedents established by all the courts, that the word "intentional" refers alone to the person inflicting the injury, and if, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means, within the meaning of such policies. Thus, when one was waylaid and assassinated for the purpose of robbery, his death was held to have been caused through "external, violent, and accidental means." *Hutchcraft v. Travelers' Ins. Co.* 87 Ky. 800. So death by hanging, at the hands of a mob, was held to be an accident, within the meaning of a policy against injuries through "external, violent, and accidental means." *Fidelity & C. Co. v. Johnson*, 72 Miss. 383, 80 L. R. A. 206. So the death of a person who is shot by one whom he is trying to eject by force from an hotel office is a death by accident, and "not a risk voluntarily assumed, when he makes the attempt without knowing that the other person is armed." *Lovell v. Travelers' Protective Assn.* 126 Mo. 104, 80 L. R. A. 209. See also numerous authorities to the same effect in notes to case last cited, in 80 L. R. A. 207.

In the *Hutchcraft Case*, however, and in others cited, a recovery was denied because, while the killings were accidental, within the meaning of the words "external, violent, and accidental," as used on the face of the policy, yet certain conditions or provisos protected the company against loss where "the death or injury may have been caused by intentional injuries inflicted by the insured or any other person." And a consideration of this feature brings us to the second question presented by the demurrer. In the cases to which our at-

tention has been called, involving accident policies in many different companies, it is noticeable in all that the form of the usual protecting proviso against loss from "intentional injuries" is somewhat different from the corresponding clause in the policy before us. The clause in the *Hutchcraft Case* against the Travelers' Insurance Company well illustrates this. It is as follows: "And no claim shall be made under this ticket, when the death or injury may have been caused . . . by intentional injuries inflicted by the insured or any other person." This is not merely protection against injuries so inflicted, but against death as well. In express terms, that policy excepts death from intentional injuries inflicted by any other person, and does not content itself with providing merely that no claim shall be made when the injuries may have been intentionally inflicted. The language is "death or injury," and the policy protects against either death or injury when caused by intentional injuries inflicted by the insured or any other person. In the present case, as we have seen, the policy is not to extend to or cover intentional injuries inflicted by the insured or any other person. Here we find a difference between the policy under consideration and all others we have examined. The words "death or injury" are used in all of them, and indeed in this policy we find those words separated for the first time in the clause under discussion. We find it provided in the preceding clause that "this policy does not cover accidental injuries or death resulting from hernia," etc.; and immediately succeeding the clause in dispute the language is, "or injury or death happening while the insured is insane," etc. We notice, too, that the policy is not to cover injuries, whether fatal or otherwise, of which there are no visible marks upon the body. And it appears well settled that this exception, without the words "fatal or otherwise," has reference only to cases of bodily injury which do not result fatally; that is, the word "injury" is used in its usual sense, as implying a hurt not resulting in death. *McGlinchey v. Fidelity & C. Co.* 80 Me. 251. The words "injury or death," and "injured or killed," are used in this policy some eight times or more, and seemingly in sharp contrast, and the significant omission of the word "death" in this particular clause requires us to hold that the exception referred only to nonfatal injuries intentionally inflicted by the insured or any other person. We conclude, therefore, that the petition stated a good cause of action, so far as the points discussed are concerned.

It is insisted, however, that as the plaintiff sued for the full principal sum of \$5,000, the ought to have negatived the conditions stated in the face of the policy, under which, if they existed, that sum must have been reduced, and the policy scaled. The insured agreed that, if he was killed in any occupation or exposure classed by the company as more hazardous than that of druggist, his beneficiary was to get only the reduced sum; and it seems evident that his beneficiary must allege, if he can truthfully do so, that the insured was not so killed, else the court could not render judgment for the sum to which the policy, under its terms, entitled him. The policy was made part of

the petition, and forms the basis of the action. The claimant must bring himself within its terms and conditions as stated on its very face. It cannot be said that this should come from his adversary. Whether the insured was engaged at the time of his death in a more hazardous occupation or exposure than that of a druggist was peculiarly within the knowledge of the insured and his beneficiary, who must be held to a general knowledge of the divisions and classifications of risks, and to have acted intelligently in accepting insurance in division A. Of course, if the true issue is in fact made, it does not matter from whom the exceptional

matter comes; and it is true that the company pleaded that the insured was killed while acting as deputy sheriff, and attempted to plead that he was insured as a druggist or dealer, and not otherwise. But just what its pleas would have been, had the plaintiff been required to set up its cause of action according to the terms of the contract, we do not know; and convinced of this error occurring at the inception of the proceedings, no other questions need be considered.

Judgment reversed for further proceedings consistent with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

William E. WHITELEY, *Appt.*,

CENTRAL TRUST COMPANY OF NEW YORK.

CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*,

William E. WHITELEY.

(76 Fed. Rep. 74.)

1. **Preference to railroad mortgagees is not gained by payment of a judgment against the railroad company for damages when it is paid after its affirmation on appeal by the surety on a supersedeas bond who signed it when the mortgage was in existence and no default had been made upon it, and when the railroad company was apparently solvent, although the bond may have benefited the mortgagees by preventing a levy on the railroad, which might have worked detriment to them directly or indirectly as substantial owners of the property.**
2. **An implied vendor's lien in favor of a judgment for damages for breach of indefinite, continuing covenants in a conveyance cannot arise under Ky. Gen. Stat. chap. 63, art. 1, §24, denying a lien for unpaid purchase money unless the deed states what part of the consideration remains unpaid.**

(July 8, 1896.)

CROSS-APPEALS from a decree of the Circuit Court of the United States for the District of Kentucky in certain suits brought to foreclose a mortgage and to enforce an alleged prior lien against the mortgaged property. Whiteley appealing from so much of the decree as refused the priority to the full extent claimed, and the mortgagee appealing from so much as allowed any part of the priority. *Reversed on the trust company's appeal.*

The facts are stated in the opinion.

Before *Taft* and *Lurton*, Circuit Judges, and *Hammond*, District Judge.

Messrs. J. D. Atchison, Charles S. Walker, and Fairleigh & Straus, for Whiteley:

Whoever makes an agreement to do a thing in the future makes at the same time a contract that in case of default he will pay in money an amount which may be judicially ascertained to be the damage for the breach. The judgment is a contract.

Dayton, X. & B. R. Co. v. Lewton, 20 Ohio St. 411; *Howe v. Harding*, 76 Tex. 17.

The rule established by the decisions of some courts that no lien exists to secure the performance of independent contracts which are the consideration for the sale of land has no application for the reason that here the agreements are not independent within the meaning of the rule. The agreements run with the land and bind every successor of the railway company. They are embedded in the grant itself and constitute a burden upon the enjoyment of the thing granted.

Toledo, St. L. & K. C. R. Co. v. Cosand, 6 Ind. App. 232.

The question is in all its bearings, so far as the bondholders are concerned, a question between the original parties to the grant.

The mortgage of the railway company was executed to the trustee on the 1st day of February, 1887; the agreement between Taylor and the railway company by which it acquired the right of way was executed on May 17, 1887. Therefore the mortgage could embrace this property only by the force of an after-acquired property clause.

A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands.

New Orleans & O. R. Co. v. Mellen ("United

NOTE.—As to the power to gain a preference over a mortgage debt on the property of a railroad or street-railroad company, in favor of a claim for damages, see *St. Louis Trust Co. v. Riley* (C. C. App. 8th C.) 30 L. R. A. 466, and, *contra*, *Green v. Coast Line R. Co.* (Ga.) 33 L. R. A. 306.

As to the power of the receiver of a mere private corporation in distinction from a quasi public corporation to create liens in preference to mortgages, see *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* (C. C. S. D. Ill.) 16 L. R. A. 603, and *note*; also *Hanna v. State Trust Co.* (C. C. App. 8th C.) 30 L. R. A. 201.

As to the claim of an implied obligation arising out of a receipt of benefits, see *Cincinnati, S. & C. R. Co. v. Bensley* (C. C. App. 6th C.) 19 L. R. A. 796.

States v. New Orleans R. Co."), 79 U. S. 12 Wall. 865, 20 L. ed. 436.

Whitely paid the judgment as surety upon a supersedeas bond, and this fact creates in his favor a right to reimbursement prior to the mortgages upon the ground that his act of becoming surety on the bond saved the property of the railway company from immediate seizure under execution, and preserved the unity of the property as a going concern to the direct use of the bondholders.

Union Trust Co. v. Morrison, 125 U. S. '81 L. ed. 825; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 71 Fed. Rep. 245.

Messrs. Pirtle & Trabue, Butler, Notman, Joline, & Mynderse, and Alexander & Green, for Central Trust Company of New York:

The Central Trust Company was no party to the suit in which the Taylor judgment was obtained, and is certainly not bound by that judgment nor for any damages or costs assessed in that action.

Hassall v. Wilcox, 130 U. S. 493, 32 L. ed. 1001.

Whitely has no lien on the right of way of the railroad company for any amount whatever. Taylor's deed to the railroad company contained no express reservation of a lien, and there was therefore no contract lien, so if a lien existed it must have arisen by implication.

A vendor's implied lien arises either upon conveyance without payment of the price or where there is an executory contract of sale without conveyance and the price remains unpaid. The lien of the vendor who has made a conveyance may be defeated in many ways, *e.g.* by showing that he has accepted other security for the purchase money or that from the nature of the transaction no lien was intended by the parties.

Henley v. Stemmons, 4 B. Mon. 182.

No lien existed to secure damages for failure to perform the indefinitely continuing covenants.

McKillop v. McKillop, 8 Barb. 552; *Brawley v. Outron*, 8 Leigh, 522; *Peters v. Tunell*, 43 Minn. 473; *Bell v. Pelt*, 51 Ark. 433, 4 L. R. A. 247; *Harris v. Hanis*, 37 Ark. 348; *McCandlish v. Keene*, 18 Gratt. 615; *Arlin v. Brown*, 44 N. H. 102; *Paterson v. Edwards*, 29 Miss. 67; *Hiscock v. Norton*, 42 Mich. 320; *Re Brentwood Brick & C. Co.* L. R. 4 Ch Div. 562.

The very nature of the transaction precludes the idea of a lien.

This conclusion is not affected by the Kentucky statute, for it is only restrictive upon the creation of a lien, and does not create a lien.

Ledford v. Smith, 6 Bush, 132; *Brown v. Ferrell*, 83 Ky. 417.

Lurton, Circuit Judge, delivered the opinion of the court:

W. E. Whitely, at the request of the Louisville, St. Louis, & Texas Railway Company, became its surety upon a supersedeas bond executed November 5, 1892. The railway company had been sued in a circuit court of Kentucky in an action at law for damages for breach of covenants contained in a conveyance under which it had acquired a right of way through the lands of one E. P. Taylor, 34 L. R. A.

situated in Daveiss county, Kentucky. The circuit court rendered judgment against the railway company for the sum of \$6,406.55, with costs and interest from October 29, 1892.

In order to obtain a review of this judgment in the Kentucky court of appeals, an appeal was prayed and allowed, and a supersedeas bond executed, on which Whitely became bound as surety. This judgment was affirmed by the court of appeals in December, 1894. [*Louisville, St. L. & T. R. Co. v. Taylor*, 96 Ky. 241.] The railway company, pending the appeal, became insolvent, and passed into the control and management of a receiver appointed by the United States circuit court for the district of Kentucky, under proceedings instituted in that court by general creditors. Subsequently two foreclosure bills were filed by the Central Trust Company of New York, as trustee under two mortgages covering the entire road and its equipment, and the former receivership was extended to these suits. By reason of this subsequent insolvency, Whitely, as surety, has been obliged to pay in discharge of his liability \$8,153.10. He has intervened in the foreclosure suits mentioned, and claims that the circumstances are such as to entitle him to payment out of the *corpus* of the mortgaged property in preference to the mortgagees. The decree of the circuit court gave him a priority as to a large part of his claim, on the theory that the debt paid was purchase money for land, and therefore a prior equitable lien. From this decree both Whitely and the Central Trust Company have perfected appeals.

Two distinct theories have been advanced by counsel for Whitely as furnishing ground upon which priority of payment should be accorded his claim. The first is that his act as a surety on the supersedeas bond operated to keep the property together, and to keep the railroad as a going concern, and that the mortgagees were indirectly benefited, and should, therefore, be postponed until he has been paid. The second is that the covenants in the deed of conveyance of a right of way from Taylor to the railroad company constituted the consideration for the conveyance, and that the judgment for damages for breach of those covenants fixes the money value thereof, and, although no express lien was retained, an equitable lien is implied, which must be discharged in preference to mortgages subsequently executed with record notice of the existence of the covenants set out in the title of the company. We shall consider these questions in the order stated. The case of *Union Trust Co. v. Morrison*, 125 U. S. 591 *et seq.*, 31 L. ed. 825, is supposed to lend countenance to the first ground upon which this court is asked to give relief to the intervener. Both of the mortgages now being foreclosed were in existence when Whitely stepped forward and assumed the liability of a surety upon the supersedeas bond of the railway company. Both mortgages covered substantially the whole property of the mortgagor company, including its rights of way, depots, depot grounds, rolling stock and equipments of every kind. But it is said that under the law of Kentucky an execution might have been levied upon the equipment of the company, and, although such levy would

have been subject to the prior mortgage liens that still such a levy and execution sale would have greatly embarrassed and crippled the operations of the railway company as an active common carrier, and worked great detriment, directly and indirectly, to the mortgagees, as the substantial owners of the property. This is the principal equity which is supposed to bring this case within the logic of *Union Trust Co. v. Morrison*. The two cases may be assumed to present analogous features, so far as this equity is concerned. But here their identity is at an end. The judgment in Morrison's favor was not rested alone upon the equity stated. A succession of equitable circumstances existed in that case, which unitedly were deemed strong enough to support a decree in his favor. When Whitely became surety on this supersedeas bond, he did so at the request of an apparently solvent company, and presumably as a matter of accommodation, and upon the personal credit of the company. When one becomes a surety under such circumstances, he is presumed to have trusted his principal, and not the property. In no state is this obvious principle more positively recognized than in the state of Kentucky. *Johnson v. Morrison*, 5 B. Mon. 107; *Bank of Hopkinsville v. Rudy*, 2 Bush, 829. In Morrison's case he did not trust his principal, but took a chattel mortgage upon four engines. Another most significant circumstance upon which that judgment was rested is entirely absent from *Whitely's Case*. When Morrison stepped in and prevented a levy upon and sale of the railroad equipment, the railroad company had been long in default upon the interest on its mortgage debts. The mortgagees had an existing right to take possession of the mortgaged property, or to have secured the appointment of a receiver. They had done neither, but had suffered the railroad company to continue in the possession and management of its property. When a levy upon equipment was threatened, and the operation of the railway imperiled, the mortgagees, though legally authorized to prevent such a result, stood by and did nothing, and saw Morrison intervene, and by his act keep the property together, and keep the railroad in operation. In the case before us, the railroad company was not in default as to its interest, and was rightfully and legally in the complete control and management of its property. The mortgagees had no right to interfere with that management, and no right of foreclosure. This furnishes a marked distinction between the two cases.

But a circumstance of greater significance than any yet mentioned lies in the fact that, after a receiver had been appointed for the company, in whose behalf Morrison became surety, the receiver applied to the court for permission to protect Morrison and others, who had become sureties under like circumstances, by paying out of current income the debts upon which they were bound. An order was accordingly made allowing the receiver "to pay out of any money coming to his hands as such receiver, over and above expenses of operation and repairs," all such claims as had been brought to the attention of the court, including the claim upon which Morrison was liable. The mortgagees, though parties, made

no objection to this order. Their mortgages were foreclosed, and the property bought in by them, under a decree which obligated them to pay all intervening claims which the court should deem entitled to priority out of the property or assets of the company. The receiver did not pay off this Morrison claim upon the pretense that the income was insufficient. The court, however, found that this was untrue. That the income had been used in the purchase of "new property, real estate, and rolling stock," and that this property, into which income had been diverted, had passed into the hands of the mortgagee purchasers. The income thus diverted to the benefit of the mortgagees was held to be presumably sufficient to have indemnified Morrison, and he therefore entitled to be paid out of the *corpus* of the property which had been covered by the mortgages and bought in by the mortgagees. No such circumstance exists in *Whitely's Case*. Justice Bradley carefully guarded the court's opinion by declaring that case to be "a special one." After distinguishing the case from *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, and announcing that nothing was intended to be decided conflicting with that case, he concluded by saying of Morrison's claim that it "was presented upon the equities arising in favor of the intervener for taking the action he did, and thus securing the results which followed, and upon the other circumstances of the entire case taken together; and it was upon these grounds that the claim was allowed by the court below." *Union Trust Co. v. Morrison*, 125 U. S. 618, 31 L. ed. 581.

Such cases as *Foadick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *Miltenderger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Dow v. Memphis & L. R. R. Co.* 124 U. S. 652, 31 L. ed. 565, and *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694,—seem to rest upon the doctrine that railroad mortgagees impliedly agree that current earnings shall be first applied to current operating expenses, and, if diverted to the payment of interest on the mortgage debts, may be followed, or such creditors subrogated to the rights of mortgagees, to the extent of such diversion. That those cases have carried the rule of displacing mortgage debts as far as the courts feel justified is made very clear by the emphatic declarations of the supreme court in *Kneeland v. American Loan & T. Co.* 136 U. S. 97, 34 L. ed. 383; and *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663. See also *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.* 137 U. S. 171-194, *et seq.*, 34 L. ed. 625-633.

In the *Kneeland Case* the court said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver

conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility; and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

The case before us is not within any principle to be fairly deduced from *Morrison's Case*. The conclusion we reach finds strong support in the opinion of Justice Brewer, when a circuit judge, as reported in *Blair v. St. Louis, H. & K. R. Co.*, 23 Fed. Rep. 522; as well as in the able and convincing opinion of Judge Jenkins in *Farmers' Loan & T. Co. v. Northern P. R. Co.*, 68 Fed. Rep. 86. For these reasons we concur in the opinion of Judge Barr, in so far as he refused any relief upon the ground just considered.

We come now to consider whether Taylor's judgment constituted a prior lien to which Whitely may be subrogated. That judgment was for damages for breach of the covenants contained in Taylor's deed conveying a right of way and depot site. Those covenants were undoubtedly the principal consideration for the conveyance. They were that the "said railroad and its successors shall put up and keep in good repair a good and lawful fence, made of slat and wire, along both sides of said railroad where it crosses over said land, and to build and keep in good repair stock gaps at reasonable distances along said road, if required by said Taylor, and especially shall such gaps be kept where said Taylor's lands adjoin his neighbors. Said railroad and its successors agree that they will build and keep a good and substantial depot and switch on said Taylor's lands where said railroad intersects the Iceland road, at which all trains on said railroad flagged or signaled shall stop; and said Taylor shall have the use of said switch free of charge for any shipping he may have done on said road; and for the purpose of building said switch and depot said Taylor hereby conveys to said railroad 50 feet fronting on the Iceland road where said railroad intersects the Iceland road, and running back parallel with said railroad 75 feet. Said railroad company agrees to build said depot and switch in a reasonable time after the cars commence running on

said road at said point. It is further agreed by said railroad and its successors that said Taylor and his family shall have free travel over the line of said railroad on its trains."

Judge Barr was of opinion that certain of these covenants ran with the land, and bound the successors in title, while others were personal. The former class he deemed a charge on the land in the nature of a vendor's lien, and held that so much of the judgment as was for damages for breach thereof constituted an equitable vendor's lien entitled to payment out of the corpus of the mortgaged property in preference to both the mortgages. The contention of Whitely was, and now is, that the covenants collectively constituted the consideration for the conveyance of the right of way and depot site, the money value of which was fixed by the judgment; and that for this money value a vendor's lien exists. From so much of the decree as refused relief upon part of the judgment he has perfected an appeal. The Central Trust Company, denying that any vendor's lien exists, appealed from the decree in Whitely's favor.

In the view we take of this case it is not necessary to consider how far a successor in title would be bound by the covenants of this deed. If we assume that the covenants were real covenants, following the title, does a lien, enforceable in equity, exist in favor of a judgment for damages for a breach of such covenants? No express lien for the security of such damages or to secure the performance of the covenants is claimed. If one exists at all, it must be upon the ground that an implied vendor's lien arises to secure the performance of covenants entered into as a consideration for the conveyance of land, and that the same equitable lien exists in favor of any judgment for damages for the breach of such covenants, under the principles touching such liens, as are enforced by courts of equity. The equitable lien of a vendor will be recognized and enforced in courts of the United States if in harmony with the law of the state in which the lien is sought to be enforced. *Bayley v. Greenleaf*, 20 U. S. 7 Wheat. 46, 5 L. ed. 393; *Fisher v. Shropshire*, 147 U. S. 133-139, 37 L. ed. 109-113; *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 38 L. ed. 802. The doctrine that a lien on land exists for the purchase money may be regarded as very well settled in the jurisprudence of England, as well as that of the state of Kentucky. In *Mackreth v. Symmons*, 15 Ves. Jr. 329, Lord Eldon has given us a very full historical review of the cases, and has drawn deductions as to the extent of the doctrine. In *Bayley v. Greenleaf*, cited heretofore, the limits of the doctrine in respect of the obligation of the lien upon subsequent vendees, and the general nature of this most fragile of all equitable liens, received a most thorough consideration by Chief Justice Marshall. Further light was thrown on the subject in a masterly opinion by Justice Story in *Gilman v. Brown*, 1 Mason, 212, subsequently affirmed in *Brown v. Gilman*, 17 U. S. 4 Wheat. 255, 4 L. ed. 564. In *Gilman v. Brown*, cited above, Justice Story said of the doctrine that "the rule, however, is manifestly founded on a supposed conformity with the intentions of the parties, upon which the

law raises an implied contract; and therefore it is not inflexible, but ceases to act where the circumstances of the case do not justify such a conclusion." 1 Mason, 191. What the circumstances are which will determine the existence or nonexistence of the lien is often a question of difficult determination, and has given rise to certain nice distinctions which have crystallized into rules of decision, somewhat arbitrary in their consequence. Thus it seems to be settled that, if the consideration be that the vendee will enter into certain covenants, as for the payment of an annuity to A and a certain sum to another in the event of the death of the vendor, the consideration on one side is the conveyance of the estate, and upon the other side the entering into the covenants; in which case, if no lien be reserved, none will be implied for the performance of the covenants. *Clarke v. Royle*, 3 Sim. 499; *Parrott v. Sweetland*, 8 Myl. & K. 656; *Buckland v. Pocknell*, 18 Sim. 406; *Sugden, Vendors*, 65, 66; *McCandlish v. Keen*, 13 Gratt. 615-626, *et seq.*

The principle upon which *Clarke v. Royle* and the other cases cited above may be said to rest is that, where the consideration for the conveyance is the entering into an agreement to do or not to do certain things, and the remedy for a breach of such agreement consists in an action for unliquidated damages, the parties will be presumed not to have intended that the land should remain charged with a vendor's lien to secure such unliquidated damages,—damages which may never accrue, and are unascertainable by third persons dealing with the land. The consideration for the deed is deemed to be the entering into the covenants. When this is done, the covenants are deemed a substitute for the price. Indeed, the rule has been very broadly stated by most American courts to be that a vendor's lien will not arise where the consideration is unliquidated, and ascertainable only by an action sounding in damages. The existence of such a lien for the security of a covenant, accepted as the consideration for a conveyance of land, has most often arisen where the deed was in consideration that the vendee would maintain or support the vendor. Where there has been a breach of such a covenant, the great weight of opinion is that no lien exists to secure the performance thereof, unless expressly contracted for. The subject received elaborate consideration from the supreme court of Virginia in the cases of *Brawley v. Ontron*, 8 Leigh, 522, and *McCandlish v. Keen*, 13 Gratt. 615, and the doctrine of those cases has been generally accepted as a sound statement of the equitable doctrine touching the nonexistence of a lien where the consideration consists in the entering into covenants to do or perform acts for the breach of which the remedy at law was an action sounding in damages. *Hiscock v. Norton*, 42 Mich. 320-325; *Campbell v. Campbell*, 21 Mich. 438; *Payne v. Avery*, Id. 524-551; *Arlin v. Brown*, 44 N. H. 102; *Harris v. Hanie*, 37 Ark. 348; *Bell v. Felt*, 51 Ark. 433, 4 L. R. A. 247; *McDonald v. Elyton Land Co.* 78 Ala. 382-384; *Walker v. Struve*, 70 Ala. 167; *Patterson v. Edwards*, 29 Miss. 71; *Barlow v. Delany*, 36 Fed. Rep. 577; *Peters v. Tunell*, 43 Minn. 473; *Chase v. Peck*, 21 N. Y. 34 L. R. A.

581; *Chapman v. Beardsley*, 31 Conn. 115; *Meigs v. Dimock*, 6 Conn. 458; *Jones, Liens*, § 1071.

Counsel for appellant Whitely have cited the case of *Dayton, X. & B. R. Co. v. Lewton*, 20 Ohio St. 401, as supporting their contention. The facts of that case make it an exceptional one. The bargainor had retained the title, and only agreed that the railroad company might enter upon and construct the railway in consideration of \$1,500, to be paid in money, and the construction of certain road crossings and cattle guards. There was a judgment at law for the unpaid purchase money, and another judgment for the damages for breach of the agreement as to crossings and cattle guards. Upon a bill in equity to declare and enforce a lien in favor of both judgments as against mortgages, the court held that the retention of the legal title operated to put mortgages upon inquiry as to the rights of the vendor. As to the lien of the judgment for damages, the court held that a lien existed for its payment as the money value of the covenants breached. The ground upon which this case is rested is indicated very plainly by Judge McIlvaine, who delivered the opinion of the court, who, among other things, said: "It may be that this equity of the defendant in error is not, technically, what is commonly called a 'vendor's lien,' inasmuch as the legal title has not been conveyed by him to the purchaser. It is, however, at least as strong a hold upon the property sold as the lien of a vendor after title conveyed; for here not only is an equity retained by the vendor in the property sold to the extent of the unpaid purchase money, but the legal title is also retained by him as additional security. It cannot be said in this case, 'that from the nature and objects of this sale, the vendor did not intend to rely upon the thing sold as security for his payment.' Retaining the legal title is very strong, if not conclusive, evidence that he did intend to rely upon it as security. The presumption, however, in all cases, even where the vendor conveys the legal title, is that he intends to rely upon the property sold as security. And before his abandonment or waiver of such security can be found, it must be shown that he did not intend to rely upon it."

From the fact that the vendor had retained the legal title it is very clear that the Ohio court did not have the question now presented in this case.

There is nothing in the decisions of the Kentucky courts which in any way strengthens the case for a lien. Upon the contrary, the legislation of that state has much modified the general rule so far as third persons are affected by the secret and implied lien of a vendor. Ky. Gen. Stat. chap 63, art. 1, § 24, provides as follows: "When any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against bona fide creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid."

This statute is restrictive in its character, and does not originate a lien where, under general principles of equity, one would not

exist. *Long v. Burke*, 2 Bush, 90; *Ledford v. Smith*, 6 Bush, 182; *Brown v. Ferrell*, 88 Ky. 417. In *Long v. Burke*, cited above, a part of the consideration was that the vendee "is to pay all the debts which were owing by me the 10th day of March, 1860." Touching the question as to whether a vendor's lien existed for the performance of this covenant, the court held it to be a mere personal covenant, and also held that under the statute no lien existed, because the deed did not state what part of the consideration remained unpaid. As to this, the court said: "It is very clear that a covenant to pay all the vendor's debts existing on a given day does not state the portion of the purchase price unpaid; nothing, in fact, could be more indefinite; it did not give even a clue as to how this amount could be ascertained. Had it even specified to whom these debts were due, without stating the amount to each, it would have been as indefinite as to state that some of the purchase price was still unpaid to the vendor, which the court held to be insufficient." See also *Chapman v. Stockwell*, 18 B. Mon. 658.

By the statute as it now stands the restric-

tion applies only to bona fide creditors and purchasers. *Ross v. Adams*, 18 Bush, 870; *Tate v. Hawkins*, 81 Ky. 582, 50 Am. Rep. 181; *Thompson v. Heffner*, 11 Bush, 858.

Assuming the mortgagees, through their trustee, the Central Trust Company, to have notice of the covenants of this deed, the deed itself does not expressly state "what part of the consideration remains unpaid." From it a creditor or purchaser might learn that the consideration consisted in covenants, some of which were perpetual, while others might last for several generations. The purpose of the statute was to give definite notice to creditors and buyers of the extent to which the purchase price remained unpaid. The judgment in *Long v. Burke* seems conclusive. If a covenant to pay all the debts of the vendor due on a certain day was too indefinite to stand as a compliance with this statute, it is difficult to see how indefinite, continuing covenants, such as those found in this deed, can be held to be a definite statement of the part of the consideration remaining unpaid.

The case must be remanded, with direction to enter a decree in accordance with this opinion.

MICHIGAN SUPREME COURT.

Mary E. FULLER, Deceased, etc., *Plff. in Err.*,

Edward E. KANE,

(.....Mich.....)

A stipulation in a mortgage that the mortgagor shall pay within the time prescribed by law all taxes upon the premises does not make the mortgagor liable for all taxes in case of the subsequent passage of a law requiring the mortgagee to pay those properly leviable against his interest.

(July 31, 1898.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to compel defendant mortgagor of certain real estate to pay the taxes which had been assessed upon the interest of the mortgagee. *Affirmed*.

The facts are stated in the opinion. *Messrs. Gray & Gray*, for plaintiff in error:

The court in *Detroit v. Detroit Bd. of Assessors*, 91 Mich. 97, 16 L. R. A. 59, sustains the rights of the parties to make agreements for the payment of these taxes so that the obligation to pay them may be shifted from those designated in the law, and says, with respect to existing agreements, "that if the engagement of the mortgagor is sufficiently broad to cover any assessment which may be made on all in-

terests in the land mortgaged, his undertaking is in no way interfered with or abridged by the present statute."

There is such an agreement in the case.

Hammond v. Lovell, 186 Mass. 184.

Mr. Edward E. Kane, in propria persona:

The purpose of this enactment was to make the mortgagee, whether resident or nonresident, pay the tax upon such interest in the mortgaged property as represents the money he has loaned upon it, and thereby relieve the mortgagor from the burden of paying both that and the tax upon his own interest.

Detroit v. Detroit Bd. of Assessors, 91 Mich. 78, 16 L. R. A. 59; *Hewitt v. Dean*, 91 Cal. 5; *Welty, Assessments*, 98, and note.

The weight of authority upon the adjudged cases is clearly with defendant.

McCoppin v. McCartney, 60 Cal. 367; *Hay v. Hill*, 65 Cal. 883; *Clopton v. Philadelphia & R. R. Co.* 54 Pa. 856; *Tracycross v. Fitchburg R. Co.* 10 Gray, 298; *Tidwell v. Whitworth*, L. R. 2 C. P. 825.

Montgomery, J., delivered the opinion of the court:

Prior to 1891, mortgages were assessed against the mortgagee, and the real estate was assessed against the owner. By the act of 1891, the legislature provided for the assessment of mortgages as an interest in lands, and relieved the mortgagor from taxation upon so much of his property as the mortgagee's interest represented. Prior to the enactment of this law, in October, 1889, the defendant executed a mortgage, with a condition to "pay and discharge, or cause to be

NOTE.—As to the power to tax mortgages in general, see *Detroit v. Bents* (Mich.) 16 L. R. A. 59, and note.

34 L. R. A.

paid, within the time prescribed by law, all such taxes and assessments as shall by any lawful authority, while the money secured by the presents remains unpaid, be levied and imposed upon said premises above described;" and it is also agreed that "should any default be made in the payment of the taxes and assessments as above provided, or any part thereof, then in such case it shall be lawful for the party of the second part, her heirs or assigns, . . . to pay and discharge such taxes and assessments; and the money thus paid shall be a lien on said premises, added to the amount secured by these presents, and shall be payable on demand, with interest at 5½ per cent per annum."

The sole question presented in this case is whether the stipulations above quoted imposed upon the mortgagor the duty of paying taxes assessed under a law subsequently passed, providing for an assessment against the mortgagee's interest. The learned circuit judge was of the opinion that this undertaking was not to be so construed, and in that opinion I concur. As was said by Pollock, C. B., in *Berwick-upon-Tweed v. Oswald*, 8 El. & Bl. 678: "Every contract (which does not expressly provide the contrary) must be considered as made with reference to the existing state of the law, and, if, by the intervention of the legislature, a change is made in the law, which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold with reference to the state of things as altered by the new law." This opinion is cited with approval by Endlich, Interpretation of Statutes, § 461, where it is said: "The intervention of the legislature, in altering the situation of the contracting par-

ties, is analogous to a convulsion of nature, against which they, no doubt, may provide; but if they have not provided, it is generally to be considered as excepted out of the contract."

In this case we think there is nothing in the language of the contract which evidences a purpose to extend the obligation of the mortgagor so as to make it include the duty of paying taxes which by subsequent legislation it is made the duty of the mortgagee to pay. The case cited above is instructive, and, while the opinion of Baron Pollock is a minority opinion, the conclusion of the majority appears to be based upon the view that language is employed in the contract under consideration which could not be operative if limited to conditions existing under the law in force at the time it was entered into, so that the principle announced by Baron Pollock seems not to have been controverted. We are cited to the case of *Hammond v. Lovell*, 186 Mass. 184, as sustaining the contention of plaintiff. In that case it is implied in the opinion that, prior to the enactment of the statute making the change in the manner of assessing taxes, the mortgagee, if in possession, was liable to be assessed upon the land, and that in that state the legal title to the mortgaged property is vested in the mortgagee. This would distinguish the cases, as, if such be the state of the law in Massachusetts, the undertaking to pay all taxes and assessments on the premises might, under the prior existing law, have imposed the obligation of paying the mortgagee's taxes. However this may be, we are fully convinced that this provision should not be given the broad construction contended for, under the statutes of this state, and that *the judgment should be affirmed.*

The other Justices concur.

MARYLAND COURT OF APPEALS.

Lewis MYERS *et al.*, *Appts.*,

v.

BALTIMORE COUNTY COMMISSIONERS *et al.*

(33 Md. 385.)

1. The average amount of live stock which cattle dealers have each week, although usually sold within one day after they are received, and most of them are brought from other states, constitutes property within the state which can be taxed under Code, art. 81.
2. The intent of dealers in cattle to export part of them, and the fact that they do export about two thirds of all which they handle, do not prevent the taxation of such cattle to the average amount that they have on hand.
3. Notice of a new assessment or of an in-

crease of taxation, required by Code, art. 81, §145, is necessary in order to sustain such new or increased tax.

(June 17, 1896.)

APPEAL by plaintiffs from a decree of the Circuit Court for Baltimore County in favor of defendants in an action brought to enjoin the collection of certain taxes. *Reversed.*

The facts are stated in the opinion.

Mr. S. S. Field, for appellants:

These identical cattle have already been taxed once in the state where grazed or fed. This is not a bar to their taxation here, but is to be borne in mind when considering whether the legislature intended by a general provision to tax them. General provisions are to be construed so as to avoid double taxation.

25 Am. & Eng. Enc. Law, pp. 667, 668; Penn.

NOTE.—As to the place of taxation of personal property, see also *Com. v. American Dredging Co.* (Pa.) 11 L. R. A. 237, and *note*; *Liverpool & L. & G. Ins. Co. v. Board of Assessors* (La.) 16 L. R. A. 56.

As to the place of taxation of partnership property, see 34 L. R. A.

personal property, see *Hopkins v. Baker Bros.* (Md.) 22 L. R. A. 477, and *note*.

As to the place of taxation of trust property, see *Richmond County Academy v. Augusta* (Ga.) 20 L. R. A. 151.

sylvania Co. v. Com. (Pa.) 15 Atl. 456; *State v. Sterling*, 20 Md. 520.

And double taxation in this state is illegal. *State v. Central Sav. Bank*, 67 Md. 292.

Within this state, so far as it relates to tangible chattels like cattle, it is believed to mean the same as the phrase "permanently located," used in art. 8, § 51, of the Constitution, which was before this court in *Hopkins v. Baker*, 78 Md. 363, 22 L. R. A. 477.

In that case the court says that "abiding place" and "permanent location" are synonymous terms.

Firemen's Ins. Co. v. Baltimore, 23 Md. 311, defines "permanently located" by another phrase, "actually situated."

The cattle upon which appellants were assessed were not ordinarily kept at the stock yards.

Com. v. American Dredging Co. 123 Pa. 886, 1 L. R. A. 287, 2 Inters. Com. Rep. 231.

Intangible property and ships which cannot be located in any state are within the state if the owner resides here; but with regard to tangible property the actual *situs* is the one meant by the tax laws.

Ibid.; *Rorer*, Interstate Law, 204 (281); *People, Hoyt, v. Commissioners of Taxes*, 23 N. Y. 225.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business.

Appeal Tax Court v. Patterson, 50 Md. 367.

Property which is in transit, or which is temporarily within a state or sent into a state for sale, is not subject to taxation there, although entitled to and receiving the temporary protection of the law for the time being.

Rorer, Interstate Law, 2d ed. 281; *Burroughs, Taxn.* § 47; *People, Parker Mills, v. Commissioners of Taxes*, 23 N. Y. 243.

Property to be assessable must not only be within this state but must be valued to the respective owners thereof and assessed to them.

Code, art. 81, § 2; *Baltimore County Comrs. v. Winand*, 77 Md. 522.

Two thirds of all the cattle handled by appellants were export cattle. These cattle were merely in transit. The legislature could not, if it had attempted, authorize a tax upon them.

State, Lehigh & W. Coal Co., v. Carrigan, 89 N. J. L. 35; *State, Detmold, v. Engle*, 84 N. J. L. 427; *Rorer*, Interstate Law, 2d ed. 281; *Burroughs, Taxn.* § 47.

Goods in course of transportation through a state, though detained for a time within the state by low water or other cause of delay, are not taxable.

Oce v. Errol, 116 U. S. 525, 29 L. ed. 718.

As appellants were clearly not taxable upon the cattle sold by them on commission which they never owned, nor upon their export cattle which were merely in transit to Europe, and as the whole were included in one indivisible assessment, the whole assessment is void.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 395, 30 L. ed. 118.

This assessment was newly made against appellants without notice. Of course the record of the assessment required by law to be kept (Code, art. 81, § 23) is the exclusive evidence of

the actual assessment; and the assessment to be valid must be made by the officers designated by law.

25 Am. & Eng. Enc. Law, pp. 210, 211; *People v. Ilagadorn*, 104 N. Y. 517.

They were the county commissioners. Van Meeter might report to them, but they must assess.

Code, art. 81, §§ 6, 9, 10.

There was (until the late act) no law in Maryland taxing money. Money is not property in the sense in which property is used in the tax laws.

Cooley, Taxn. 279; *Johnson v. Lexington*, 14 B. Mon. 648; *Louisville v. Henning*, 1 Bush, 881; *Vaughan v. Murfreesboro*, 96 N. C. 318, 60 Am. Rep. 418; *People v. Hibernia Sav. & L. Soc.* 51 Cal. 243, 21 Am. Rep. 704; *Mifflintown v. Jacobs*, 69 Pa. 151.

These cattle were, in the very language of the Code, "new property not valued and returned . . . by the proper assessor or collector," and the county commissioners were expressly forbidden to place them on the tax books without a notice previously given.

Code, art. 81, § 145; *Allghany County Comrs. v. New York Min. Co.* 76 Md. 550; *Baltimore County Comrs. v. Winand*, 77 Md. 522.

Mr. D. G. McIntosh, for appellees, in support of motion for reargument:

There was no ignorance on the part of the taxpayer; there was no want of information to him of what was going to be done; he himself consented to the assessment, or rather he fixed it himself; he did not desire to be heard; and if "the only object of notice is to give the party opportunity to be heard," the appellants had such opportunity and expressly declined and waived the same. A party may waive a right created in his favor by statute as well as any other.

Tombs v. Rochester & S. R. Co. 18 Barb. 585; *Shutte v. Thompson*, 82 U. S. 15 Wall. 159, 21 L. ed. 125.

The effect of the return was to operate as an estoppel to appellants, and takes the case out of the line of decisions referred to in the opinion.

People v. Central P. R. Co. 105 Cal. 593; *Central P. R. Co. v. California*, 162 U. S. 162, 40 L. ed. 927.

It will always be presumed that the assessor acted in accordance with the law, and it is incumbent upon the defendants to show his acts were unauthorized.

San Francisco v. Flood, 64 Cal. 505.

Mr. Jefferson D. Morris also for appellees.

Page, J., delivered the opinion of the court:

The bill in this case was filed by the appellants to restrain the collection of certain taxes alleged to be due from them to the appellees. The assessment upon which these taxes were levied is \$20,000 on the "stock in trade, capital stock" of the appellants. *Myers & Houseman* are cattle dealers. Their principal office is at the Union Stockyards in Baltimore county. Their gross annual sales amount to about \$2,000,000 per annum. Their cattle are mostly purchased in the western states, thence

shipped to Baltimore, and there disposed of by the firm. Some are shipped to Europe and others are disposed of at home. They also receive and sell cattle on commission. The market days at the Union Stockyards are Wednesday and Thursday. On the first-named day the original owners sell to the dealers; and on the next the dealers retail to the butchers and others and ship the remainder. On other days there is no dealing, except when an occasional load arrives from shippers who are ignorant of the custom of the trade. Of the cattle handled by the firm two thirds are exported, one sixth sold to butchers, and the residue are on commission. Of those exported, some are purchased in this state, but the large majority of them come from western states. The course of business is as follows: The cattle are expected to and generally arrive on Wednesday. They are then placed in the pens of the Union Stockyards. There they remain rarely longer than one day; so that by Thursday evening the pens are empty, and so remain until the following Wednesday. Those intended for export are fed, watered, and rested at the yards, and then placed on the ship. Those fit for export are not of such a class as are offered in the Baltimore market, and none of these are sold there except when there are more than are wanted for shipment. The appellants contend this stock was not liable to taxation, because it cannot be considered as property "within this state," as the words are employed in the 2d section of art. 81 of the Code. That provision is as follows: "All other property of every kind, value, and description, within this state, shall be valued to the respective owners thereof in the manner prescribed by this Code, and shall be assessed and taxed as the property of such respective owners according to such prescribed methods of valuation," etc. In *Hopkins v. Baker*, 78 Md. 863, 22 L. R. A. 477, it was held that a stock of goods is to be regarded as "permanently located" (within the meaning of the words as used in art. 8 of § 51 of the Constitution) at the place where they are to remain until sold. The separate articles, the court says, constituting the stock, may continue the property of the appellees for a day, a week, a month, a year, or longer; but until they are sold they remain permanently in Baltimore, and are not moved from place to place. The stock in trade of the appellants consisted of cattle, and the evidence shows that, while they kept this stock on an average of but one day in the week, they did have, sometimes, every week at least, \$20,000 worth of cattle on hand; so that, if the week be regarded as the unit of time, and not the day, they may be said to keep on hand all the time an average of \$20,000 worth of cattle. They keep them there for sale, and as they sell, according to the custom and exigencies of the trade, they replenish with other stock. Suppose, instead of not being fortunate enough to sell each week's receipts in one day, it took them ten days to close them out, so that the second week's consignment would be received before the first could all be disposed of, this case would then be substantially like that in 78 Md., and no sufficient reason could be assigned for holding that the cattle, "stock in trade,"

"so held for sale," would not be "within the state" for the purposes of taxation. These cattle are disposed of rapidly, for the simple reason that the expense of keeping them on hand would in a short time destroy the profits of the business. It is an exigency of the trade. Ordinary goods may be kept on the shelf for a considerable period of time without loss, but cattle must be sold. The power of the state to tax an ordinary stock in trade is unquestionable. Can it be that the power is lost by any sort of an exigency that the special trade or class of goods may impose upon the trader? When received by the appellees in Baltimore they are to be kept an indefinite time until sold. The only disposition to be made of them is to be sold; and that this takes but one day is due to the course of trade, and not to the specific purpose of the firm. They buy and bring them to Baltimore, not for the temporary purpose of holding them in Baltimore county one day, but until they are sold, whether it be one day or one year. Therefore they are not temporarily there, but permanently, for sale; or, in other words, to remain there permanently until sold. There seems to be no reason for holding that these cattle, brought into the state by the appellants, residents of the state, for the purpose of supplying their trade, do not have, for the purposes of taxation, the same status as the goods of a merchant who buys in other states merchandise for the purpose of replenishing his stock. When here, they may fairly be "considered as constituting a part of the mass of the property of the state." *Appeal Tax Court v. Patterson*, 50 Md. 367.

It is said, however, that the assessment is bad, because it includes the cattle exported. This class comprised two thirds of the cattle handled. It is well settled now by the decisions of the Supreme Court of the United States that property in transit through the state, or from a point in the state to a point outside, is not within the taxing power of the state. That power lies with Congress, under that provision of the Federal Constitution (art. 1, § 8, cl. 3) which declares that it shall have power "to regulate commerce with foreign nations, and among the several states and with Indian tribes, and it is exclusive in all matters which require or only admit of general and uniform rules." *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 18 L. ed. 996; *Brown v. Maryland*, 25 U. S. 13 Wheat. 419, 6 L. ed. 678; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691. But this provision does not prohibit a state from taxing articles brought from another state, so long as there is no discrimination against the product of other states or the rights of its citizens. *Woodruff v. Parham*, 75 U. S. 8 Wall. 123, 187, 19 L. ed. 382, 386; *Brown v. Houston*, 114 U. S. 623, 29 L. ed. 257. The mere fact, therefore, that these cattle were purchased in other states, and brought to this state, is *per se* no reason why they cannot be taxed in the usual manner in which such property is taxed in the state, as a part of the general mass of the property of the state. In *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, the supreme court said: "They cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to

laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any state, without consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided . . . that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an imposition would be a regulation of commerce among the states, and therefore void as an invasion of the exclusive power of Congress. . . . But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of assessment for such property, and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed?" *Philadelphia & R. R. Co. v. Pennsylvania* ("State Freight Tax Case"), 82 U. S. 15 Wall. 252, 21 L. ed. 146. We cannot hold in this case that at the period of assessment any of these cattle were in course of transportation. In the regular course of business the cattle purchased by the appellants are shipped to themselves at Baltimore, to be there disposed of as they may deem most advantageous to their own interests. Once at the Union Stockyards, the transportation ceases, until, at the pleasure of the appellants, they are again shipped. They are not held there to await a steamer or a train, but for the convenience of the owners, in order that they may determine which of them they will sell in the home market and which they will ship to the foreign, or any other disposition they may choose. After this determination is reached, some are disposed of at home to the butchers, and those destined for other markets are delivered to the carrier for their final journey. Now, it is proposed to tax them here, not because they come from another state, nor as exports, but in the same manner and for the same objects, as all other property in the state is taxed. The case of *State, Detmold, v. Engle*, 84 N. J. L. 425, is not such a one as this. There the coal was mined on their own land by a company in Pennsylvania, and sent by rail to Elizabethport, to be there shipped by water to other markets for sale. The court says: "The power of the state to tax the subjects of commerce where their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another state in its transit to market in another state, which is delayed within this state, not for the purpose of sale, but merely for separation and assortment for the convenience of shipment to its destination, is a tax on commerce among states, is too plain to require argument." In this case the place of destination, upon their shipment from the West, is Baltimore county; and in the latter place the owners keep them until they shall have determined what disposition shall be made of them. The property, then, not being in transit, either through the state, or from a point in the state to a point outside, is "property within the state," within the meaning of

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the statute. But it is contended that, even if this be true, the property is not properly taxed, because the appellants purchased the cattle with the intention to export them; and, therefore, to tax them while in Baltimore county would be within the provision of the Constitution of the United States prohibiting the state from laying imposts or duties on imports or exports. This question was raised in the Supreme Court in the case of *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, but not decided. Justice Bradley, speaking for the court, said: "A duty on exports must either be a duty levied on goods as a condition or by reason of their exportation, or at least a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports it is not necessary to determine." The subject came up again for consideration in the case of *Coe v. Errol*, 118 U. S. 517, 29 L. ed. 715. The court, after referring to what had been previously held, proceeded: "But no definite rule has been adopted with regard to the point of time at which the taxing power of a state ceases as to goods exported to a foreign country, or to another state. What we have already said . . . will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of the property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have started upon such transportation in a continuous route or journey. . . . Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state." This decision was based on the provisions relating to commerce between the states. But in *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 988, the court declared the same rule applicable where the goods are to be exported to foreign countries. They say: "A general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition." In *Carrier v. Gordon*, 21 Ohio St. 608, the rule is stated as follows: "To say that the simple purchase of the property, with an intention to remove it, would relieve it from liability to taxation, would be to make its liability depend upon the mere intention of the owner. . . . The safer and better rule is . . . to consider property actually in transit as belonging to the place of its destination, and property not in transit as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state."

It is also objected that cattle sold on commission are included in this assessment. The evidence does not support this contention. It is true that Mr. Myers testified that one sixth of the cattle sold by the appellants were commission cattle, but it does not appear that these were included in the assessment. On the contrary, Myers, and also Houseman, expressly affirm that the statement which places his

stock in trade—"capital stock"—at \$20,000, is a true return of all the property owned by them. And nowhere in the record is there a word that tends to show that in making up the assessment the commission cattle were taken into account. Myers testified that the valuation was of the capital stock or stock in trade. Some criticism was made upon the words "capital stock" as not referring to the amount of stock kept on hand. As used here, we think the words "capital stock" are intended to refer to the stock of the concern, and not its money. *Corson v. State*, 57 Md. 286.

There is, however, a fatal omission in the method by which this assessment was made. We do not think it can be regarded as a transfer from the tax books of Baltimore city. It was a new assessment, so far as it affected the taxable basis of Baltimore county, and was therefore within the provisions of § 145 of art. 81 of the Code. By that section, where new property, not valued and returned by the proper assessor or collector, is to be added, the county commissioners must first notify the owner by "written or printed summons, containing" interrogatories, etc., and appointing a certain day "for him to appear and answer; and, secondly, such notice is to be served at least five days before the day of hearing." On that day the owner may appear and answer, and present such testimony as he desires or the commissioners deem necessary to be heard. It is only after the owner has been thus summoned, and has failed to answer in writing on oath, or has appeared and answered orally, and the return day has passed, that the county commissioners can add such new property. The section excepts from these provisions such assessments as are made by the proper collector or assessor whose duty it is to assess and return the same; but this exception does not apply in this case, inasmuch as Van Meeter was merely an agent, with no power to do more than report newly discovered and mixed properties to the commissioners. In this case a memorandum

was made by this agent, and the entry of this upon the tax books, by the direction of the county commissioners, constituted the only assessment. This court has said: "Until the property owner was duly notified, and given an opportunity to come in and answer as to the valuation of the property proposed to be affected, or had failed to come in after receiving such notice, the commissioners have no authority or power either to increase the valuation of property already valued and assessed, or to add thereto other property, not valued and returned to them by the proper assessors or collectors, as provided in the statute." "The statute law of the state, applicable to the case," the court proceeds to say, "should have been complied with, and the notice given as required." *Alleghany County Comrs. v. New York Min. Co.* 76 Md. 557.

This notice not having been given as required by the statute, this assessment cannot be upheld.

Decree reversed, and the cause remanded.

A petition for rehearing having been filed, *Page, J.*, in response thereto, on November 20, 1896, handed down the following opinion:

We have carefully considered the motion for reargument in this case, but do not think there was such notice as is required by the statute. In *Alleghany County Comrs. v. New York Min. Co.* 76 Md. 556, this court said: "Until the property owner was duly notified, and given an opportunity to come in and answer as to the valuation of the property proposed to be affected, or had failed to come in after receiving such notice, the commissioners have no authority or power either to increase the valuation of property already valued and assessed, or to add thereto other property not valued and returned to them by the proper assessors or collectors, as provided in the statute." Without discussing the matter further, we are of opinion this is conclusive of the case upon this point. The motion for reargument is therefore overruled.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* Elmer H. METCALF,

v.

Charles Q. JOHNSON.

(..... Mont.....)

1. A state convention nominating candidates will not be recognized so as to permit the names of the nominees to appear on an official ballot when it was held by only twenty-one persons, representing only one fourth of the precincts of a single county, who met without any call for a convention or any notices given except by word of mouth, or any election as delegates, or any credentials, and immediately assumed to form a new party and organize themselves into a county convention, and then on the same evening into a state convention.

2. A county convention whose nomi-

nees will have a right to appear on an official ballot cannot be held by twenty-one persons, coming from but one fourth of the precincts in the county, who met and assumed to form a new party without any credentials or election as delegates, or any call for a convention, or any notice except by word of mouth.

(October 22, 1896.)

APPPLICATION for an injunction to restrain defendant from printing on the official ballots the names of certain persons who were claimed to have been nominated as candidates for public offices to be filled at a coming election. *Granted.*

The facts are stated in the opinion.

Mr. Thompson Campbell for relator.

Messrs. F. T. McBride, L. J. Hamilton, and *John F. Forbis* for respondent.

NOTE.—For the right to nominate candidates in a mass convention under modern ballot laws, see *Manston v. McIntosh* (Minn.) 28 L. R. A. 606. See 84 L. R. A.

also the case next following, *State, Russell, v. Tooker* (Mont.) *post*, 815.

Hunt, J., delivered the opinion of the court:

The petitioner asks for an injunction to restrain the county clerk of Silver Bow county from printing upon the official ballot for that county the nominees of the Citizens' Silver party as they appear by the certificates on file with the county clerk of Silver Bow county. Answer was filed, and testimony heard by this court. The facts in evidence before us are these: On October 1, 1896, at 8 o'clock p. m., there assembled at the council chamber of the city hall at Butte a gathering of twenty or thirty persons, electors of Silver Bow county, Montana. These persons met in response to invitations extended by Mr. J. A. Baker and several others. The exact circumstances under which they came together were detailed by Mr. Baker as follows:

Q. Do you know whether there was any call made for this meeting?

A. The manner in which this call was made was from hand to hand and from mouth to mouth.

Q. By whom?

A. By the electors of Silver Bow county.

Q. When was this call given?

A. Several days before the meeting; two days, perhaps three.

Q. Don't you know?

A. I do not know.

Q. You participated?

A. I did. I invited people perhaps three or four days before the meeting was called. I invited gentlemen whom I knew to be in sympathy with the principles of the financial plank of the party.

Q. Were any notices given to any other counties, or electors of any other counties, to come in and participate?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Do you know whether anybody else gave any notice?

A. No, sir; I do not know.

Q. Don't you know that they did not?

A. Well, I can't say.

Q. Was there any notice published in the papers?

A. No, sir.

Q. Now, when you did assemble, how did you determine as to who had a right in the meeting?

A. The gentlemen who did assemble were supposed to be gentlemen who were invited to the meeting, and were electors of that party.

When thus assembled, Mr. William Thompson was elected as temporary chairman, and Mr. J. A. Baker temporary secretary. These gentlemen were made permanent officers. Then the gathering appointed several committees, and thereafter at once organized itself into a political party to be known as the "Citizens' Silver Party."—"the beginning," testified the secretary, "of a new national party." Directly after this important epoch in the history of this new national organization, and without pursuing the common ceremony of a call for a convention, it proceeded as a "county convention" to consider the report of a committee recommend-

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ing nominations for candidates for district court judges and county officers of Silver Bow county. The report of the committee recommending certain names was adopted, and a complete ticket nominated forthwith by acclamation. The county ticket so nominated was identical with the Republican county ticket, or "Auditorium ticket," and which we are not asked to disturb. No resolutions or platform was adopted, "it appearing," the minutes recite, "to the convention, from statements made in the convention, that a state convention of the Citizens' Silver party had been called to meet on October 1, 1896, at the council chamber, city hall, Butte, at 8 o'clock p. m. of that day, and that the electors and delegates to that convention were ready to meet upon the adjournment of the county convention, and that the said state convention would probably adopt resolutions setting forth the principles of the party. It was therefore the sense of the convention that the county convention should not adopt any resolutions as a county convention, but would be bound by such resolutions as the state convention should adopt as a declaration of its principles." The "county convention" then adjourned *sine die*. Then at once followed a "state convention of the Citizens' Silver party." Mr. McMillan was chairman, Mr. Baker, secretary. The same gentlemen who had composed the county convention made up the so-called "state convention;" that is to say, the persons composing the county convention simply assumed to act in a different capacity. Only one roll of delegates was kept for both conventions. It showed twenty-one names of persons as present. The body nominated Hon. Martin Maginnis, Henry L. Frank, and Daniel Brown, Esqs., as presidential electors, and voted to leave the balance of the state ticket blank. Resolutions favoring free coinage of silver by the United States independently of any other nation were adopted, and the "state convention" adjourned. No call for a state convention was ever given; no delegates to the state convention were ever elected by any county convention; no credentials were ever given to any such delegates by anyone; no notice throughout the state, or any county in it, was attempted to be published by way of notice of a state gathering of this new party; and no delegates, other than the twenty-one persons already referred to, participated. The whole history of the party covered one short evening. It originated one minute, convened as a county convention the next, convened as a state convention the next, then promulgated its principles, and adjourned. We doubt if political history records the undertaking of another so vast a work as this in so brief a time!

But, now that the facts are subjected to the severe test of impartial judicial investigation, we find them wholly insufficient to sustain the action of the assemblage either in attempting to nominate county or state officials, and we are satisfied by all the evidence that the real object of the nomination of the Citizens' Silver ticket was to place the Republican nominees beneath the Democratic electoral ticket. Let us grant that a new na-

tional party was organized. Yet, even so, how can a few individuals, coming from but one fourth of the voting precincts of one county, without any notice to the electors of the state, organize a state convention representing such an organized party and its principles? The very underlying principle of convention organization is in representation. This principle pervades every political system in our form of popular government. It was recognized in May, 1787, when the Federal system was revised by the Philadelphia convention of delegates from the states at the outset of the government, and has steadily grown to be a common form of giving expression to the choice of the people by whom delegates are usually chosen. As political parties have grown and become the medium of declarations of principles of electors, so the convention system has become a common part of political machinery as the means of putting candidates before the people. National party conventions have nominated presidential candidates since 1832. Somewhat recently, in the growth of electoral reform, legislation has come to recognize the existence of political party conventions; and the statutes of many states, including those of Montana, have briefly put in definite form the rule that a convention is an organized assemblage of electors or delegates representing a political party or principle. This definition cannot be separated into wholly independent, divisible parts. The assemblage must not only be an organized one, but the electors as well must, when so organized, represent a political party or principle. Thus a convention must be a representative body. Now, if we are right in this reasoning, this representation is of electors of the party to whom the candidates of the convention are to be submitted for election to office. And this representation must be what the statute implies,—a gathering of electors springing from the electors who compose a political party or adhere to a political principle. If such electors fail or decline to send delegates to the convention, or if the delegates sent disagree or act unwisely, then other matters may arise; but there can be no representation without the presence of electors fairly representing the party, or without some opportunity having been given to the electors to say whether or not they desire their party or principle to be represented. This was the doctrine of the *Woody Case* (Mont.) 46 Pac. 370, and is now reaffirmed. Here, in this case, we find an attempted state convention of an organized party, made up of a few persons, without credentials, voluntarily coming from but nine precincts of one county in a great state, and no attempt at giving to the electors of the party in other precincts or counties a chance to participate in the assemblage! The whole theory of representation, as fairly intended by the law, was entirely ignored. The vigorous authority of the electors of the party was lacking, and, unless relief is granted in such cases, the voters of the state who are members of an existing political party may be confronted with a ballot containing the names of persons in whose nomi-

ination they had no opportunity whatever to take part by delegate representation. We can not assent to such a method as a convention nomination of candidates. A political convention is to a certain extent a law unto itself, and the right to assemble in convention is one that must be always upheld, but whether there has been a convention with authority to nominate candidates is, under conditions of fact, one that must be determined by applying the statute law of the state. The duty of the court, therefore, in this case is to subject the methods employed to form a convention to such examination as any other case properly presented to a court would be. We have done so, and our conclusion is that there was no state convention held, and the writ must issue as prayed for.

These views apply to the so called "county convention." The electors of the new party in Silver Bow county had no fair notice of any convention, and no opportunity to be represented by delegates, and were not represented, except by a few projectors of the new party. The action of the body, therefore, as a county convention, cannot be sustained, and it must be nullified.

All questions of practice are passed. *State, Russell, v. Tooker* (Mont.) *post*, 315.

Let the writ of injunction issued enjoining the county clerk from putting the so-called "Ottizans' Silver Ticket" upon the official ballot be made permanent.

As it appears to the court that the secretary of state has certified the Citizens' Silver party electoral ticket to all of the county clerks throughout the state, the attorney general is hereby directed to notify each and every county clerk of this decision, and to order them to omit the said ticket from the official ballots of their respective counties.

Pemberton, Ch. J., and De Witt, J., concur.

STATE of Montana, *ex rel.* Edward C. RUSSELL,

vs.
John S. TOOKER.

(.....Mont.....)

1. **Nominations cannot be made by a petition** filed with a county clerk and recorder so as to entitle the names of the nominees to be placed upon an official ticket as candidates of a party.
2. **Nominations by a self-constituted county committee** of an alleged party cannot be made so as to appear on an official ticket when no power has been delegated to such committee by any convention of the party.
3. **A nomination by a political club cannot be recognized** as that of a county convention when the participants did not consider themselves a convention and the minutes kept were those of the club, and there had been no call or notice of a convention or any election of delegates, and no primaries had been held.

(October 22, 1896.)

NOTE.—See the preceding case of *State, Metcalf, v. Johnson*, *ante*, 313.

PETITION for an injunction to restrain defendant from printing on the official ballots the names of certain persons who were claimed to have been nominated as candidates for certain offices to be elected at a coming election. *Granted.*

The facts are stated in the opinion.

Messrs. E. D. Weed and Oliver T. Crane, for relator:

The law provides only two methods by which nominations for office may be made, and the names placed on the official ballot. The first method is by a convention or organized assemblage of electors as provided by §§ 1810, 1811, and 1812, Pol. Code; and the second by a certificate signed by the required number of electors in the manner and as provided in Pol. Code, § 1813.

A certificate signed by the electors, commonly called a petition, does not entitle the persons named therein as candidates to have their names printed on the official ballot under or as part of the Silver Republican party ticket or under any other ticket.

State, Woody, v. Rotwitt (Mont.) 46 Pac. 370; *Philips v. Curtis* (Idaho) 88 Pac. 405; *Atkeson v. Lay*, 115 Mo. 538.

A caucus not held at a place where caucuses of the party are usually held or called by any one having authority, for which insufficient notices were given, and not attended by such a number of electors of the party as to take the place of a proper official call and due notice, is not such a primary meeting of electors held under the rules of a party as can make and certify nominations.

Re Wilkesbarre Twp. Nominations, 7 Kulp, 529; *Re Ingram*, 3 Pa. Dist. R. 272; *Re Craig*, Id. 274; *Allegheny City Elections*, 12 Pa. Co. Ct. 660.

The entire body of electors belonging to a particular party residing in a county, town, district, circuit, or precinct who are entitled to vote for the candidate at the election, have a right to join in his nomination.

State, Bloomfield, v. Weir, 5 Wash. 84.

A majority of the persons who took part in that alleged convention also took part in the Republican primaries, and some of them in the county Republican convention, and thereby joined in nominating other persons for the same office; and the officers of the so-called convention were members of the Republican county convention.

Philips v. Curtis, supra; *State, O'Malley, v. Lesueur*, 108 Mo. 253; *Re Woodworth*, 16 N. Y. Supp. 153.

When persons who are not entitled to vote are permitted to vote by the officers conducting the election or convention, it vitiates the election, and it is void.

Re Gibbons' Nomination, 5 Pa. Dist. R. 194; *Re Winton's Nominations*, 2 Lack. L. News, 13; *McCrory, Elections*, p. 441, § 184; *Judkins v. Hill*, 50 N. H. 140.

A convention having authority to make nominations may delegate authority to a committee appointed by it to fill vacancies or make nominations after the convention fails to nominate. But that committee derives its authority from the convention or primaries, and can only exercise the authority thus specifically delegated.

State, Pigott, v. Benton, 18 Mont. 325.

Messrs. T. C. Bach, E. C. Boon, and J. W. Kinsley for respondent.

De Witt, J., delivered the opinion of the court:

This action is brought in this court to restrain the county clerk and recorder of Lewis and Clarke county from printing on the official ballot to be voted at the next election the names of certain persons as candidates of the Silver Republican party, which names were certified to the county clerk as of persons having been nominated as candidates of that party by methods which relator asserts are illegal. Objections are made by respondent's counsel to the form of this action. It is argued by relator, however, that the action is properly brought, under the authority of *Chumacero v. Potts*, 2 Mont. 242; *Territory, Tanner, v. Potts*, 3 Mont. 384, and other later decisions of this court. If the action is not properly brought, and upon investigation we should be obliged to so hold, the result would be that a new proceeding must be commenced in order to obtain a judgment on the merits. The same remarks apply to five other election ballot cases which are now (October 22d) before us, and the hearing of which has occupied us all of the last four days. These are cases of great public interest. Counsel inform us that the ballots must be published to-morrow, and that there is barely time to print them. For these reasons we shall approve the form of the actions *pro forma*, but shall not consider this decision as to this matter of practice binding in the future, if the question shall be at any time fully argued, and we have time to deliberately consider it. Public policy and public interest demand an immediate decision of this case on the merits, and justify us in thus passing the question of practice.

It was attempted to get the names of a certain list of persons upon the official ballot of Lewis and Clarke county by three different methods:

First: A petition was filed with the respondent clerk and recorder nominating these persons for their respective offices as candidates of the Silver Republican party. The nominations could not be made by this method, and the procedure did not entitle these persons to be placed upon the official ticket as candidates of the Silver Republican party. *State, Woody, v. Rotwitt* (Mont.) 46 Pac. 370.

Second: A certificate was filed nominating these same persons, and purporting to certify their nomination as by the county central committee of the Silver Republican party. But no convention of the Silver Republican party had ever delegated this power to a committee. *State, Pigott, v. Benton*, 18 Mont. 306. This committee, therefore, had no power delegated to them from the convention of their party. There was some attempt to show that this committee derived this power by delegation from the chairman of the state central committee of the Silver Republican party to the member of that committee in and for the county of Lewis and Clarke, and from that member to the county central committee of the Silver Republican party. Testimony was taken by us upon disputed questions of fact, and, among other things, the chairman of the state committee testified that he did not dele-

gate to the member of Lewis and Clarke county the power to nominate a county ticket, nor did he consider that he had power to delegate such authority in local affairs. This disposes of the alleged nomination by petition and by the central committee. They are each wholly invalid.

Third. A certificate was filed nominating these same persons, purporting upon its face to be that of a county convention of the Silver Republican party. Upon this alleged certificate respondent's counsel relies. The question, then, remains for decision whether the alleged county convention purporting to nominate these persons was in fact a convention of the Silver Republican party of the county of Lewis and Clarke. Upon this question evidence was taken.

We think that the only question before us is whether these persons are entitled to go upon the ballot as party nominees; that is, as candidates of the Silver Republican party. *State, Woody, v. Rotwitt, supra.* The question of their going upon the ballot as Independents, or as nonparty candidates, we do not think is before us. Every fact in the pleadings and evidence contradicts any suggestion that anyone pretended that these persons were Independents or nonparty candidates. There is not a syllable in the testimony to indicate that the persons endeavoring to make these nominations ever intended to attempt to place their candidates upon the ballot as Independents. The question then remains, Did a party convention nominate these people? Section 1810 of the Political Code is as follows: "Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the state. A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle." We are of opinion that the only reasonable view of the evidence is that these alleged candidates were nominated simply by a political club in the city of Helena, county of Lewis and Clarke, called the "Republican Silver Club." We have before us the minutes of the club, and the evidence of persons and members who were present at the proceedings. It is perfectly apparent that the club, in acting, was not a convention representing the Silver Republican party; nor, indeed, did those persons participating in the proceedings consider themselves a convention. There is not a minute of a convention. The minutes are all of the Silver Republican Club. To be sure, witnesses on the stand make statements that the Silver Republican Club of Helena and the Silver Republican party were one and the same thing; but we look beyond bare statements and forms of speech, and endeavor to arrive at the real substance of the proceedings. We find that the officers acted as officers of the club, and did not pretend to be officers of a convention. No primaries were ever held. No call for a convention was ever made, nor was any person ever elected as a delegate to a convention, and no notice was given that a convention was to be held. It is in evidence that a daily newspaper in Helena published as news items the

proceedings and intentions of this club, but these were simply narrations by a newspaper reporter, and published as news. To pretend that such news items were notices of a convention seems to us to reach the point of absurdity. It is claimed that a banner was strung across the street, which gave notice; but the banner was an ordinary political one, giving the name of the club, and stating that it met every Wednesday evening. It is a very violent stretch of imagination to pretend to call this a notice of a convention. To construe the proceedings of this club as a convention is contrary to all ideas of political conventions among the American people. The Silver Republican party, it was stated in the evidence, was a wing of the Republican party. If it were a wing, it naturally inherited the political practices of the Republican party. No one pretends that the Republican party had any such usages or customs, or ever held conventions in any such manner as this. Upon this question the evidence of the presiding officer of the club, Mr. Reece, is interesting. It was he who signed as chairman the certificate of nomination. After his signature appear these words: "Chairman and Presiding Officer of Said Convention or Organized Assemblage of Electors of the Silver Republican Party. Business: Land attorney. Business address: Helena, Montana." This signature was shown to the witness, and he testified that he did not know what he signed; that Mr. Kinsley asked him to sign it; that he did so hurriedly, as he was leaving his office. This question was asked:

Had you any idea that evening, during the whole process of the meeting, that it was anything else than a meeting of the Silver Republican Club?

A. My understanding was that it was a meeting of the Silver Republican Club.

When did you first know that it was called a convention?

A. After the certificate was filed.

He stated further that he did not believe he was presiding over a convention, and that he did not know that any was called. In reply to a question by one of the justices, he said: "I did understand it was a certificate; that these persons were the nominees of the Silver Republicans; but I did not understand that I presided over a Silver Republican convention."

This testimony, let it be remembered, was that of the presiding officer of the club and the officer who signed the certificate of nomination filed with the county clerk. And we are asked to call this sort of a proceeding a party county convention. We decline to do so. No matter with what force some of the members of the club assert that the club and the party were the same thing, still, when we reach the real substance of the whole proceeding, it seems to us wholly absurd to contend that this proceeding was a convention. Furthermore, it appears that the Silver Republican Club has some 400 members. These proceedings were participated in by 80 to 50 members. It is claimed that this was the action of a political party. We have evidence before us of what the Silver Republican party is claimed to be, and what are a so-called Silver Republican's political principles. These

principles are stated by witnesses to be simply that a Silver Republican is one who has been a Republican, and who indorses the whole of the national Republican platform of 1896, except the financial plank; and as to the financial question his position is the advocacy of the free and unlimited coinage of silver at the ratio of 16 to 1 by the United States, independent of any other nation. Such is the evidence before us, and such, for the purposes of this case, must be considered the fact. We do not pretend to deny the right of a political party in convention assembled to nominate a ticket composed of members of its own party, and also those of other parties, but we think the natural presumption from history is that, as a rule, political conventions nominate candidates from the ranks of their own party. But the alleged convention in this case nominated a ticket composed of Republicans, Silver Republicans, Democrats, and Populists. A very large majority of this ticket—that is to say, a majority of 16 to 8—was of men other than Silver Republicans, and of men already in nomination upon the Republican, Democratic, and Populist county tickets. We are of opinion, therefore, that this is additional evidence tending to show that the assembly which nominated the persons in question was not a convention of the Silver Republican party. Let it be remembered that we do not question the right of a convention to make such nominations if they please; but when the question in controversy is whether or not an assemblage was a convention, the fact that it has done that which is wholly contrary to the history of political conventions is some evidence against the claim of the assemblage to be a convention; for when it nominates a vast majority of its candidates from among the ranks of its enemies it is doing that which is at least extraordinary as convention action.

The respondent's counsel earnestly argue that any number of men, however small, may organize a political party. This will not be denied at this time or place. But that is not the question for consideration.

The question here is whether or not a political party held a convention. We have stated above our reasons for holding that the evidence shows that this was not a convention under the statute or under the usages or customs of

political parties. It must be remembered that this is an action in equity, and that this court is sitting as an equity court. It is our duty to arrive at the real substance of things. These cases must each stand upon their own facts,—a doctrine to which we gave particular emphasis in *Stackpole v. Hallahan*, 16 Mont. 40, 28 L. R. A. 503. Regarding the real facts of this case as they have been presented to us by the pleadings and by the evidence, we cannot, in any equity or good conscience, concede that the assemblage which nominated these persons was in any sense a county convention of the Silver Republican party. It seems to have been sought by the respondent to show by the evidence which the counsel introduced that the alleged convention under consideration was a parallel to the state convention, which convention, representing all the electors of the state, deliberately and formally divided itself into two conventions which two conventions each then proceeded to nominate presidential electors and congressmen. The facts in regard to the state convention were introduced in evidence. But without discussing them at any length at this time we will leave them with the remark that the facts in regard to the state convention are very widely distinguished from the proceedings of the assemblage, which nominated these persons under consideration. The judgment in equity cases is not controlled by the prayer for relief. *Davis v. Davis*, 9 Mont. 268; *Kleinschmidt v. Steele*, 15 Mont. 1-8. We are of opinion that the facts shown entitle the plaintiff to an injunction restraining the county clerk and recorder from placing upon the official ballot as candidates of the Silver Republican party all those persons named in the pretended certificate of nomination signed by F. L. Reese, as chairman and W. J. McHaffie, as secretary; and also such persons as pretended to be nominated by petition of electors and by certificate of the Silver Republican party central committee,—that is to say, all those persons who were named in said three certificates, copies of which are annexed to relator's complaint as exhibits.

Let the writ of injunction therefore be made perpetual to the foregoing effect.

Pemberton, Ch. J., and Hunt, J., concur.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Resp't.*,
v.

Hans C. NELSON, *App't.*

(.....Minn.....)

*1. **Certain provisions of an ordinance of the city of Minneapolis** to license and regulate the sale of milk in the city, considered.

*Headnotes by MITCHELL, J.

NOTE.—The question in the above case as to the validity of an ordinance requiring a tuberculin test of milk is one on which there seems to be no precedent.

For an ordinance as to the inspection of milk, see 34 L. R. A.

and held to be authorized by Gen. Laws 1896, chap. 208, entitled "An Act Relating to the Inspection of Milk and of Dairies and Dairy Herds, and to Provide for the Licensing and Regulation of the Sale of Milk in Cities."

2. **It is competent for a city council by ordinance to require** that an applicant for a license to sell milk within the city shall consent that the dairy herd from which he obtained his milk may be inspected by the commissioner of

State v. Dupaquier (La.) 26 L. R. A. 162; and as to such an ordinance providing also for the destruction of milk which does not answer the test, see Deems v. Baltimore (Md.) 26 L. R. A. 541.

health of the city, although such dairy herd is kept outside the city limits.

3. The requirement that he shall consent, as a condition precedent to obtaining such license, that the animals from which he obtains the milk shall be subjected to the "tuberculin test" is not unreasonable.

4. Whether a license from a city under an ordinance passed pursuant to Laws 1896, chap. 203, is, as to the sale of milk in such city, a substitute for the license from the state dairy commissioner provided for in Laws 1889, chap. 247, or whether it is merely supplemental and additional, is not decided. In either view the ordinance is authorized by the act of 1895.

(November 6, 1896.)

APPEAL by defendant from an order of the Municipal Court of Minneapolis denying a motion for a new trial after a conviction for violating a city ordinance. *Affirmed.*

The facts are stated in the opinion.

Mr. F. F. Davis for appellant.

Messrs. David F. Simpson and M. D. Purdy, for respondent:

The ordinance under which appellant was convicted is not extraterritorial in its operation.

The various states of the Union are authorized by their respective constitutions to enact certain laws which shall be operative within their respective boundaries, but no state has the authority to enact a law which shall be extraterritorial in its operation. In this respect a state is endowed by its Constitution with no greater authority or power than is conferred upon a municipal corporation by its charter.

17 Am. & Eng. Enc. Law, p. 254.

Municipal by-laws which do not assume to operate upon the person or property of people residing outside of the municipality, but which merely seek to impose conditions upon such nonresidents who desire to carry on their business within the municipality, should be upheld by the courts.

People's Mut. Ben. Soc. v. Lester (Mich.) 2 Det. L. N. 244; *Ross v. Kimberly & C. Co.* 89 Wis. 545, 27 L. R. A. 556.

The ordinance in question is not oppressive or unreasonable in its operation and therefore void.

State v. Kantler, 83 Minn. 69; *Wykoff v. Healey*, 57 Minn. 14.

The ordinance is not repugnant to the general laws of the state, and therefore *ipso facto* void.

State v. Oleson, 26 Minn. 507; *State v. Ludwig*, 21 Minn. 202; *State v. Lee*, 29 Minn. 445; *State v. Harris*, 50 Minn. 128; *Foster v. Board of Police Commrs.* 102 Cal. 484.

Mitchell, J., delivered the opinion of the court:

Laws 1887, chap. 140, as amended by Laws 1889, chap. 247, entitled an "Act to Prevent Deception in the Sale of Dairy Products, and to Preserve the Public Health, etc.," prohibited, among other things, the keeping of cows for the production of milk for the market in a crowded or unhealthy condition; the sale of impure or unwholesome milk; and provided for the appointment of a dairy commissioner and assistant commissioner, experts and chem-

ists, who should have access to all places used in the manufacture and sale of dairy products. Sections 13 and 14 of the amendatory act (Gen. Stat. 1894, §§ 7004, 7005) provided in substance that everyone who sold or offered for sale milk in any city or town of 8,000 inhabitants or more should obtain a license from the dairy commissioners.

The legislature subsequently enacted Gen. Laws 1895, chap. 203, providing that the city council of any city may by ordinance provide for the inspection of milk and of dairy herds kept for the production of milk within its limits, and issue licenses for the sale of milk within its limits; and regulate the same; and may authorize and empower the board of health to enforce all laws and ordinances relating to the production and sale of milk, for sale or consumption, within such city, and to appoint such inspectors, etc., as are necessary for the proper enforcement of such laws and ordinances, and such inspectors, etc., shall be possessed of such necessary powers within the limits of such city as shall be prescribed by ordinance, but no such ordinance shall conflict with any law of this state. The act further provided that nothing therein contained should affect or interfere with any of the powers and duties conferred on the state dairy commissioners by any law of this state.

In March, 1896, the city council of Minneapolis passed an ordinance to provide for the inspection of milk dairies and dairy herds, and to regulate the sale of milk in the city of Minneapolis. This ordinance is set out in full in appellant's brief as Exhibit C. Its provisions, as far as now material, may be summarized as follows:

Any person desiring a license to sell milk in the city is required to file with the commissioner of health of the city an application thereof, stating, among other things, the location or place from which the applicant obtains the milk, and, if he is not a producer of milk, then the name of the person from whom he obtains his milk, and also requesting the city to inspect his dairy and dairy herd, or the dairy or dairy herd of the person from whom he obtains his milk, for the purpose of carrying out the provisions of the ordinance—a refusal of the applicant to request such inspection to result in his failure to obtain a license.

Upon the filing of such application the commissioner of health is to inspect the dairy and dairy herd of the applicant, or those of the person from whom he obtains his milk, and to cause an examination by the veterinarian of the department of health to be made of every animal producing milk for sale within the city, belonging to the applicant or the person from whom he obtains his milk, "and for the purpose of detecting tuberculosis or other contagious or infectious disease, the veterinarian is authorized in making such inspection to use what is known as the tuberculin test as a diagnostic agency for the detection of tuberculosis in such animal." The ordinance further provides for the tagging of such animal thus examined and inspected so as to afford a permanent record of the result as regards the presence or absence of an infectious or contagious disease; that when the applicant, or the person from whom he obtains his milk, shall have removed

from his dairy herd all cows and animals which may be found to be affected with any contagious disease so that they are no longer used for the production of milk, for sale or consumption within the city, then the commissioner of health shall make a report to the city council concerning such applicant and the condition of the dairy and dairy herd from which he obtains his milk. After these reports are submitted, the city council is, after proper examination, to determine what applicants are entitled to a license to sell milk in the city. It then becomes the duty of the commissioner of health to issue licenses to those determined by the city council to be entitled thereto. The ordinance also provides that no person shall sell, deal in, or dispose of any milk within the city without first having obtained a license so to do in the manner above provided, and imposes a penalty for the violation of any of the provisions of the ordinance.

The defendant having been convicted of selling milk in the city without first having obtained a license as provided in the ordinance, appealed to this court.

1. The first and second objections urged against this ordinance are virtually one, and may be considered together. The objection is that the provisions of the ordinance are not within the limits prescribed for it by the statute for the reason that it is attempted to make its operation extraterritorial in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point. The manifest purpose of the statute under which this ordinance was passed was to enable the city council to adopt such reasonable police regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge as well as of proof in this case that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine whether it does or does not contain the germs of any contagious or infectious disease it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits provided for by this ordinance applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on the part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection the result merely is that he or the one to whom

he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city.

2. The objection is urged that the ordinance is oppressive and unreasonable in that it requires every dairy herd whose milk is desired to be sold within the city to be subject to the "tuberculin test" which it is claimed is uncertain in its results and deleterious to the health of animals. At the present stage of scientific research on this subject it may be a debatable question whether this test has been fully proved or how far it is as yet merely experimental. There is ample evidence in this case that it is now the generally accepted theory that the presence of consumption or tuberculosis in animals can be detected by this test, also that this is what is called a "germ disease" which may be contracted by eating the flesh or drinking the milk of a tuberculosis animal. Upon the evidence we could not say that this provision of the ordinance is oppressive or that it has not a reasonable tendency to prevent the sale of unwholesome milk within the city. There are some other objections urged against the reasonableness of the ordinance, but none of them are of sufficient merit to require special notice.

3. It is further urged that the ordinance is repugnant to Gen. Laws 1887, chap. 140, as amended by Laws 1889, chap. 247. The point of this objection is that the act referred to entrusts to the state dairy commissioner the matter of inspecting dairies and dairy herds and issuing licenses to sell milk in cities or towns of 2,000 inhabitants, while under the ordinance in question these powers, so far as they relate to dairies and dairy herds whose milk it is proposed to be sold in the city, are assumed to be exercised by the city council, whereas the act of 1895 provides that no ordinance shall conflict with any law of the state, and that nothing in that act shall affect or interfere with any of the powers and duties conferred on the state dairy commissioner by any law of the state.

It must be presumed that the legislature intended to do something when it enacted the law of 1895. But if counsel's contention is correct then the legislature in the first part of that act conferred certain powers upon the cities and then in the latter part of the same act took these powers all back.

It is clear that the legislature intended to confer on city councils the very powers which have been exercised by the enactment of this ordinance. Whether when a city has exercised these powers it is, as to the sale of milk in such city, a substitute for the license from the dairy commissioner provided for in the act of 1887 as amended in 1889 or whether it is merely supplemental and additional, is a question not involved in this case; for in either view the provisions of the ordinance under consideration are authorized by the act of 1895.

Order affirmed.

NEBRASKA SUPREME COURT.

City of HASTINGS, *Pff. in Err.*,

Jefferson H. FOXWORTHY.

(45 Neb. 676.)

*1. The provision of § 34, art. 3, chap. 14, Comp. Stat., that, in order to maintain an action against a city of the second class having more than 5,000 inhabitants, for injury or damage to person or property, the party complaining must file a statement in the office of the city clerk within six months from the date of the injury, giving the circumstances of such injury, and other information, is a reasonable exercise of legislative power, and the filing of such a statement is a condition precedent to maintaining an action for such injury, and

*Headnotes by IRVING, C.

compliance therewith must be alleged and proved.

2. An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal; but, where the case was, on the first appeal, remanded generally for a new trial, and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal, and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect.

3. *Hiatt v. Brooks*, 17 Neb. 83, modified.

4. Where a statute requires a certain thing to be done within a time specified as a condition precedent to maintaining an action, the disability of the plaintiff during a portion of the period allowed will not extend the

NOTE.—Conclusiveness of prior decisions on subsequent appeals.

- a. Generally.
- b. Where the prior decision is erroneous.
- c. As applied to matters after remanding a case.
- d. As to evidence.
- e. As to party.
- f. As to matters necessarily involved.
- g. As to matters of estoppel.
- h. As to matters of jurisdiction.
- i. As to defective appeals.
- j. As to cross-appeals.
- k. Where prior decision is not final.
- l. As to matters of pleading.
- m. As to injunctions and interlocutory orders.
- n. As to questions which might have been made on prior appeal.
- o. As to excessive verdicts.
- p. Change of court.
- q. As to effect of dicta.
- r. Where the questions are different.
- s. As to ambiguous decisions.
- t. As to limited decisions.
- u. As to decisions by a divided court.
- v. Statute and Constitution changing the rule.
- w. Rule in intermediate courts.

The case of *HASTINGS V. FOXWORTHY* holds that a decision upon a prior appeal is not conclusive upon a subsequent appeal where the prior decision reversed a judgment of the district court sustaining a demurrer to an answer, and by implication held that the action was brought within the proper time, where subsequently the same court held in another case, under a similar charter, that such an action was barred by limitation, and that so much of the opinion in the *FOXWORTHY* CASE as held that the action was not barred was a *dictum*. The court reviews all the former decisions of Nebraska which appear to state that the law of the case is conclusive, and holds that the fact that the prior decision has been overruled in another case makes the question a new one. The rule that a prior decision is not conclusive, if erroneous, is now adopted in Nebraska. The court further holds that when the case was remanded generally for a new trial, the prior decision, if erroneous, is not conclusive on the second trial.

a. Generally.

It is so generally accepted that the prior decision is conclusive on the same question on a subsequent appeal that a great many cases adopt this rule without any discussion, and it may be said to be the law of the case in a great many of the states.

34 L. R. A.

This is termed the "law of the case," and is more binding than the rule of *stare decisis*. The application of this principle is more apparent where the prior decision is admitted to be erroneous and yet followed. But on this proposition there are some exceptions and quite a number of *dicta* to the contrary, and it may now be said that the binding force of the prior decision, if erroneous, is not conclusive, not only in Nebraska, but also in Texas, Utah, and Missouri. Some decisions in Connecticut, New York, and Ohio indicate that such states would make exceptions in a proper case. See subd. b, "Where the prior decision is erroneous."

So, the decision upon a prior appeal was conclusive upon the second appeal, where the question presented was the same. *Bryan v. Weems*, 25 Ala. 186; *Stien v. Ashby*, 30 Ala. 363; *Goodman v. Walker*, Id. 482, 68 Am. Dec. 134; *Huffman v. State*, 30 Ala. 532; *Pearson v. Darrington*, 32 Ala. 227; *Pickens v. Oliver*, Id. 623; *Thomason v. Dill*, 34 Ala. 177; *Bryant v. Boothe*, 35 Ala. 229; *Ritter v. Stevenson*, 11 Cal. 27; *Crowell v. Gilmore*, 17 Cal. 194; *Phelan v. San Francisco*, 20 Cal. 40; *Jaffe v. Skae*, 48 Cal. 540; *Donner v. Palmer*, 51 Cal. 623; *Yates v. Smith*, 40 Cal. 662; *Hobbs v. Duff*, 43 Cal. 485; *Lick v. Diaz*, 44 Cal. 479; *Dilla v. Bohall*, 62 Cal. 610; *Paulson v. Numan*, 64 Cal. 290; *Johnston v. San Francisco Sav. Union*, 75 Cal. 124; *Re Cook's Estate*, 83 Cal. 415; *Brusie v. Gates*, 96 Cal. 263; *Emerie v. Alvarado*, 90 Cal. 444; *People, Bryant v. Holladay*, 93 Cal. 241; *Kahn v. San Francisco City & County Supers.* (Cal.) 25 Pac. 403; *Gould v. Adams*, 108 Cal. 365; *Routt v. Greenwood Cemetery Land Co.* 18 Colo. 122; *Arnold v. Woodward* (Colo.) 44 Pac. 507; *Kanasa P. R. Co. v. Bayles*, 19 Colo. 343; *Wilson v. Fridenburg*, 19 Fla. 461; *Doyle v. Wade*, 23 Fla. 94; *Lewis v. Hill*, 87 Ga. 466; *Shelton v. Ellis*, 73 Ga. 138; *Dean v. Feely*, 89 Ga. 804, 66 Ga. 273; *Savannah Bank & T. Co. v. Hartridge*, 75 Ga. 149; *Young v. Harrison*, 21 Ga. 584; *Palmer v. Utah & N. R. Co.* 2 Idaho 350; *McFarland v. Washburn*, 28 Ill. App. 355; *Houston v. Boltz*, 33 Ill. App. 449; *Allemania F. Ins. Co. v. Peck*, Id. 548; *Chicago Drop Forge & F. Co. v. Van Dam*, 50 Ill. App. 470; *Peoria & P. U. R. Co. v. United States Rolling Stock Co.* 36 Ill. App. 552; *Whitney v. Bohlen*, 56 Ill. App. 237; *Chicago & N. W. R. Co. v. Cicero*, 157 Ill. 89; *Kising v. Carr*, 79 Ill. 596; *Diversey v. Johnson*, 93 Ill. 547; *Clayes v. White*, 83 Ill. 540; *Keiser v. Cox*, 16 Ill. App. 631; *Flower v. Brumbach*, 30 Ill. App. 294; *Chicago & A. R. Co. v. Stites*, 28 Ill. App. 430; *Desplaines v. Poyer*, 22 Ill. App. 574, Affirmed in 123 Ill. 343; *Gardiner v. Bunn*, 24 Ill. App. 627; *Taylor v. Frew*, 113 Ill. 359; *Chicago & A. R. Co. v. People*, 72 Ill. 82; *Mo-*

time of performance, provided a reasonable time remain within the period, after the disability is removed.

(June 22, 1885.)

ERROR to the District Court for Kearney County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries caused by falling upon a sidewalk which was alleged to have become defective through defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. A. H. Bowen and Tibbets, Morey, & Ferris, for plaintiff in error, in opposition to petition for rehearing:

The decision on the question as to the rule of *res judicata* or law of the case may be divided into two classes. One class holds that all points become *res judicata* which are before the court for decision, no matter whether or

not they are expressly considered and decided. The other class holds that only those questions become *res judicata* which are expressly raised and distinctly considered and decided.

Reason, justice, and good sense require that no points shall become *res judicata* unless they have been actually considered and adjudicated, and it is evident that this is the view entertained by this court in its consideration and application of this rule.

Hiatt v. Brooks, 17 Neb. 38; *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 742; *O'Donohue v. Hendrix*, 18 Neb. 257; *Meyer v. Shamp*, 26 Neb. 729.

The following authorities are clear and strong in support of this view.

Gwin v. Waggoner, 116 Mo. 148; *Portland Trust Co. v. Coulter*, 38 Or. 181; *Re Meeker's Estate v. Swift*, 45 Mo. App. 186; *Smith v. Bogenschultz*, 14 Ky. L. Rep. 307; *Chicago, S. F. & C. R. Co. v. Swan*, 120 Mo. 80.

Kinley v. Smith, 29 Ill. App. 106; *Whitesides v. Cook*, 43 Ill. App. 183; *Field v. Brokaw*, 40 Ill. App. 871; *Shimp v. Cedar Rapids Ins. Co.* 26 Ill. App. 254; *Continental L. Ins. Co. v. Houser*, 111 Ind. 266; *Star Wagon Co. v. Swesy*, 68 Iowa, 620; *McClure v. Rabben*, 138 Ind. 507; *Clay Dist. Twp. v. Buchanan Independent Dist.* 69 Iowa, 38; *Cleveland, C. C. & I. R. Co. v. Wynant*, 124 Ind. 681; *Anderson v. Kramer*, 98 Ind. 170; *Oldershaw v. Knoles*, 6 Ill. App. 325; *Gilbert v. Bakes*, 106 Ind. 558; *Jones v. Castor*, 98 Ind. 307; *Dodge v. Gaylord*, 53 Ind. 365; *Willson v. Binford*, 81 Ind. 588; *Legrand v. Baker*, 5 T. B. Mon. 214; *Covington & C. Elev. R. Bridge Co. v. Com.* 15 Ky. L. Rep. 740; *Norton v. Huntoon*, 48 Kan. 275; *Brown v. Crow*, *Hardin (Ky.)* 446; *Moss v. Rowland*, 3 Bush, 506; *Ford v. Gregory*, 10 B. Mon. 175; *Sims v. Reed*, 12 B. Mon. 51; *Paland v. Chicago, St. L. & N. O. R. Co.* 44 La. Ann. 1003; *Gillaspie v. Scott*, 32 La. Ann. 767; *H. B. Claflin Co. v. Davis*, 48 La. Ann. 1223; *Cumberland Coal & I. Co. v. Sherman*, 20 Md. 117; *Emory v. Owings*, 3 Md. 178; *Worthington v. Hiss (Md.)* 23 Atl. 196; *Wheeler v. Meyer*, 101 Mich. 465; *Green v. McDonald*, 13 Smedes & M. 445; *Smith v. Elder*, 14 Smedes & M. 100; *Overall v. Ellis*, 38 Mo. 209; *Rice v. McFarland*, 41 Mo. App. 489; *Leighton v. Stuart*, 19 Neb. 544; *O'Donohue v. Hendrix*, 17 Neb. 237; *Coburn v. Watson (Neb.)* 67 N. W. 171; *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 742; *Bell v. Lamprey*, 58 N. H. 124; *Hagerty v. Lee*, 60 N. J. Eq. 464; *McCracken v. Flanagan*, 141 N. Y. 174; *Saxton v. New York Elev. R. Co.* 139 N. Y. 320; *Re Callaghan's Estate*, 58 N. Y. S. R. 899; *Spears v. Willis*, 59 N. Y. S. R. 885; *Cassidy v. Atlantic Ave. R. Co.* 33 N. Y. Supp. 1126; *Meyers v. Stix*, 59 N. Y. S. R. 286; *Burns v. Yonkers*, 34 N. Y. Supp. 1135; *Malony v. Brady*, 45 N. Y. S. R. 864; *Metcalf v. Del Valle*, 30 N. Y. Supp. 984; *Taendstieksfabriks Aktiebolaget Vulcan v. Myers*, 19 N. Y. Supp. 1000; *Roosevelt Hospital v. New York Elev. R. Co.* 18 N. Y. Supp. 940; *Cassagne v. Marvin*, 51 N. Y. S. R. 466; *Mores v. Burnes*, 23 N. Y. Supp. 1144; *Holley v. Holley*, 95 N. C. 229; *Arnow v. Ferguson*, 50 N. Y. S. R. 509; *Crystal v. Troy & B. R. Co.* 51 N. Y. S. R. 938; *Lahay v. Kortright*, 32 N. Y. S. R. 112; *Ollwill v. Verdenhalven*, 39 N. Y. S. R. 200; *Salt Springs Nat. Bank v. Sloan*, 39 N. Y. S. R. 771; *Re Nelson's Will*, 21 N. Y. Supp. 1123; *Warden v. McKinnon*, 99 N. C. 251; *Budd v. Multnomah Street R. Co.* 15 Or. 404; *Strouse v. New York Elev. R. Co.* 18 N. Y. Supp. 938; *White v. Kyle*, 1 Serg. & R. 515; *Terry v. Wait*, 56 N. Y. 91; *Bryan v. Alexander*, 111 N. C. 142; *Kane v. Rippey*, 22 Or. 299; *Kibler v. Bridges*, 5 S. C. N. B. 335; *McCormick v. Wright*, 79 Va. 524; *Bank of the Valley v. Stribling*, 7 Leigh, 28; *Corbell v. Zeluff*, 13 Gratt. 236; *White v. Atkinson*, 2 Call (Va.) 576; *Benjamin v. Covert*, 55 Wis. 157; *Clark v. Keith*, 34 L. R. A.

106 U. S. 465, 27 L. ed. 302; *United States v. 422 Cases of Wine*, 26 U. S. 1 Pet. 547, 7 L. ed. 257; *Thatcher v. Gottlieb*, 59 Fed. Rep. 872, 19 U. S. App. 469.

So, the decision upon a prior appeal was conclusive upon the second appeal, where the state of facts was substantially the same. The prior decision so far as applicable is the law of the case. *D. M. Osborne & Co. v. Stringham*, 4 S. D. 593; *Gamble v. Gates*, 97 Mich. 465.

And where the court of appeals on a former decision held that there was no cause of action and there was no material change on a new trial. *Sanger v. Merritt*, 39 N. Y. S. R. 894.

And where the bill of exceptions presented no new question. *Pingry v. Watkins*, 17 Vt. 379.

And where the first decision held that plaintiff failed to make a case, and the second trial did not present any material difference. *Sherwood v. Houtman*, 34 N. Y. Supp. 1143.

And where the questions were the same, and such decision can only be reviewed by a petition for a rehearing. *Brooklyn v. Orthwein*, 140 Ill. 620; *Bell v. Woodward*, 47 N. H. 539; *Wears v. Deering*, 60 N. H. 55; *Plaisted v. Holmes*, 58 N. H. 619; *Windsor v. Cobb*, 74 Iowa, 709; *McDonald v. McKinnon*, 104 Mich. 428; *Damon v. DeBar*, 94 Mich. 564.

And where the same question was presented upon the second appeal. The power to grant a reargument should be sparingly exercised, and it was suggested that it should never be exercised unless the court on its own motion desired to have a reargument. *Cassedy v. Bigelow*, 27 N. J. Eq. 505.

And where the same question was presented upon the second appeal. The court said the prior decision would only be reviewed by motion for a rehearing, and such motion could not be made after a jury trial took place under the prior decision. *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332.

Where the same question was presented on second appeal in an intermediate court. If there was error the remedy was by motion for re-argument by appeal from the general term to the court of appeals. *Cooper v. Smith*, 11 Jones & S. 9.

In such a case if errors were committed they should be rectified by the higher court of last resort. *Stegman v. Hollingsworth*, 39 N. Y. Supp. 1132.

Where the same question was presented on second appeal a judgment which had been affirmed might be reviewed under Ky. Civ. Code, § 518, providing for vacating a judgment upon newly-discovered evidence, and for such errors as could not be noticed upon the prior appeal. *Maddox v. Williams*, 37 Ky. 147.

And where the decision reversed a judgment and

The question of the validity of that portion of § 34, etc., requiring statement to be filed within six months was not distinctly presented and decided on previous hearings of this case, and is not *res judicata*.

It is only necessary to refer to the petitions in error filed in the former cases, and to the syllabi and opinions of the same, to show the following facts:

1. The question under consideration was not raised in the petitions in error.

2. It was not presented to the court in the briefs of counsel.

3. It was nowhere considered by the court.

4. It was nowhere decided by the court.

It therefore follows that the question is not *res judicata*.

Smith v. Bogenschulte, supra.

Where a petition does not state facts sufficient to constitute a cause of action, the point cannot be waived. Such a petition will not

support a judgment, and its sufficiency can be called into question at any stage of the case, or at any time.

Burlington & M. R. R. Co. v. Kearney County, 17 Neb. 511; *Burlington & M. R. Co. v. Crockett*, Id. 572; *O'Donohue v. Hendrix*, 18 Neb. 255; *Renfrew v. Willis*, 33 Neb. 98; *Farrar v. Triplett*, 7 Neb. 237.

This court has held that it is no part of its duty to search the record for the purpose of ascertaining if there are errors in it, and that it will not consider and decide any questions excepting those presented in the petition in error and in the briefs for decision.

Minick v. Huff, 41 Neb. 516; *Glaess v. Parcel*, 40 Neb. 732.

Messrs. J. R. Webster, B. F. Smith, and J. L. McPheely, for defendant in error, in support of petition for rehearing:

A judgment, in the legal sense, can be nothing less nor more than a determination, by a

remanded a case, and the facts were the same. *Miller v. Jones*, 29 Ala. 174.

And where the court of appeals on the first decision reversed the case because no cause of action was proved which justified a recovery, and on the second trial the facts were the same. *Tripler v. New York*, 44 N. Y. S. R. 585.

And where the first decision reversed a decree, and directed that amended and supplemental bills seeking to charge purchasers of corporate property should be dismissed. *Goodwin v. McGehee*, 15 Ala. 232.

The decision upon a prior appeal is conclusive upon the second appeal where the same question is presented again, as the court will not examine *de novo* questions which have been once passed upon. Unless other facts appear the former decision is conclusive. *Beran v. Tradesman's Nat. Bank*, 45 N. Y. S. R. 407.

And so where the facts were the same it made no difference whether the case had been affirmed on a prior trial or reversed. *Davidson v. Dallas*, 15 Cal. 75.

And where the judgment of the lower court was affirmed as to part and reversed as to part. *Dilworth v. Curtis*, 189 Ill. 508.

And where the decision of a former court was that there was error in the judgment, and the same was reversed and set aside, and the same question was made to the court, at a subsequent term, to which the cause was continued for the court to render such a judgment as the county court ought to have rendered. *Slade v. Day*, *Brayton (Vt.)* 72.

And where there was no material change of the record rendering the principles and points decided on the first appeal inapplicable. *Malone v. Carroll*, 33 Ala. 191.

And where the questions were the same. It was said that it was not allowable for this court to question the correctness of its prior rulings. *Davis v. Curtis*, 70 Iowa, 388.

And where the same question was settled, and a judgment of restitution given upon the reversal of an erroneous judgment. This was conclusive of the matters adjudicated by it. *Breading v. Blocher*, 29 Pa. 247.

And where the first decision settled a question in issue and reversed the case on another question to be tried below. The first question was *res judicata*. *Hurck v. Erskine*, 50 Mo. 118.

And so where the same question was presented a second time. The appellee should have relied on the prior decision as *res judicata*. *Masterson v. Chicago, R. I. & P. R. Co.* 58 Mo. App. 572.

And where the same question was settled on the prior appeal, and such decision was correct, and for 34 L. R. A.

the further reason that it had become *res judicata*. *Marion v. State*, 20 Neb. 247, 57 Am. Rep. 325.

And where the same question was settled, and having become *stare decisis* was no longer open to discussion. *Flier v. Smith*, 102 Mich. 93.

And where the prior decision was by the supreme court on a question reserved by the superior court upon a statement of facts, and the same question was again presented on a writ of error. *Nichols v. Bridgeport*, 27 Conn. 459.

And where the same question was settled, but was not conclusive as to new issues presented. *Ulmer v. Ryan*, 187 Pa. 309; *Cherry v. Kansas City, Ft. S. & M. R. Co.* 61 Mo. App. 305; *Brown v. Somerville*, 8 Md. 444; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Bank of Old Dominion v. McVeigh*, 29 Gratt. 544; *Steele v. Thompson*, 38 Mo. App. 312.

And where the same question was settled. Only such errors will be examined as are alleged to have occurred in the decision of questions which were peculiar to the second trial. *Roberts v. Cooper*, 61 U. S. 20 How. 467, 15 L. ed. 909.

And where the matters were the same. It was said that what was stated by way of illustration or argument was not binding. *Richmond Street R. Co. v. Reed*, 38 Ind. 9.

And where the prior decision sustained an indictment, and the question presented on the second appeal was settled on the previous appeal. *Tucker v. People*, 123 Ill. 583.

And where the case was appealed four times and the complaint had been amended seven times, and the prior decision held that a contract in writing could not be varied by a previous parol agreement, and that the failure to pay instalments to a contractor did not prevent him from fulfilling his contract, and this question was again presented on appeal. *Cox v. McLaughlin*, 63 Cal. 196.

And where the same question as to the rule of damages applicable to the case on the second trial was discussed on the former appeal. *Blesch v. Chicago & N. W. R. Co.* 48 Wis. 168.

And where the same question was presented regarding the measure of damages for a breach of covenant to insure, whatever might be the rule in other jurisdictions. *National Mahalve Bank v. Hand*, 39 Hun, 322.

And where the action was for an injunction against diverting water, and the former decision held that the plaintiff was estopped by consent although it was insisted that the consent was not pleaded as a defense. *Churchill v. Baumann*, 104 Cal. 369.

And where the effect of that decision was not avoided by any showing that a declaratory statement in the pre-emption act was not filed within

competent court, of an issue of fact or of law between adversary parties over which it has jurisdiction, defining and establishing their rights.

The right to a retrial is itself the mere consequence, not the judgment. The judgment must have been, not that there was an error in the record, but some certain error giving the plaintiff in error or appellant the right to new trial, and such a judgment determines the rights of the parties and includes in it determination of every matter of fact or of law necessarily included in or necessary to reach the judgment that there was "error in the record," that the judgment was not what on the issue it should have been.

It follows necessarily that a judgment of reversal on a purely law issue does adjudge the law as that the pleadings are or are not sufficient to sustain the judgment below.

If the same subject-matter comes in question

in a second action before an appellate court, it is bound by its own former decision.

Black, Judgm. § 527.

Black does not limit it to cases between the same parties or their privies, though such limitation is necessary.

Herman, Estoppel & Res Adjudicata, p. 117, § 115.

No case is intended to be cited below which was not at the former hearing "reversed generally for a trial *de novo*," and citation where reversed, if the case was reported and is found, is made.

United States: *Roberts, v. Cooper*, 61 U. S. 20 How. 481, 15 L. ed. 973, error, ejectment, reversed; *Cooper v. Roberts*, 59 U. S. 18 How. 182, 15 L. ed. 341, for new trial generally, Grier, J.: "We cannot be compelled on a second writ of error in the same case to review our own decision on the first." *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed.

three months after the township plat was returned to the land office. *Megerle v. Ashe*, 47 Cal. 632.

And where the action was one of ejectment, and it was contended that since the beginning of the action the party's title had been strengthened. To recover in ejectment the plaintiff must not only have a right of entry at the trial but also when the suit is brought. *Kile v. Tubbs*, 33 Cal. 332.

And where in deciding who were necessary parties to an action for partition, the prior decision held that the holder of a special location acquired the title of a tenant in common and stood in the place of his grantor in respect to the special location. *Gates v. Salmon*, 46 Cal. 351.

And where the same question was presented. It was said that as to whether a composition deed would be binding upon the plaintiff if carried out, no question remains to be considered as that was passed upon by the court upon the previous decision. *Continental Nat. Bank v. Koehler*, 17 N. Y. S. R. 23.

And where the prior decision construed a deed of trust. *More v. Calkins*, 95 Cal. 435.

And where the prior decision construed a will, and held that the executors had no power to sell real estate. *Huse v. Den*, 85 Cal. 390.

And where the prior decision held that a will was sufficient to pass the title of the land to the executors. *Gaines v. Fender*, 82 Mo. 497.

And where the prior decision construed a will and the disposition of personal property, the charge of existing debts, the power of the executor, and the existence of a trust. *Bank of United States v. Beverly*, 42 U. S. 1 How. 184, 11 L. ed. 75.

And where the same question was presented, although a material fact appearing in the record was not recited among other facts which were stated in the opinion, as this did not tend to show that such fact was not considered by the court. *Mulford v. Estradillo*, 32 Cal. 131.

And so where the same question was presented a second time. Such decision cannot be departed from so far as the questions of law or fact are concerned which were therein presented for review or decision. *Palmer v. Murray*, 8 Mont. 174.

And where the same question was settled. "No question, once considered and decided by this court, can be re-examined at any subsequent stage of the same case." *Re Sanford Fork & T. Co.* 160 U. S. 247, 40 L. ed. 414.

And where the law of the case was settled and an affidavit was subsequently filed in the court below by a party claiming a contrary effect of such decision. *Pico v. Cuyas*, 48 Cal. 639.

And where it was claimed that the judgment dis-

rected to be entered failed to give the party what was justly his due. *Argenti v. Sawyer*, 32 Cal. 414.

And where the questions were the same. It was questioned whether or not the attempt to make a second appeal was not a contempt under Cal. Code Civ. Proc. § 1209, subsec. 4, which provided that abuse of process or proceedings of the court by a party to an action was a contempt of the authority of the court. *Heinlen v. Beams*, 78 Cal. 240.

And so where the same questions were settled as to the statute of limitations. It was said that the effort to obtain a different decision upon the same question was not respectful to the court, and a misconception of professional duty. *Cook v. Norton*, 61 Ill. 285.

And so where the questions were the same. It cannot be shown upon second appeal that the supreme court did not determine the case on its merits, when it appears from the record of its judgment that it was so determined. *Wabash, St. L. & P. R. Co. v. Peterson*, 115 Ill. 597.

And where the prior decision was by the supreme court, and the same question on the second appeal was before the court of appeals, an intermediate court. *Tittman v. Thornton*, 53 Mo. App. 512; *Blondeau v. Sheridan*, 47 Mo. App. 460; *Chicago, M. & St. P. R. Co. v. Snyder*, 27 Ill. App. 476, 128 Ill. 655.

And where such appeal was to the supreme court, and the prior appeal was to the court of appeals, which did not reverse the case upon the merits, and therefore must have held the evidence was sufficient to authorize a recovery, and the facts were the same in both cases. *Dye v. Delaware, L. & W. R. Co.* 59 N. Y. S. R. 583.

And where the prior decisions were successively made in an equity case to foreclose a mortgage. *Akerly v. Vilas*, 24 Wis. 165, 1 Am. Rep. 168.

And where the question was decided on an appeal from a verdict rendered on a feigned issue. *Brown v. Clifford*, 7 Lans. 44.

And where the facts were the same. It was said that it was so conclusive that the court would not feel warranted in departing from it in determining the rights of the parties. The law of the case was higher authority than the rule of stare decisis. *Lee v. Stahl*, 13 Colo. 174.

So where the same question was presented again. It was said that the rule established by the general term as to the discretion to be exercised by courts in determining such motions was carefully considered, and the rules then laid down were not merely dicta of the judge rendering the opinion, but utterances of the general term and rules to

727, 114 U. S. 309, 29 L. ed. 198; *Clark v. Keith*, 106 U. S. 465, 27 L. ed. 302, Reversed *Keith v. Clark*, 97 U. S. 466, 24 L. ed. 1075; *United States v. 422 Casks of Wine*, 26 U. S. 1 Pet. 549, 7 L. ed. 268, Reversed *The Sarah*, 21 U. S. 8 Wheat. 394, 5 L. ed. 644; *Wayne County Supers. v. Kenicott*, 94 U. S. 498, 24 L. ed. 260, Reversed *Kenicott v. Wayne County Supers.* 83 U. S. 16 Wall. 471, 21 L. ed. 322.

Alabama: *Matthews v. Sands*, 29 Ala. 136, Reversed *Sands v. Matthews*, 27 Ala. 399; *Miller v. Jones*, 29 Ala. 180, Reversed 28 Ala. 247; *Roundtree v. Turner*, 86 Ala. 555, Reversed *Turner v. Roundtree*, 80 Ala. 708.

Arkansas: *Fortenberry v. Frazier*, 5 Ark. 202, 39 Am. Dec. 378 (1848), Reversed *Frazier v. Fortenberry*, 4 Ark. 162; *Rector v. Danley*, 14 Ark. 307; *Biscoe v. Tucker*, 14 Ark. 523, Reversed 11 Ark. 145; *Porter v. Doe, Hanley*, 10 Ark. 191, Reversed *Doe, Phillips*, v. *Porter*, 3 Ark. 18, 62; *Müller v. Barkeloo*, 18

Ark. 293; *Taliaferro v. Barnett*, 47 Ark. 362, Reversed 37 Ark. 511.

California: *Dewey v. Gray*, 2 Cal. 377; *Phelan v. San Francisco*, 20 Cal. 39; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, Reversed 61 Cal. 205.

Colorado: *Kansas P. R. Co. v. Bayles*, 19 Colo. 350, Reversed *Bayles v. Kansas P. R. Co.* 13 Colo. 181, 5 L. R. A. 480, 2 Inters. Com. Rep. 643; *Routt v. Greenwood Cemetery Land Co.* 18 Colo. 132, Reversed *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 15 L. R. A. 369; *Israel v. Arthur*, 18 Colo. 159, Reversed *Arthur v. Israel*, 15 Colo. 147, 10 L. R. A. 693; *Israel v. Arthur*, 7 Colo. 5; *Lee v. Stahl*, 13 Colo. 174, Reversed 9 Colo. 208.

Connecticut: *Smith v. Lewis*, 26 Conn. 116, 24 Conn. 624, 63 Am. Dec. 180; *Nichols v. Bridgeport*, 27 Conn. 459, Reversed 23 Conn. 189, 60 Am. Dec. 636; *Fowler v. Bishop*, 32 Conn. 199, Reversed 31 Conn. 560; *New Ha-*

govern such motions. (This is a memorandum decision and the motion was not defined.) *Rutherford v. Madrid*, 30 N. Y. Supp. 1134.

A second appeal from a judgment by the same party was a nullity where a prior appeal was regularly taken and then pending. *Brown v. Plummer*, 70 Cal. 387.

In *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, it was said that a decision upon a prior appeal was conclusive upon the second appeal where the same question was settled.

b. Where the prior decision is erroneous.

The cases in some of the states hold that a prior decision is conclusive upon a subsequent appeal where such prior decision is erroneous, some hold that it is conclusive even if it is erroneous, and some hold that it is conclusive whether it is right or wrong. This may be said to be the weight of authority, and these decisions are found in Alabama, Arkansas, California, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Montana, New York, Oregon, Pennsylvania, Vermont, Virginia, Washington, Wisconsin, and the Federal courts. Some states have adopted the same rule, but have cases holding that an erroneous decision is not conclusive, as Missouri, Nebraska, Utah, and Texas, and in addition to the above, Connecticut, New York, and Ohio hold that it is conclusive unless it is wrong, as in *HASTINGS V. FOXWORTHY*.

So, the decision of a court upon a prior appeal was conclusive on a second appeal where such prior decision was erroneous because the record was incomplete. Nothing will be re-examined except proceedings subsequent to the mandate. *Fortenberry v. Frazier*, 5 Ark. 202.

In *Rutherford v. Lafferty*, 7 Ark. 402, the prior decision, which was erroneous, was held not to be conclusive, where the court on the prior appeal overlooked the true state of the record, and consequently arrived at an improper conclusion, and confounded the names of John and James in a receipt and were induced to decide against the law of the case; but this case was overruled in *Porter v. Doe, Hanley*, *infra*.

The decision on a former appeal was held conclusive on a second appeal where the question was made that the prior decision was erroneous. *Porter v. Doe, Hanley*, 10 Ark. 184.

The decision upon a prior appeal was conclusive upon a second appeal where the same question was presented, although the rule established on a prior appeal was erroneous. *Hombs v. Corbin*, 34 Mo. App. 308; *Feurt v. Ambrose*, Id. 380; *McLendon v. McGlaun*, 60 Ga. 244; *Haynes v. Meeks*, 20 Cal. 288.

And where the rule laid down was one of doubt- 34 L. R. A.

ful propriety, but had been settled by a long series of years. *Yale v. Dederer*, 68 N. Y. 335.

And where the court said: "We regret that this question is not open in the present case." *Parker v. Pomeroy*, 2 Wis. 112.

And where the court said: "We are bound by the decision then made, however much we may be inclined to a different view." *Willis v. Smith*, 72 Tex. 565.

And where the same question was involved. This was so even though the court was satisfied that its former decision was erroneous. *Alexandria Sav. Inst. v. McVeigh*, 84 Va. 41.

And where the court said: "We do not, and cannot, fully indorse the doctrine declared in the above quotation (instructions given) from our former opinion." *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 110 Ind. 226.

And where the court said: "In disposing of this case we are not to be understood as approving of the correctness of the former holding." *Burlington, C. R. & N. R. Co. v. Dey*, 39 Iowa, 13.

And where the members of the court on the second appeal did not concur in the former decision. *Dougherty v. Horseheads*, 39 N. Y. Supp. 447.

And where the court was of the opinion that if the case was new the court would overrule it. *Dewey v. Gray*, 2 Cal. 377.

And where the court said: "The latter portion of that decision is in abrogation of one of the plainest principles of law, and if this case was a new one I would not hesitate to overrule it." *Davidson v. Dallas*, 15 Cal. 75.

And where the writer of the last opinion believed the former decision to be erroneous. *Missouri P. R. Co. v. Walker* (Tex. Civ. App.) 23 S. W. 856; *Brewer v. Ford*, 59 Hun, 17; *Loomis v. Cowen*, 106 Ill. 600; *Drake v. Chicago, R. I. & P. R. Co.* 70 Iowa, 59.

And where the prior decision was by the court of appeals, although the superior court at general term on the second appeal disapproved of that decision. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 4 Misc. 428.

And where the court said: "However much I might be inclined to differ from the opinion of this court which has been referred to . . . nevertheless that opinion is and must be the law of this case until it is reversed by a higher tribunal." *Creighton v. Hershfield*, 2 Mont. 160.

And where the judge who delivered the last opinion doubted the rule of law on the prior decision. *Thomas v. Doub*, 1 Md. 252.

And where the court said they were not exactly satisfied with the reasoning of the judge in that case. *Venard v. Green*, 4 Utah, 456.

ven & N. Co. v. State, 44 Conn. 391; *State v. New Haven & N. Co.* 43 Conn. 351.

Florida: *Wilson v. Fridenberg*, 21 Fla. 339, 19 Fla. 461; *Fridenburg v. Wilson*, 20 Fla. 359; *Doyle v. Wade*, 23 Fla. 94, Reversed *Wade v. Doyle*, 17 Fla. 522.

Georgia: *Central R. Co. v. Coggin*, 73 Ga. 695, Reversed *Coggin v. Central R. Co.* 62 Ga. 685, 35 Am. Rep. 132; *Dean v. Feely*, 69 Ga. 804, 66 Ga. 273, Reversed *O'Byrne v. Feely*, 61 Ga. 85; *Shelton v. Ellis*, 73 Ga. 188, 70 Ga. 800; *Saulsbury v. Iverson*, 78 Ga. 783, Reversed *Iverson v. Saulsbury*, 68 Ga. 790; *Savannah Bank & T. Co. v. Hartbridge*, 75 Ga. 151, Reversed 73 Ga. 223; *Lewis v. Hill*, 87 Ga. 466, 80 Ga. 402; *Phillips v. O'Neal*, 87 Ga. 731, as *O'Neal v. Phillips*, 83 Ga. 556, and *Phillips v. O'Neal*, 85 Ga. 142.

Idaho: *Palmer v. Utah N. R. Co.* 2 Idaho, 350, Reversed *Id.* 290.

Illinois: *Green v. Springfield*, 130 Ill. 520, Re-

versed *Springfield v. Green*, 120 Ill. 269; *Reed v. West*, 70 Ill. 479, Reversed *West v. Reed*, 55 Ill. 242; *Smyth v. Neff*, 123 Ill. 310, Reversed *Neff v. Smyth*, 111 Ill. 100; *Taylor v. Frew*, 113 Ill. 359, Reversed *Frew v. Taylor*, 106 Ill. 159; *Johnson v. Von Kettler*, 84 Ill. 317, Reversed *Von Kettler v. Johnson*, 57 Ill. 109, *Johnson v. Von Kettler*, 66 Ill. 63; *Tucker v. People*, 122 Ill. 595, Reversed 117 Ill. 88.

Indiana: *Hobson v. Doe*, 4 Blackf. 489 (1838), Reversed 2 Blackf. 303; *Armstrong v. Harshman*, 93 Ind. 217; *Harshman v. Armstrong*, 43 Ind. 126, Reversed *Armstrong v. Harshman*, 61 Ind. 52, 28 Am. Rep. 665; *Continental L. Ins. Co. v. Houser*, 111 Ind. 368, 89 Ind. 258; *Pittsburgh, O. & St. L. R. Co. v. Hixon*, 110 Ind. 226, Reversed 79 Ind. 111; *Tipton County Comrs. v. Indianapolis, P. & O. R. Co.* 89 Ind. 101, Reversed *Indianapolis, P. & O. R. Co. v. Tipton County Comrs.* 70 Ind. 385; *Forgeron v. Smith*, 104 Ind. 247,

And where the court said: "I am not prepared to commit myself to the correctness of this doctrine, as applied to the facts of this case." *Johnson v. Northwestern Teleph. Exch. Co.* 54 Minn. 37.

And where it was expressly adjudged on the prior appeal that equity had jurisdiction over the matters in controversy, and that the bill was a creditor's bill, and on the second appeal the court said: "If it were an open question we should not perhaps feel inclined to pronounce the bill as filed a creditor's bill. . . . It is sufficient for this cause, however, that it was so held when the case was in this court on the former appeal." *Williams v. Newman (Va.)* 26 S. E. 19.

And where the supreme court on the second appeal unanimously disapproved of the decision on the first appeal, and the first decision had since been overruled, *Saulsbury v. Iverson*, 73 Ga. 785.

And where the court said: "We do not hold it to be the law of other cases." *Newberry v. Trowbridge*, 13 Mich. 278.

And where it was insisted that the Supreme Court of the United States since the first decision had held differently from a ruling made on one of the points. *Conroy v. Vulcan Iron Works*, 75 Mo. 661.

And where, since the prior decision, the supreme court in another case involving similar facts had decided differently. Although the decisions of the supreme court were binding upon the appellate court as authority, the prior decision was held to be *res judicata*. *Ogle v. Turpin*, 8 Ill. App. 453.

And where, since the prior decision, the supreme court has held in other cases a contrary doctrine, but the prior decision was the law of the case between the parties in that action. *Tipton County Comrs. v. Indianapolis, P. & C. R. Co.* 89 Ind. 101; *Phoenix Ins. Co. v. Pickel*, 3 Ind. App. 332; *Brown v. Marion Nat. Bank*, 18 Ky. L. Rep. 138; *Thomson's Appeal v. Albert*, 15 Md. 333.

And where the former appeal affirmed the judgment, although the decision of the prior appeal was erroneous. If the judgment had been reversed on the prior appeal, the rulings on the prior appeal might be examined if presented in the proper shape. *State, Hay, v. Harper*, 56 Mo. App. 611.

The court of appeals on an appeal refused to notice that a decree which was used in evidence in the trial court had been reversed since the decree, although it was held to be a bar in the case below. The court of appeals could only decide the case as presented by the record. *Cates v. Loftus*, 4 T. B. Mon. 443.

The decision upon a prior appeal was conclusive upon the second appeal, where on the second trial a motion was made to correct the computation of

the amount found due by the supreme court. *Lombard v. Gregory*, 33 Iowa, 431.

Some cases hold that the prior decision is conclusive even if erroneous.

So, the decision upon a prior appeal was conclusive on the second appeal where the same question was involved, even if it was clear that the prior decision was a mistake. *Stuart v. Preston*, 39 Va. 325.

And where the same questions were settled, even if the decision was erroneous. The only mode of reviewing the same is by a petition for a rehearing. *Ward v. Johnson*, 5 Ill. App. 30; *McCormick Harvesting Mach. Co. v. Gray*, 114 Ind. 340; *Morgan County Comrs. v. Pritchett*, 35 Ind. 68; *Heffner v. Brownell*, 75 Iowa, 341; *Davenport v. Kleinschmidt*, 8 Mont. 487; *Taliaferro v. Barnett*, 47 Ark. 332; *Hough v. Harvey*, 84 Ill. 303; *Johnson v. Von Kettler*, Id. 315; *Gunter v. Laffan*, 7 Cal. 538; *Vogel v. Little Rock*, 55 Ark. 603.

And where the same question was settled, it was said that even though the prior decision may have been overruled there is no ground for altering the decision in any case where the decision was made before it was overruled. *Herrick v. Belknap's Estate*, 27 Vt. 609; *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 473.

The decision upon a prior appeal was conclusive upon the second appeal where the prior decision directed a decree to be entered. Although the appellate court might have erred in its decree, it had no power to correct the error after the term had expired in which the decision was rendered. *Bradford v. Patterson*, 1 A. K. Marsh. 347.

And where the same question was presented, however erroneous it might be; but as to new parties in a different controversy it was not conclusive. *Frazier v. Frazier*, 77 Va. 733.

And where the first decision reversed a decree, and the former appellee prosecuted a writ of error to reverse the same decree. It was conclusive if the prior decision was ever so erroneous. *Rice v. Wheatly*, 9 Dana, 271.

And where the questions presented were the same. The court had no power to review its former judgment except upon the petition for a rehearing, and if the court misapprehended the facts in the former record, it was too late to urge the same. *Reed v. West*, 70 Ill. 479.

And where it was contended that on the second appeal the court had misapprehended the facts upon the prior appeal. *Simplot v. Dubuque*, 56 Iowa, 639.

And where the court said that no court can reverse or annul its own final decree or judgment for errors of fact or law after the term, unless for

Reversed *Smith v. Ferguson*, 90 Ind. 229; *Kress v. State, Wagoner*, 65 Ind. 106, Reversed *Larr v. State, Wagoner*, 45 Ind. 884; *Gerber v. Friday*, 87 Ind. 866, Reversed *Gerber v. Sharp*, 73 Ind. 533; *Dodge v. Gaylord*, 53 Ind. 865, Reversed *Gaylord v. Dodge*, 81 Ind. 41; *Bartholomew County Comrs. v. Jameson*, 86 Ind. 154; *Jameson v. Bartholomew County Comrs.* 64 Ind. 524; *Test v. Larsh*, 76 Ind. 452, Reversed *Larsh v. Test*, 48 Ind. 180; *Richmond Street R. Co. v. Reed*, 88 Ind. 9; *Reed v. Richmond Street R. Co.* 50 Ind. 842.

Iowa: *Adams County v. Burlington & M. R. Co.* 55 Iowa, 94, Reversed 39 Iowa, 507, and 44 Iowa, 535; *Babcock v. Chicago & N. W. R. Co.* 72 Iowa, 197, Reversed 63 Iowa, 594; *Heffner v. Brownell*, 75 Iowa, 341, Reversed 70 Iowa, 591.

Kansas: *Crockett v. Gray*, 81 Kan. 846, Reversed *Gray v. Crockett*, 80 Kan. 188; *Headley v. Challiss*, 15 Kan. 603, Reversed *Challiss v. Headley*, 9 Kan. 684.

Kentucky: *Bradford v. Patterson*, 1 A. K. Marsh. 346 (1819), Reversed 4 Bibb, 584; *Smith v. Brannin*, 79 Ky. 119; *Williams v. Rogers*, 14 Bush, 776; *Davis v. McCorkle*, Id. 746; *Kennedy v. Meredith*, 4 T. B. Mon. 402, Reversed *Meredith v. Kennedy*, Litt. Sel. Cas. 516; *Kennedy v. Meredith*, 3 Bibb, 465; *Nelson v. Clay*, 7 J. J. Marsh. 138, 23 Am. Dec. 387 (1834), Reversed *Clay v. Nelson*, 5 Litt. (Ky.) 155; *Sims v. Reed*, 12 B. Mon. 52; *Meredith v. Larks*, Sneed (Ky.) 189 (1802); *Ford v. Gregory*, 10 B. Mon. 175, Reversed *Gregory v. Ford*, 5 B. Mon. 471; *Legrand v. Baker*, 6 T. B. Mon. 244, Reversed *Baker v. Legrand*, Litt. Sel. Cas. 258.

Louisiana: *Tufts v. Casey*, 16 La. Ann. 336, Reversed 15 La. Ann. 280; *Boissac v. Dickson*, 82 La. Ann. 1150, Reversed 31 La. Ann. 753; *Gillaspie v. Scott*, 33 La. Ann. 767.

Maine: *Atkins v. Wyman*, 45 Me. 400.

Maryland: *Preston v. Leighton*, 6 Md. 97, Reversed *Leighton v. Preston*, 9 Gill, 201;

clerical mistakes. *Ex parte Sibbald v. United States*, 37 U. S. 12 Pet. 438, 9 L. ed. 1167.

Some cases hold that the prior decision is conclusive whether right or wrong.

So, the decision upon a prior appeal was conclusive upon the second appeal where the question was the same, whether right or wrong. *Gerber v. Friday*, 87 Ind. 866; *Meyer v. Shamp*, 26 Neb. 729; *McKinney v. Harral*, 38 Mo. App. 337; *Central Warehouse Co. v. Sargeant*, 40 Ill. App. 438; *Brewer v. National Union Bldg. Assn.* 64 Ill. App. 161; *Babcock v. Chicago & N. W. R. Co.* 72 Iowa, 197; *Central Branch Union P. R. Co. v. Shoup*, 28 Kan. 394, 43 Am. Rep. 163; *Holleran v. Meisel*, 91 Va. 148; *Wilkes v. Davies*, 9 Wash. 112, 23 L. R. A. 108; *Wright v. Sperry*, 26 Wis. 617; *Cole v. Clarke*, 3 Wis. 323; *Du Pont v. Davis*, 36 Wis. 638; *McLeod v. Bertschy*, 24 Wis. 244; *Noonan v. Orton*, 27 Wis. 310; *Montgomery v. Gilmer*, 38 Ala. 116, 70 Am. Dec. 562.

And where the first ruling was not essential to the prior decision and became a part of the law of the case, whether intrinsically correct or not. *Table Mountain Tunnel Co. v. Stranahan*, 21 Cal. 543.

And where the lower court followed such decision, and this rule applied without regard to whether the prior decision was right or wrong. *Burke v. Matthews*, 37 Tex. 73.

And where the same question was presented as to the construction of a contract, and this rule applied whether the prior decision was right or wrong. *Chicago, M. & St. P. R. Co. v. Hoyt*, 44 Ill. App. 48.

And where the first decision was on a motion to dismiss an appeal. The ruling in that decision, whether erroneous or not, was the law of the case. *Walker v. Heller*, 104 Ind. 327.

And where the prior decision sustained a complaint on demurrer. The prior decision is the law of the case whether right or wrong. *Linton Coal & M. Co. v. Persons* (Ind.) 43 N. E. 651.

And where the same question was presented; the court saying: "In thus yielding to the former decisions we do not approve them as precedents, nor do we disapprove them, we simply yield to them as former judgments, and decline to enter upon a discussion of the general question." *Howe v. Fleming*, 123 Ind. 262.

And where the questions presented were the same, whatever might be the views of the court on that question, at the time of the second appeal. *Test v. Larsh*, 76 Ind. 452.

And where the court on the last appeal said that the conclusions then reached were correct. In any 34 L. R. A.

case it must be the law applicable to further proceedings in the same case. *Perry v. Little Rock & Ft. S. R. Co.* 44 Ark. 383.

And where the facts were the same; whatever doubt the court might entertain on the second appeal as to the rule laid down in the former decision. *Bector v. Danley*, 14 Ark. 304; *Ridgway v. Bacon*, 63 N. Y. S. R. 874.

And where the same question was involved, even if there should be doubt as to the soundness of the prior decision. *Brandon v. Fritz*, 94 Pa. 88.

And where the question was admitted to be of difficult and doubtful solution. An opinion of the appellate court determining the case upon two distinct grounds was regarded as a decision upon both grounds, and not as a *dictum* on either. *Corn v. Rosenthal*, 3 Misc. 71.

And where the same question was presented whatever views the different members of the court entertained as to the soundness of the former decision. *Stacy v. Vermont C. R. Co.* 22 Vt. 551; *Adams County v. Burlington & M. R. Co.* 55 Iowa, 94; *Southwest Lead & Z. Co. v. Phoenix Ins. Co.* 41 Mo. App. 406.

And where the prior decision was approved by the court of appeals. It would not be re-examined, even if its correctness was doubtful. *Rose v. Hawley*, 53 N. Y. S. R. 403.

And where it was said that it would make no difference whether the prior decision was correct or not, it could not be modified or changed. *Central R. Co. v. Coggin*, 73 Ga. 666; *Ryan v. Martin*, 18 Wis. 673; *Powell v. Dayton*, 8 & G. R. R. Co. 14 Or. 22.

And where the judgment was reversed, and the appellate court held that the complaint was sufficient. It was said that this would be the rule whatever might be the views of the court upon the second appeal. *Lucas v. San Francisco*, 23 Cal. 591.

And where the same question was involved on demurrer to a complaint. It was said that this was the rule whether right or wrong. *Brimm v. Jones* (Utah) 45 Pac. 46.

And where the questions were the same, and this was said to be the rule whether the prior decision was correct or not, in holding the complaint stated a cause of action and therefore settling the question as to whether the proper party was plaintiff. *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 636.

And where the questions were the same, and this was said to be the rule, whatever opinion might be subsequently entertained of the original question involved in the action in which the decision was rendered. *Sharpstein v. Freidlander*, 63 Cal. 73.

Brown v. Somerville, 8 Md. 454, Reversed *Somerville v. Brown*, 5 Gill, 899.

Massachusetts: *Booth v. Com.* 7 Met. 286; *Hunter v. Farran*, 127 Mass. 485, 84 Am. Rep. 428; *Pratt v. Boston Heel & L. Co.* 184 Mass. 800; *Negus v. Stimpson*, 99 Mass. 395; *Kent v. Whitney*, 9 Allen, 65, 85 Am. Dec. 739; *Amerherst Bank v. Root*, 2 Met. 542; *Joyner v. Great Barrington*, 118 Mass. 465; *Bardwell v. Conway Mut. F. Ins. Co.* Id. 469.

Michigan: *Henry v. Quackenbush*, 48 Mich. 417, Reversed *Quackenbush v. Henry*, 42 Mich. 75; *Great Western R. Co. v. Hawkins*, 18 Mich. 481, Reversed *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *Bassett v. Shepardson*, 57 Mich. 428, Reversed 52 Mich. 8; *Hickox v. Chicago & C. S. R. Co.* 94 Mich. 286, Reversed 78 Mich. 615; *Damon v. DeBar*, 94 Mich. 594, Reversed 88 Mich. 262; *Newberry v. Trowbridge*, 18 Mich. 278, Reversed 4 Mich. 891; *Mynning v. Detroit, L. & N. R. Co.* 67 Mich. 677, Reversed 59 Mich. 257,

and 64 Mich. 98; *Gamble v. Gates*, 97 Mich. 465, Reversed 92 Mich. 510.

Minnesota: *Caldwell v. Bruggerman*, 8 Minn. 286; *Tilley v. Wolvorton*, 54 Minn. 75, Reversed 46 Minn. 256, and 50 Minn. 419.

Mississippi: *Smith v. Elder*, 14 Smedes & M. 100, Reversed 7 Smedes & M. 507; *Bridgeforth v. Gray*, 39 Miss. 186, Reversed *Gray v. Bridgeforth*, 33 Miss. 312; *Green v. McDonald*, 12 Smedes & M. 445, Reversed *McDonald v. Green*, 9 Smedes & M. 138, Reversed *Green v. Finucane*, 6 How. (Miss.) 542.

Missouri: *Overall v. Ellis*, 38 Mo. 209, Reversed 82 Mo. 322; *Metropolitan Bank v. Taylor*, 62 Mo. 340, Reversed 53 Mo. 444; *Hombes v. Corbin*, 24 Mo. App. 394, Reversed 20 Mo. App. 497; *Feurt v. Ambrose*, 34 Mo. App. 360, Reversed *Feurt v. Brown*, 23 Mo. App. 332.

Montana: *Daniels v. Andes Ins. Co.* 2 Mont. 502, Reversed Id. 78; *Creighton v. Hershfield*, 2 Mont. 169, Reversed 1 Mont. 639; *Kelley v. Cable Co.* 8 Mont. 440, Reversed 7 Mont. 70;

And where it was said that this was the rule, whether the former decision was correct or not. *Page v. Fowler*, 37 Cal. 100; *Polack v. McGrath*, 38 Cal. 666; *Heinlen v. Martin*, 59 Cal. 181; *Lillie v. Trentman*, 180 Ind. 16; *Nickless v. Pearson*, 126 Ind. 477.

And where it was said to be the rule even if "we doubted the correctness of the ruling when applied to other cases." *Hawley v. Smith*, 45 Ind. 183.

And where the facts were the same, as the supreme court had no appellate jurisdiction over its own judgments and could not review or modify them after the case passed from its control. This rule applies whether the prior decision was right or wrong, and was as conclusive in a case of reversal as where a particular judgment was directed to be entered, and applied to an action of ejectment where the evidence was the same. *Leese v. Clark*, 20 Cal. 388.

In *Lawrence v. Ballou*, 37 Cal. 518, it was said that a decision upon a prior appeal was conclusive upon the second appeal, and this whether right or wrong. This only applies to a decision of a court of last resort.

Some cases hold that the prior decision is conclusive unless it is wrong.

So, the decision of the supreme court on a question reserved by the superior court upon a statement of facts was conclusive on the supreme court where the same question was again presented on a writ of error. But as to whether or not there might be circumstances which would authorize a re-examination of the prior questions was not decided. *Smith v. Lewis*, 26 Conn. 116.

So, the decision on a prior appeal was conclusive on a second appeal where the same question was presented, unless some general principle of law had been manifestly decided incorrectly the first time, or injustice to the rights of the parties would be done by adhering to the first opinion. *Chambers v. Smith*, 30 Mo. 156.

And where the same question was presented. But it was said in Missouri that there are some exceptions to this general rule. *Keith v. Keith*, 97 Mo. 223.

And where it was said that there were exceptions to the general rule, but this case was not within the exceptions. *Ibid.*; *Belch v. Miller*, 37 Mo. App. 623.

And where it was said that courts of last resort occasionally find it proper and just to overrule, and thus correct their former declaration of legal principles. It sometimes is a matter of congratulation that justice can be finally done in that manner. 34 L. R. A.

ner, in the same cause on a later appeal when necessary. *Rutledge v. Missouri P. R. Co.* 123 Mo. 121.

And where the same question was involved. It was said: "We have, of course, power—considered as mere power—to recall that judgment, if of opinion that it was erroneous; and appellate courts have sometimes, on a second appeal, taken a different view of the law from that announced on the former appeal. But we remain of the opinion then expressed, and do not think it necessary to repeat our reasons for so holding." *Little v. McAdams*, 38 Mo. App. 187.

And where such decision was correct. It was said that a prior decision will not be re-examined, or the ruling then made reversed, unless manifestly incorrect. *Fuller v. Cunningham* (Neb.) 67 N. W. 878.

In *Fuller v. Cunningham*, *supra*, the case of *HASTINGS v. FOXWORTHY* was approved as to the doctrine that a decision upon a prior appeal was conclusive unless manifestly incorrect.

The decision upon a prior appeal was conclusive upon the second appeal where the same question was presented. It was said that if there was any reason to suppose that the merits of the question had not been fully considered, or that any fact had been misunderstood or any principle or any authority bearing upon the validity of the contract in question had been overlooked, it might justify a review of the question. *Justice v. Lang*, 62 N. Y. 323.

And where it was said that the decision should not be reversed unless there had been some plain mistake, as in overlooking some statutory provision, or some controlling decision of that court. *Eaton v. Alger*, 47 N. Y. 345.

And where it was said that a prior judgment was binding unless there was a plain error committed by the court in declaring or applying the rule of law applicable to the case, or unless the point determined was not involved in the case before it, or unless there were new facts which subvert the ground of the former judgment and change the character or measure of relief to which the party was entitled. *Worrall v. Munn*, 53 N. Y. 185.

And where it was said this rule should not be departed from except in extreme cases founded upon some change in the law of the land either by legislation or by courts of last resort, or when the court is satisfied that an erroneous conclusion has been declared. *Brennan v. New York*, 1 Hun. 815.

And where both appeals were to the appellate division of the general term. But the court

Palmer v. Murray, 8 Mont. 174, Reversed 6 Mont. 125.

Nevada: *Trench v. Strong*, 4 Nev. 92, Reversed *Sparrow v. Strong*, 2 Nev. 362; *Clarke v. Lyon County*, 8 Nev. 181, Reversed 7 Nev. 75.

New Hampshire: *Weare v. Deering*, 60 N. H. 56, Reversed 58 N. H. 206; *Plaisted v. Holmes*, Id. 619, Reversed Id. 293; *Stanton v. Thompson*, 49 N. H. 275; *Bell v. Woodward*, 47 N. H. 542, Reversed 46 N. H. 315; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 832, 56 N. H. 386; *Bell v. Lamprey*, 58 N. H. 124, Reversed 57 N. H. 168.

New Jersey: *Cassedy v. Bigelow*, 27 N. J. Eq. 505, Reversed *Bigelow v. Cassedy*, 26 N. J. Eq. 557.

New Mexico: *Rupe v. New Mexico Lumber Assn.* 3 N. M. 555, Reversed Id. 893; *Aubry v. Nangle*, 1 N. M. 115.

New York: *Yale v. Dederer*, 68 N. Y. 835, Reversed 18 N. Y. 265, 72 Am. Dec. 505, 22

N. Y. 450, 78 Am. Dec. 216; *Bangs v. Strong*, 4 N. Y. 315, 10 Paige, 16, 7 Hill, 250, 42 Am. Dec. 64; *Oakley v. Aspinwall*, 13 N. Y. 500, Reversed 4 N. Y. 514; *Corn v. Rosenthal*, 3 Misc. 72, Reversed 1 Misc. 168.

North Carolina: *Gordon v. Collett*, 107 N. C. 362, and 104 N. C. 881, Reversed 102 N. C. 582.

Ohio: *Bans v. Wick*, 6 Ohio St. 13, 19 Ohio, 328; *Pollock v. Cohen*, 32 Ohio St. 519.

Oregon: *Powell v. Dayton, S. & G. R. Co.* 14 Or. 22, Reversed 13 Or. 446; *Applegate v. Dowell*, 17 Or. 299, Reversed 15 Or. 513.

South Carolina: *Kibler v. Bridges*, 5 S. C. N. S. 335, Reversed 3 S. C. N. S. 45; *Bradley v. Rodelerperger*, 17 S. C. 11, Reversed 8 S. C. N. S. 227; *Manufacturing Co. v. Price*, 6 S. C. N. S. 278, Reversed 4 S. C. N. S. 838; *Warren v. Raymond*, 17 S. C. 163, Reversed 12 S. C. 9.

South Dakota: *Plymouth County Bank v. Gilman*, 3 S. D. 170, Reversed 6 Dak. 304.

Tennessee: *McNairy v. Nashville*, 2 Baxt.

mid: "If the court of appeals has, since the decision of the general term, announced a different rule in a case presenting like facts, or if, under the former system, an appeal to the court of appeals might be taken, where none can now be taken from the judgment of the appellate division, possibly the decision of the general term ought no more to preclude our examination of the case than if it had been pronounced in some other case." *Patterson v. Binghamton*, 39 N. Y. Supp. 408.

And where such decision affected no general public interest nor established any doctrine in hostility to the previous law as declared by the court, and if there was any error it was in the application of admitted principles to the circumstances of the case. *Cluff v. Day*, 141 N. Y. 580.

And where a petition had been held to state a cause of action unless the decision was shown to be clearly erroneous. *Pennsylvania Co. v. Platt*, 47 Ohio St. 366.

And where the same question was presented, the rule in Texas being that the former decision is conclusive unless erroneous. *Kempner v. Huddleston (Tex.)* 37 S. W. 1006; *Galveston, H. & S. A. R. Co. v. Faber*, 77 Tex. 153.

And where the record did not show any difference from the prior case. It was said that appellate tribunals may sometimes render decisions so obviously wrong as that other courts of lower rank will be justified in disregarding them upon trials of the same case. *Robertson v. Coates*, 1 Tex. Civ. App. 672.

And where the trial court ignored such decision and was in contempt by such action. But it was said that it was not intended to intimate that a party was precluded from relief in all cases against an erroneous judgment because of its affirmance by the supreme court. *Kendall v. Mather*, 48 Tex. 565.

And where the plaintiff in error did not show that there was some difference in the record between the two cases, or that it was an exceptional case. *Frankland v. Cassaday*, 62 Tex. 418.

And where the first decision was made on a reference to the commissioners of appeal, although in Texas the rule making the former decision the law of the case is not inflexible but has its exceptions, but should not be departed from save for urgent reasons. *Burns v. Ledbetter*, 56 Tex. 283.

And where there was nothing in the record to break the full force of the decision made on former appeal. *Galveston County v. Galveston Gas Co.* 72 Tex. 509.

The following cases have held that the prior decision was not conclusive where it was wrong:

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The decision on a prior appeal was not conclusive on a second appeal where the first decision was erroneous and had subsequently been overruled in effect by later cases in the same court, as this was an exception to the general rule. *Hamilton v. Marks*, 63 Mo. 167.

And where the court was misled by the belief that the revenue law had been revised in 1879, which was not the fact. This case was an exception to the general rule. *Bird v. Sellers*, 122 Mo. 23.

And where the same question was involved and the prior decision was by the territorial supreme court and was erroneous. This was held on the ground that the court was not a court of last resort. *Jungk v. Reed (Utah)* 42 Pac. 292.

But see *Silva v. Pickard (Utah)* 47 Pac. 144, subd. w.

And where the supreme court of the United States had determined contrary to the ruling of such prior decision since it was made. *Steele v. Boley*, 7 Utah, 64; *United States v. Elliott (Utah)* 41 Pac. 720.

And where such decision overturned a long-established rule of property. *Reeves v. Petty*, 44 Tex. 249.

And where such prior decision had been overruled by other decisions before the second appeal. *Meyers v. Dittmar*, 47 Tex. 373.

And where the lower court instructed the jury in accordance with the prior decision, but such decision was erroneous. On the last appeal the court adopted the view of the dissenting judge on the prior appeal. *Layton v. Hall*, 25 Tex. 204.

In *Shiels v. Wortman*, 126 N. Y. 650, the court of appeals held that it had no jurisdiction to review the discretion of the supreme court in refusing an extra allowance where upon the prior appeal they had granted it, as they had the discretion to reach a different conclusion from the one which they had come to upon the prior appeal, or they had the discretion to conclude that the extra allowance granted was too large, and the discretion was not subject to revision.

See also *Oshkosh Fire Dept. v. Tuttle*, 50 Wis. 552, and *Bomar v. Parker*, 68 Tex. 436, subd. l; *Hill v. Morris*, 21 Mo. App. 256, subd. g; *Noonan v. Bradley*, 79 U. S. 12 Wall. 121, 20 L. ed. 279, subd. b; *Stevenson v. Edwards*, 96 Mo. 622, subd. i; *Ohio & M. R. Co. v. Hill*, 7 Ind. App. 255, subd. r.

c. As applied to matters after remanding a case.

Saving the exceptions noted in the preceding subdivision, the general rule is that a prior decision is conclusive upon a subsequent appeal as applied to matters after remanding a case, where the prior

251; *Bates v. Taylor*, 87 Tenn. 820, 8 L. R. A. 316; *Murdock v. Gaskill*, 8 Baxt. 22.

Texas: *Frankland v. Cassaday*, 63 Tex. 418, Reversed *Cassaday v. Frankland*, 55 Tex. 452.

Utah: *Venard v. Green*, 4 Utah, 458, Reversed Id. 67.

Vermont: *Ross v. Burlington Bank*, 1 Aik. (Vt.) 49 (1825); *Herrick v. Belknap's Estate*, 27 Vt. 699; *Sawyer v. Cross*, 66 Vt. 616, Reversed 65 Vt. 158.

Virginia: *New York L. Ins. Co. v. Clemmitt*, 77 Va. 368, Reversed *Clemmitt v. New York L. Ins. Co.* 76 Va. 855; *Bank of Virginia v. Craig*, 6 Leigh, 899 (1835); *Towner v. Lane*, 9 Leigh, 277; *Bank of Old Dominion v. McVeigh*, 29 Gratt. 554, Reversed *McVeigh v. Bank of Old Dominion*, 26 Gratt. 852.

Washington: *Wilkes v. Davies*, 8 Wash. 112, 23 L. R. A. 108; *Wilkes v. Hunt*, 4 Wash. 100.

West Virginia: *Henry v. Davis*, 18 W. Va. 262, Reversed 7 W. Va. 715; *Hall v. Bank of*

Virginia, 15 W. Va. 828; *Board of Education v. Parsons*, 24 W. Va. 552, Reversed 23 W. Va. 818.

Wisconsin: *Parker v. Pomeroy*, 2 Wis. 112; *Luning v. State*, 1 Chand. (Wis.) 266, Reversed 1 Chand. (Wis.) 178, 53 Am. Dec. 153; *Ellis v. Northern P. R. Co.* 80 Wis. 459, 77 Wis. 114; *Noonan v. Orton*, 27 Wis. 310, 4 Wis. 885; *Du Pont v. Davis*, 35 Wis. 638, Reversed 80 Wis. 170; *Lathrop v. Knapp*, 37 Wis. 807, 27 Wis. 214; *Oshkosh Fire Dept. v. Tuttle*, 50 Wis. 552, 48 Wis. 91.

Thirty-seven of the forty-eight supreme judicatories of the United States uphold the rule.

A fair construction of decisions of Maine, Massachusetts, Ohio, and Texas places them in the same category, though the cases are not so clear nor so strictly in point.

On the other hand, we have but one, Nebraska, at present, that refuses to recognize the rule.

Six more, Arizona, Delaware, North Da-

decision is mandatory, or where the question is as to the application of the principles of the prior decision on the subsequent proceeding.

So, the decision upon a prior appeal was conclusive on the second appeal where the lower court followed the first decision. The only question open would be whether the mandate has been executed according to its true intent and meaning. *Himely v. Rouse*, 9 U. S. 5 Cranch, 314, 3 L. ed. 111; *Eyler v. Hoover*, 8 Md. 1.

And where the case was remanded with directions to make a specific modification of a decree, which did not require any change in the pleadings or evidence. *Washburn & M. Mfg. Co. v. Chicago Galvanized Wire Fence Co.* 119 Ill. 30; *Stump v. Hornback*, 109 Mo. 277; *Stapp v. Owens*, 45 Ill. App. 488; *Mix v. People*, 122 Ill. 641; *Holley v. Holley*, 5 Litt. (Ky.) 290; *Brady v. Kelly*, 64 Cal. 590.

And where the court of appeals remanded a case with specific directions, which were followed, and affirmed the case on the second appeal, and this was approved by the supreme court. *Lackland v. Smith*, 75 Mo. 307.

And where the trial court obeyed the mandate of the court of appeals. *Covington v. Shinkle*, 14 Ky. L. Rep. 558.

And where the decision on prior appeal was an order directing the court below to modify its judgment, and upon that question was final and conclusive. *Argenti v. San Francisco*, 30 Cal. 453.

And where the trial court followed the prior decision in its subsequent proceedings. *Wilson v. Bates* (Colo.) 40 Pac. 351; *Wood v. Wheeler*, 9 Tex. 127; *Nelson v. Clay*, 7 J. J. Marsh. 139, 23 Am. Dec. 397; *T. T. Haydock Carriage Co. v. Pier*, 82 Wis. 318; *Sanders v. Peck*, 131 Ill. 423; *Mong v. Bell*, 7 Gill, 246; *Rowell v. Vershire*, 63 Vt. 510; *Burtraw v. Clark* (Mich.) 65 N. W. 218; *Hilsenbeck v. Guhring*, 39 N. Y. S. R. 460; *Meinhard v. Youngblood*, 41 S. C. 812; *Krantz v. Rio Grande W. R. Co.* (Utah) 22 L. R. A. 828; *Smith v. San Luis Obispo* (Cal.) 84 Pac. 830; *Mechanics' & T. Bank v. Seltz Bros.* 155 Pa. 191; *Burwell v. Burgwyn*, 105 N. C. 507; *Torrey v. Waters*, 59 N. Y. S. R. 885; *Rehm v. Weiss*, 30 N. Y. Supp. 1134; *Ripp v. Hale*, 45 Neb. 567; *Teichman Commission Co. v. American Bank*, 35 Mo. App. 472; *Rimel v. Hays*, 22 Mo. App. 177; *New York L. Ins. Co. v. Clemmitt*, 77 Va. 366; *Lee v. Corn*, 56 N. Y. S. R. 902; *United States v. 422 Casks of Wine*, 26 U. S. 1 Pet. 547, 7 L. ed. 367; *Teley v. Boone*, 115 N. C. 195; *Beckwith v. New York, O. & W. R. Co.* 36 N. Y. Supp. 1122; *Hoes v. Hume*, 38 N. Y. Supp. 1144; *Van Houten v. Pye*, 36 N. Y. Supp. 1134; *Lacy v. Getman*, 17 N. Y. S. R. 408; *Isert v. Davis* (Ky.) 87 S. W. 151; *Lane v. Chi-*
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cago, R. I. & P. R. Co. 35 Mo. App. 567; *Hiatt v. Brooks*, 17 Neb. 38; *First Nat. Bank v. Badger Lumber Co.* 60 Mo. App. 255; *Ogburn v. Wilson*, 96 N. C. 211; *Thuringer v. New York C. & H. R. R. Co.* 83 Hun, 33; *McCampbell v. Cunard S. S. Co.* 58 N. Y. S. R. 870; *Adair County v. Ownby*, 75 Mo. 232; *Shroyer v. Nickell*, 67 Mo. 589; *Roan Mountain Iron & S. Co. v. Edwards*, 111 N. C. 500; *Collins v. Barnes*, 130 Pa. 356; *Manufacturing Co. v. Price*, 6 S. C. N. S. 273; *Johnston v. Jones*, 66 U. S. 1 Black, 203, 17 L. ed. 117; *Bradsher v. Cheek*, 112 N. C. 638; *Phillips v. O'Neal*, 87 Ga. 727; *Blazey v. McLean*, 59 N. Y. S. R. 832; *Lansburgh v. Walsh*, 59 N. Y. S. R. 408; *Carpenter v. United States L. Ins. Co.* 174 Pa. 636; *Nugent v. Atlas S. S. Co.* 40 N. Y. S. R. 927; *Dowell v. Guthrie*, 116 Mo. 646; *Hayden v. Grillo*, 42 Mo. App. 3 Crawford v. Spencer, 41 Mo. App. 96.

And where the first decision was by the court of appeals, and the trial was had in conformity with such decision. *Rumsey v. New York & N. E. R. Co.* 39 N. Y. S. R. 894.

And where the matters appealed from were only proceedings in conformity with the prior decree. *Tufts v. Casey*, 16 La. Ann. 336.

And where the trial court simply applied the law of the prior decision to the facts as they appeared. *Applegate v. Dowell*, 17 Or. 292.

And where the trial court construed the contract in controversy according to the rule established on the prior appeal. *Hannay v. Zerban*, 1 Misc. 829.

And where the trial court, in accordance with the former opinion, directed a verdict for the defendant. *Apey v. Detroit, L. & N. R. Co.* 104 Mich. 646.

And where the prior decision in effect held that the plaintiff was entitled to judgment, and the trial court subsequently refused to consider additional evidence introduced by the defendant. *Garmoe v. Windle*, 76 Iowa, 239.

And where the same question was presented, and supplemental proceedings to carry out the prior decision cannot be made the means of relitigating any issues determined by the first decree. *Younkin v. Younkin*, 44 Neb. 729.

And where the case was reversed and remanded for further hearing. As to all matters decided on a prior appeal the court was concluded. *Boisse v. Dickinson*, 22 La. Ann. 1150.

And where the trial court followed the prior decision on the trial of the case, and the doctrine of such decision has since been affirmed in another case by the court of appeals. *Huber v. Grauer*, 38 N. Y. Supp. 1145.

And where the trial court followed the rule laid

kota, Pennsylvania, Rhode Island, and Wyoming, so far as counsel are able to discover, have not discussed the question, and three of these are of so recent organization that their silence is not matter of remark.

The rule did not originate from misinterpretation of the case in *Washington Bridge Co. v. Stewart*, 44 U. S. 3 How. 413, 11 L. ed. 658, decided in 1845, as we find it in force in many states long before that, and in some as long as twenty-six years earlier.

The *quære* propounded in the opinion springs naturally in the error that when a cause in the appellate court is reversed for a new trial generally there is no judgment except that there was error in the proceedings antecedent to the judgment of the inferior court. This is in substance to say that the construction of the law by the appellate court is not binding on itself, nor on the parties, nor on the inferior court, till a final judgment of affirmance is reached. That in a reversed case the action

and conclusion of the appellate court are conclusive on no one, and are advisory merely.

The office of an appellate court is obviously to correct error in the proceedings of inferior courts. But if its action determines nothing and is not a judgment conclusive on the parties, how is this office performed or this end attained? It then becomes, not a court to correct errors, but has merely the power to annul them for the time being. Yet the final judgment of an appellate court, in any matter before it, it is respectfully submitted must in the nature of things always be final of that matter.

A proceeding in error is not a step in the cause, the record of which is reviewed, but is a new and distinct suit which terminates on its judgment and the sending out of its mandate.

11 Am. & Eng. Enc. Law, p. 812.

The judgment is therefore final, and on the sending out of the mandate the jurisdiction of the court is terminated.

down in such prior decision, and the facts presented in the question were substantially the same. *St. Croix Lumber Co. v. Mitchell*, 4 S. D. 487.

And where the trial court ruled on the admission of evidence as directed by the court of appeals in the prior appeal. *Bedpath Bros. v. Lawrence*, 48 Mo. App. 427.

And where the trial court followed the prior decision, and the evidence was the same in both cases. *Waite v. Fræbie*, 48 Minn. 420.

And where the ruling complained of was in accordance with the decision on former appeal. *Adams v. Mayer*, 36 N. Y. S. R. 83; *Pirson v. Arkenburgh*, 36 N. Y. S. R. 82.

And where the trial court below followed the rule laid down in the first appeal in regard to instructions. *Koch v. Hebel*, 40 Mo. App. 241; *Costigan v. Michael Transp. Co.* 38 Mo. App. 219; *Nelson v. Wallace*, 31 Mo. App. 397; *Murphy v. Murphy*, 28 Mo. App. 276; *Kelley v. Cable Co.* 8 Mont. 440.

And where the trial court made rulings on evidence and instructions in accordance with the prior decision. *Huntton v. Lloyd*, 8 Mont. 283.

And where the same question was settled, and the decree of the lower court was in accordance with the mandate. But notwithstanding this the court again discussed the same question. *Hill v. National Bank*, 97 U. S. 450, 24 L. ed. 1051.

In *Hammond v. Inloes*, 4 Md. 138, it was said that the decision upon a prior appeal was conclusive upon a second appeal where the lower court followed the prior decision in the trial of the case.

The decision upon a prior appeal was conclusive upon the second appeal, where the first decision was by the court of appeals, and the trial court followed such decision. *Crosby v. Delaware & H. Canal Co.* 49 N. Y. S. R. L.

And where the same question was presented. Only proceedings subsequent to the mandate will be reviewed. *Volk v. Bergman*, 38 N. Y. Supp. 1150; *Browder v. McArthur*, 20 U. S. 7 Wheat. 53, 5 L. ed. 397; *Stewart v. Salamon*, 97 U. S. 361, 24 L. ed. 1045; *Humphrey v. Baker*, 103 U. S. 736, 26 L. ed. 456; *Cook v. Burnley*, 78 U. S. 11 Wall. 659, 20 L. ed. 238; *Roberts v. Cooper*, 61 U. S. 20 How. 467, 15 L. ed. 969; *Sizer v. Many*, 57 U. S. 16 How. 98, 14 L. ed. 861; *Wayne County Supers. v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Boyce v. Grundy*, 34 U. S. 9 Pet. 275, 9 L. ed. 127; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717; *Hill v. Chicago & E. R. Co.* 140 U. S. 52, 35 L. ed. 331; *Everett v. Gorea*, 92 Wis. 527.

And where it was ruled that a claim for damages would have been established if excluded evidence had been received, and on retrial such evidence

was adduced. *Langdon v. New York*, 138 N. Y. 628.

And where the referee had disregarded the decision of the general term. The trial court should obey the decision of the appellate court upon the new trial. *Re Van Slooten v. Wheeler*, 80 N. Y. S. R. 873.

And where the trial court had held contrary to such decision. It was said it will be presumed the attention of the lower court was not called to the prior decision. *Gordon v. Collett*, 107 N. C. 362.

And where the question was settled on the prior appeal. The lower court had no power, after the court of appeals had rendered judgment against an administrator, to decide that he was not liable because prior thereto he had settled his accounts and had been discharged. *Henderson v. Winchester*, 31 Miss. 290.

And where the trial court on the second trial committed error in reinvestigating the same question. *Arick's Succession*, 23 La. Ann. 611.

And where the first decision on the merits of the case held that the bill did not state a cause of action, and the trial court allowed the plaintiff to dismiss the bill without prejudice, "when it should have dismissed the bill." *Wadhams v. Gay*, 53 Ill. 250.

And where such decision required the lower court to render judgment against a party, and the court erroneously allowed him to retry the case, the rulings on the retrial will be examined. *Butler v. Barnea*, 61 Conn. 399.

And where the prior decision authorized a recovery upon the common counts, and the lower court granted a nonsuit contrary to such decision. *Buis v. Norton*, 4 Cal. 359.

And where the trial court did not follow such prior decision, and there was no amendment authorizing a departure. *Rupe v. New Mexico Lumber Asso.* 3 N. M. 555.

In *Martin v. Hunter*, 14 U. S. 1 Wheat. 304, 4 L. ed. 97, it was held that a former judgment on appeal was conclusive on the appellate court. But as this case was on a writ of error from the refusal of the lower court to obey the mandate, the question was reconsidered, and then the judgment of the lower court rendered on the mandate was reversed.

A judgment for plaintiff on the second trial will be affirmed where the defects preventing recovery upon a former trial and appeal have been supplied. *Constant v. University of Rochester*, 17 N. Y. Supp. 363.

In *Aspen Min. & S. Co. v. Billings*, 150 U. S. 31, 39

The reason of the rule is shown by the concurring decisions of the Supreme Court of the United States and of the states to rest on the rule of *res judicata*.

Irvine, C., filed the following opinion:

This was an action by Foxworthy against the city of Hastings to recover for personal injuries by him sustained through falling upon a sidewalk where it was alleged the city had permitted ice and snow to accumulate and remain. The case has acquired a long history. In its early course the district court overruled a demurrer to one count of the answer, and, a judgment of dismissal having been entered, the plaintiff brought the case to this court, where the judgment of the district court was reversed. *Foxworthy v. Hastings*, 23 Neb. 772. The case was remanded to the district court. A trial was had, resulting in a verdict for the defendant, and the case was again brought to

this court, and the judgment reversed for error in the instructions, 25 Neb. 133. A second trial having resulted in another verdict for the defendant, Foxworthy again brought the case here, where it was for the third time reversed, this time for the insufficiency of the evidence. 31 Neb. 825. After the cause had been the last time remanded, a change of venue was taken to Kearney county, where the case has been again tried, this trial resulting in a verdict and judgment for the plaintiff for \$5,000. The city now brings the case here for review. Of the errors assigned we shall notice only two, which raise the same question. These are that the court erred in overruling the objection of the defendant to the introduction of any evidence, on the ground that the petition does not state a cause of action; the other, that the verdict was not sustained by sufficient evidence.

The city of Hastings has been, ever since the events complained of, a city of the second

L. ed. 983, and in *Re Pike*, 76 Fed. Rep. 400, it was said that an appeal cannot be taken from a decree entered by the court below in accordance with the mandate of the appellate court.

In *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, it was held that the circuit court of appeals cannot review by writ of error a judgment of the circuit court made in compliance with the mandate of the United States Supreme Court.

In *Biecoe v. Tucker*, 14 Ark. 523, it was said that on a second appeal no question can be returned to the supreme court in a chancery appeal, where final decree is directed by the supreme court, except such as may rarely arise out of proceedings that are had subsequent to the mandate.

An order which merely carries out the decision of the circuit court and the mandate of the supreme court is not appealable. *State v. Merriman*, 34 S. C. 577.

d. As to evidence.

A prior decision is conclusive upon a subsequent appeal where the same questions are presented in regard to the same evidence, or to similar rulings on evidence.

So, the decision upon a prior appeal was conclusive upon the second appeal, where no material change was made in the evidence. *Higgins v. v. Crouse*, 55 N. Y. S. R. 94; *Stanton v. French*, 91 Cal. 274; *Anderson v. Dickinson*, 84 N. Y. Supp. 510; *Larkin v. Burlington, C. R. & N. R. Co.* 91 Iowa, 654; *Todd v. Union Dime Sav. Inst.* 128 N. Y. 636; *New York, L. E. & W. R. Co. v. National S. S. Co.* 43 N. Y. S. R. 361; *West v. Douglas*, 145 Ill. 164; *Poorman v. Mills*, 43 Cal. 325; *Russell v. Harris*, 44 Cal. 439; *Souder v. Jeffries*, 107 Ind. 552; *Gernau v. Oceanic Steam Nav. Co.* 23 N. Y. Supp. 1143; *Jones v. Brooklyn Heights R. Co.* 86 N. Y. Supp. 1127; *Nassau Bank v. Campbell*, 74 Hun, 618; *Clerklee v. Mundell*, 4 Harr. & J. 497; *Preston v. Leighton*, 6 Md. 97.

And where the question in regard to evidence was the same. *Washington Gaslight Co. v. Eckloff*, 23 Wash. L. Rep. 546.

And where the question was as to the weight of the evidence, and as it was substantially the same on both appeals. *Bevis v. Baltimore & O. R. Co.* 30 Mo. App. 364.

And where the question was as to the sufficiency of plaintiff's evidence to carry the case to the jury, and this was substantially involved in the second appeal. *Leeser v. Boekhoff*, 33 Mo. App. 445.

And where the judgment was reversed on prior appeal holding that upon the conceded facts plaintiff was bound to recover, and the evidence on the second appeal was the same. *State, Schouhorst, v. Henning*, 55 Mo. App. 579.

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And where on the prior appeal from a motion by plaintiff for a new trial it was held that the plaintiff was entitled to judgment, and there was no change in the evidence on second trial. *King v. La Grange*, 61 Cal. 221.

And where a new trial was granted on the first appeal because the verdict was not sustained by the evidence, and there was no material change in the evidence on the second appeal. *Roberts v. Boston & M. R. Co.* 83 Me. 260.

And where on the first appeal it was decided that contributory negligence barred a recovery, and the evidence on the second trial was the same. *Mynning v. Detroit, L. & N. R. Co.* 67 Mich. 677.

And where the evidence on the second trial was changed from inferential to direct proof, and the court of appeals held on the first appeal that the plaintiff could not recover on the evidence. *Fowler v. Metropolitan L. Ins. Co.* 13 N. Y. S. R. 622.

And where the former decision reversed a judgment which directed a dismissal of the complaint and granted a new trial, and a second trial was had on the same evidence. *Price v. Holman*, 41 N. Y. S. R. 589.

And where the action was in ejectment, and after affirmance a new trial was taken under the statute, and the evidence was the same in both cases. *Miller v. Pence*, 131 Ill. 122.

And where the first decision was that plaintiff did not establish any cause of action, and the change in the evidence did not entitle the plaintiff to go to the jury on the second trial. *Breck v. Ringier*, 56 N. Y. S. R. 881; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 324.

And where the decision upon the prior appeal was by the court of appeals, and the facts proved on the new trial were not materially different. *White v. Wood*, 21 N. Y. Supp. 1124.

And where the new evidence on the second trial was only cumulative. *Hickman v. Link*, 116 Mo. 123.

And where the same question was presented on a ruling on the admission of evidence. *Hambleton v. Tenant*, 4 Harr. & J. 440.

e. As to party.

A decision upon a prior appeal is conclusive upon a subsequent appeal where the same question has been settled on the prior appeal, although the subsequent appeal is made by a different party in the same action.

So, the decision on a former appeal was conclusive upon a second appeal where the new parties, wife and children, were represented by a trustee in the first case, and the prior decision was favorable to another new party, the assignee in bankruptcy.

class, having more than 5,000 inhabitants; and § 84, chap. 14, art. 2, Comp. Stat., providing for the government of such cities, is as follows: "All claims against the city must be presented in writing with a full account of the items verified by the oath of the claimant or his agent that the same is correct, reasonable, and just, and no claim (or demand) shall be audited or allowed unless presented and verified as provided for in this section; provided, no costs shall be recovered against such city in any action brought against it for any unliquidated claim, including claims for personal injuries sustained by reason of the negligence of such city, which has not been presented to the city council to be audited; nor upon claims allowed in part, unless the recovery shall be for a greater sum than the amount allowed, with the interest thereon; provided, further, that all actions against such city for injury or damage to person or property hereafter sustained by

reason of the negligence of such city must be brought within six months from the date of sustaining the same; and to maintain such action it shall be necessary that the party file in the office of the city clerk, within six months from the date of the injury or damage complained of, a statement giving full name and the time, place, nature, and circumstances of the injury or damage complained of, and the name or names of the witness or witnesses thereto." The case, when first presented to this court, called for a consideration of this section. The defendant had pleaded that the action was not brought within six months from the time when the plaintiff had sustained his injury. It was to this plea that the plaintiff demurred. The court held (23 Neb. 772) that that portion of the section we have quoted, requiring that actions shall be brought within six months, was invalid, and that the general statute of limitations applied. The city's con-

Such new parties cannot question the former decision. *Rugely v. Robinson*, 19 Ala. 405.

And where the prior decision determined the interest of the plaintiff and his codefendant and a defendant in the land, and the defendant afterwards acquired the interest of the coplaintiff in the judgment. *Haggin v. Clark*, 71 Cal. 444.

And where the prior judgment settled the rights of two persons to be appointed executors, and one of them died after the former appeal. *Re Pacheco's Estate*, 29 Cal. 224.

And where the prior appeal was by other defendants, and the same question was involved. *Hunter v. Hubert* (Cal.) 89 Pac. 534.

And where the prior decision was on an appeal by one of the defendants, and the other defendant was made a party to the appeal but filed a disclaimer and prosecuted the second appeal. The reversal of the judgment on the prior appeal operated upon all the parties to the record. *Mason v. Burk*, 120 Ind. 404.

And where the case had been remanded with instruction to render a decree, and before entry another party prosecuted a writ of error. *Phelps v. Davis*, 2 J. J. Marsh. 388.

And where some of the parties who did not join in the prior appeal attempted to prosecute the second appeal. *Conery v. New Orleans Waterworks Co.* 42 La. Ann. 441.

And where the prior appeal was by one of the defendants and the second appeal was by both of the defendants. *Kansas City v. Neal*, 1 Mo. App. Rep. 196.

And where the first appeal was taken by one of the parties to an action, and the second appeal was taken about nine months thereafter by another party, whose rights were dependent upon that of the prior appellant. *Muggrave v. Staylor*, 35 Md. 122.

An appeal by two persons was a bar to application for a mandamus compelling the trial court to grant an appeal to one of them. *State v. First Dist. Court Judge*, 12 Rob. (La.) 320.

See also *Newberry v. Blatchford*, 106 Ill. 584, subd. 1. *As to cross appeals.*

1. *As to matters necessarily involved.*

Matters necessarily involved in the determination of a question on appeal are settled by the decision when the same are again presented on a subsequent appeal.

So, the decision upon a prior appeal was conclusive on a second appeal where the question presented on the second appeal was necessarily involved in the prior decision. *Hutchinson v. Chil-* 34 L. R. A.

cago & N. W. R. Co. 41 Wis. 541; *Downer v. Croes*, 3 Wis. 371; *Bangs v. Strong*, 4 N. Y. 815; *Headley v. Challise*, 15 Kan. 602; *Crockett v. Gray*, 31 Kan. 346; *National Park Bank v. Haas*, 49 N. Y. S. R. 772; *Hollowbush v. McConnell*, 12 Ill. 208; *Eversdon v. Mayhew*, 85 Cal. 1.

And where the same questions were necessarily involved, and the conclusion declared could not have been reached without either expressly or impliedly deciding such questions. *Forgeron v. Smith*, 104 Ind. 246.

And where the same question must have been considered upon the prior appeal. *Milbank v. Jones*, 51 N. Y. S. R. 616.

And where the same questions were expressly or by necessary implication decided on the first appeal. *McKinney v. State*, Nixon, 117 Ind. 28.

And where the same question was involved in the former writ of error. *Board of Education v. Parsons*, 24 W. Va. 552.

And where the same question was involved in the prior decision, although not discussed in such decision. *Joslin v. Cowee*, 56 N. Y. 626.

And where the same question was necessarily passed upon in the first appeal although not adverted to in the opinion. *Williams v. Rogers*, 14 Bush. 776.

And where such prior decision in its meaning and effect held that payments of encumbrances should be treated as payments on the price of land, although the question did not appear to have been formally raised or considered on the former appeal, and on the second trial it was insisted that the payments should be treated as set-off. *Stuart v. Heiskell*, 36 Va. 191.

And where the same question was involved, and granting a new trial on one issue only excludes all other questions. *Pratt v. Boston Heel & L. Co.* 134 Mass. 300.

And where the same question was directly and expressly or by implication and in substance disposed of by such appeal. *Camden v. Werninger*, 7 W. Va. 523.

And where the legal effect of the facts in each appeal was the same although not identical. *Amaden v. Atwood*, 63 Vt. 322.

And where the same question was involved, it was said that the remedy for any errors must be through the legislature. *Luning v. State*, 1 Chand. (Wis.) 266.

And where the same question was involved, although the case was reversed upon another question. *Adams v. Fisher*, 75 Tex. 657.

And where the same question was involved, although a part of the former opinion was not applicable to the second decision because certain evi-

tention now is that, notwithstanding that decision, the last clause of the section is valid, and that no action can be maintained unless the plaintiff, within six months from the date of the injury, filed in the office of the city clerk a statement of the time, place, nature, and circumstances of the injury, and the names of the witnesses. The amended petition avers that the injury was sustained January 21, 1886, and that the statement was filed July 28, or more than six months thereafter. There are averred other facts, by which it is sought to excuse the delay. This feature will be considered separately. The petition and proof both show that no statement was filed within the period required by the statute, and it is in this respect that the city claims that the petition and proof are defective.

The first opinion in the case related solely to that portion of the section providing a special period of limitations, but in the opinion the

following language was used: "Questions, no doubt, will arise as to the validity of the provision requiring notice of the names of the witnesses, etc., to be given to the city council at the time the claim for damages is filed. But that matter does not properly arise in this case. While it is proper to present the names of such witnesses to the city authorities, in order that the validity of the claim may be investigated, yet it is believed that the failure to do so will not defeat a recovery, although it may affect the question of costs." While by this language there is ventured an intimation that the action would lie notwithstanding the failure to file a statement, the court expressly states that the question was not involved in the record as then presented. Since the last hearing of the case in this court it has been decided that a provision almost identical in the charter of cities of the first class having more than 25,000 inhabitants, is valid, and that the filing of the statement re-

dence in the first trial was not in the second. *Murphy v. Hays*, 56 N. Y. S. R. 835.

And where the question was necessarily involved in the prior decision. But questions which had not been submitted and were subsequently raised may be examined on second appeal. *Green v. Springfield*, 180 Ill. 520.

And where the prior decision was by the supreme court on a question reserved by the superior court, and the same question was involved, or should have been presented. *New Haven & N. Co. v. State*, 44 Conn. 376.

See further, *Clary v. Hoagland*, 6 Cal. 685, and *Champaign County v. Reed*, 106 Ill. 389, subd. b; *Great Western R. Co. v. Hawkins*, 18 Mich. 427, and *Forester v. St. Louis, I. M. & S. R. Co.* 28 Mo. App. 123, subd. i; *Warren v. Raymond*, 17 S. C. 163, subd. n; *Clews v. Bank of New York Nat. Bkg. Asso.* 105 N. Y. 393, subd. r.

g. As to matters of estoppel.

The general doctrine of estoppel applies on a subsequent appeal, where a party attacks a prior decision as to points on which his conduct of the case was the controlling element.

So, the decision on a former appeal was held conclusive in a subsequent appeal, where the questions made on the second appeal by an attempt to correct the record had been decided on the former trial as though the record was before the court. A party who presents a defective record is concluded by the decision thereon. *Adams v. Horsfield*, 14 Ala. 223.

And where the same question was involved, whatever might now be said of the conclusion then reached. "It does not lie in the mouth of the same party now to shift his position, and adopt a different view, and to put the circuit court in the wrong, merely because it tried the cause upon a theory which we had laid down for it, which theory was pressed upon us by the party who now complains of it." *Hill v. Morris*, 21 Mo. App. 256.

And where concessions were made on the former trial that controlled, even if the concessions were improperly made, by the party who afterwards questioned the same. *Henry v. Quackenbush*, 48 Mich. 415.

See also *San Francisco v. Spring Valley Waterworks*, 53 Cal. 606, subd. q.

h. As to matters of jurisdiction.

The failure to raise the question of jurisdiction on or before the prior appeal will prevent a party from raising that question on a subsequent appeal. Although there is an Illinois case to the contrary, it has been in effect overruled.

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So, the decision upon a prior appeal was conclusive on the second appeal, where the question presented was one of jurisdiction, as such questions must have been involved in the prior appeal. *Clary v. Hoagland*, 6 Cal. 685.

And where the facts were the same. It was insisted that the trial court did not have jurisdiction, but that question was before the court on the prior appeal, and was necessarily determined in remanding the case. *Champaign Company v. Reed*, 106 Ill. 389.

And where the first appeal was upon a ruling on an instruction, and the second appeal questioned the jurisdiction which was involved in the prior case. The fact that the reversal of the case was placed on other grounds was conclusive that the supreme court first entertained the opinion that the objection to the jurisdiction of the district court was untenable. (But notwithstanding this the supreme court discussed the question of jurisdiction.) *Clarke v. Lyon County*, 8 Nev. 181.

And where after the term of the first decision a motion was made to admit an administrator as a party, and to change the mandate showing that the suit had abated. Whether the prior decision was right or wrong after the mandate was sent down, it was too late to question the jurisdiction of the lower court. *Noonan v. Bradley*, 79 U. S. 12 Wall. 121, 20 L. ed. 279.

And where an attempt was made for the first time to question the jurisdiction of the court in the original suit. *Whyte v. Gibbs*, 61 U. S. 20 How. 542, 15 L. ed. 1018.

And where it was attempted to question the jurisdiction of the circuit court after the mandate from the supreme court. *Skinner v. May*, 10 U. S. 6 Cranch, 297, 3 L. ed. 220.

And where it was attempted to question the jurisdiction of the circuit court in the original case, which had been determined by the supreme court. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 51 Fed. Rep. 329, 5 U. S. App. 97.

And where it was attempted on the second appeal for the first time to question the jurisdiction of the justice of the peace in the original suit. The question of jurisdiction, if available on the prior appeal, could not now be taken advantage of. *Rutherford v. Lafferty*, 7 Ark. 402.

But in *Temple v. Anderson*, 9 Ill. 548, the decision upon a prior appeal was not conclusive upon the second appeal, where the first decision was upon the question as to the sufficiency of the declaration, and the point made upon the second appeal was that the court had not jurisdiction because process was sent into another county, and the declaration did not show where the action accrued or

quired is a condition precedent to maintaining the action, and must be alleged and proved. *Lincoln v. Grant*, 38 Neb. 369; *Dayton v. Lincoln*, 39 Neb. 74. In *Lincoln v. Grant* there was cited on behalf of the contention that the statutory provision was not mandatory the language we have quoted from the first opinion in this case; and the court in the opinion in the *Grant Case* observed that this language was a mere dictum, and so intended. The opinion in the *Grant Case* was concurred in by the author of the opinion in 23 Neb.; so it is manifest that the court did not in the latter opinion undertake to decide the question. So far as any express decision or actual consideration of the question is concerned, it has never arisen in this case, and, following the decision in *Lincoln v. Grant*, the question must be solved in favor of the contention of the city, unless by implication it has formerly been otherwise resolved in this case, and unless, further, the court is bound by

such implied decision so far as this case is concerned, notwithstanding its deliberate judgment to the contrary in the *Grant Case*. The defendant in error contends that there has been such an implied decision, and that this court is so bound. To this contention counsel address an argument of great technical force, supported by very respectable authority. Referring to the decision in 23 Neb., it will be remembered that the case was there presented to reverse the overruling of a demurrer to the answer. It is a familiar rule of pleading, repeatedly enforced by this court, that a demurrer brings up for review not only the pleading demurred to, but all prior pleadings, and judgment on the demurrer must go against that party who is guilty of the first defect. *Bennet v. Hargus*, 1 Neb. 419; *Hower v. Aultman*, 27 Neb. 251. Regarding this rule, it is therefore clear that the city on the first hearing could have invoked the aid of that clause of the statute we are now considering

the residence of the parties, and the plaintiff in error in the last case had not waived his privilege.

The case of *Semple v. Anderson*, *supra*, was cited and approved in *Orle v. Turpin*, 3 Ill. App. 453, to the effect that a court will not go behind its former adjudication even though it shall appear upon the record that the court acted without jurisdiction; but this was not the decision of the court in the *Semple Case*, and was the discussion of the decisions in cases quoted, and the contrary was directly decided in the case of *Semple v. Anderson*.

In *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439, the rule was laid down that the jurisdiction of the superior court will be presumed, and to this extent *Semple v. Anderson*, *supra*, and a large number of prior cases in Illinois to the contrary, were overruled. The effect of this would be that a plea to the jurisdiction should be made in order to raise the question.

See also *Magwire v. Tyler* ("Tyler v. Magwire"), 84 U. S. 17 Wall. 232, 21 L. ed. 533; *Dilworth v. Curtis*, 139 Ill. 508; *Boone v. Shackelford*, 66 Mo. 438; *Washington Bridge Co. v. Stewart*, 44 U. S. 3 How. 413, 11 L. ed. 658; *Fowler v. Bishop*, 32 Conn. 129, subds. m, n.

1. As to defective appeals.

A decision under a prior appeal, which is ineffectual owing to technicalities, as defective record, not taken in time, or failure to assign error and the like, has been held conclusive upon the same matter disposed of in that appeal.

So, the decision upon a prior appeal was conclusive on the second appeal where the prior decision affirmed the judgment of the trial court for failure to serve copies of the case and points. The proper mode in the second appeal was to object to the court considering questions that might have been raised on the first appeal. *Schleuder v. Corey*, 30 Minn. 501.

And where an order striking out an answer as sham was affirmed for failure of the appellants to serve printed copies of the return, assignments of error and brief, and judgment for plaintiff having been entered the defendants appealed from that judgment. *Maxwell v. Schwartz*, 55 Minn. 414.

And where the first appeal affirmed a case for want of assignment of error and on the second appeal the evidence would have entitled to a different result, but it was held that the affirmance precluded any other decision. *Miller v. Bernecker*, 46 Mo. 194.

And where there was no assignment of errors going to the rulings of the chancellor, although Ala. Code, § 683, provided that the supreme court in deciding the case, when there is a conflict between its existing opinion and any former rulings 34 L. R. A.

in the case, must be governed by what in its opinion at that time is law, without regard to such former ruling. *National Commercial Bank v. McDonnell*, 32 Ala. 387.

And so where the first appeal was from a final decree, which was affirmed, and the second appeal was from subsequent proceedings, but more than twelve months from the rendition of the decree. Ala. Code, § 683 a, providing that a prior appeal shall not be binding in case of error, does not apply to such a case. *Stoudenmire v. De Bardelaben*, 85 Ala. 85.

And where the supreme court had decided otherwise, since the prior decision and the pleadings on the second appeal did not squarely present the question for decision. *Stevenson v. Edwards*, 96 Mo. 622.

See also *Schleuder v. Corey*, 30 Minn. 501, subd. n.

1. As to cross-appeals.

A decision upon a prior appeal is conclusive, where a subsequent appeal is taken on cross-appeal, if the prior decision disposes of the question presented on the cross-appeal.

So, the decision on a prior appeal was conclusive on a second appeal where the question on the second appeal should have been presented by cross-appeal at the first decision. The supreme court will not try a case by instalments. *Still v. Anderson*, 63 Miss. 545.

And where the defendant appealed in the first case, and the second appeal was by the plaintiff below, who should have prosecuted a cross-appeal on the first appeal. He cannot resist an appeal and obtain an affirmance of his decree and thereafter prosecute an appeal from a portion of the decree which he insisted should be affirmed. *Caston v. Caston*, 54 Miss. 512.

And where a bill for an injunction for infringement of a patent was answered on two grounds, first that the complainant was not the inventor, and, second, that respondent used the machine under a license. The court below sustained the last defense and entered a decree dismissing the bill, and the complainant appealed, and the case was reversed, and the defendant thereafter appealed for failure to sustain the first defense; but this objection was made on the first appeal and was considered by the court, although not a part of the first decree. *Corning v. Troy Iron & N. Factory Co.*, 56 U. S. 15 How. 451, 14 L. ed. 768.

And where the defendant filed no cross bill of exceptions against the allowance of an amendment of the declaration, and a judgment granting a new trial to the defendant was affirmed on the prior appeal, and on the second trial the verdict was for

against the demurrer to its answer, and that a decision on the lines of the *Grant Case* would have resulted in the affirmance of the judgment on the ground that the petition was defective for not pleading a compliance with the last clause of the section. It may then be fairly said that the court, by sustaining the demurrer to the answer, impliedly held that the petition did state a cause of action, and that it was therefore not necessary to plead, and consequently not necessary to prove, a compliance with the provision we are considering. So, again, on each of the other occasions when the case was before this court, similar considerations would have led to the affirmance of the judgments in favor of the city on the ground that, notwithstanding any of the errors which in fact led to a reversal, the judgment was the only one which could have been rendered under the pleadings and proof. We think, therefore, that the

plaintiff in error has quite clearly established the proposition that the question under consideration, had it been presented, would have controlled any of the former decisions; and that the court may be said to have already three times impliedly decided the question now before us in favor of Foxworthy, although on no occasion was that question in fact considered or actually decided.

The argument having advanced thus far, the defendant in error invokes the application of a rule, which has been frequently announced by appellate courts, that a ruling once made in a case by an appellate court, while it may be overruled in other cases, is binding both upon the inferior court and upon the appellate court itself in all subsequent proceedings in the original case, and that in such subsequent proceedings neither the lower court nor the court making the ruling can depart from such ruling.

plaintiff, and the questions presented on the second appeal were as to the allowance of the amendment of the declaration. *Story v. Brown* (Ga.) 25 S. E. 562.

And where the bill was amended on remanding, but the questions presented were the same, and the attorney general was made a party defendant, who prosecuted a cross-appeal from the second decree. On remanding the case on the first appeal the court should have dismissed the bill in conformity with the prior decision. *Newberry v. Blatchford*, 106 Ill. 564.

And where the questions settled were the same, it was said that the court had neither the power nor the inclination to review its former decision, as this could only be obtained on a petition for a rehearing. A party cannot by filing a cross bill after a prior decision obtain a reconsideration of the same question that he made in his answer and which was decided on the first appeal. *Norton v. Moshier*, 114 Ill. 146.

But the decision on a prior appeal was not conclusive on the second appeal where the case was reversed upon cross-error and the appellant assigned upon the second appeal the same errors assigned upon the first appeal, and which were not passed upon in the prior decision, even though he waived them by failure to argue them on the first appeal, and there was no decision upon the merits. *Cook v. Moulton*, 64 Ill. App. 429.

And where the plaintiff failed to take a cross-appeal on the first appeal, and his amended petition was rejected, and he obtained a judgment, and on the second trial the amended petition was refused and the judgment was for the defendant, and the amended petition was not passed upon in the first appeal. *Smith v. Bogenschultz*, 14 Ky. L. Rep. 307.

And where the prior judgment in the court below was in favor of the defendant, and the plaintiff appealed upon the judgment roll without any bill of exceptions, and after remanding, the judgment was entered in favor of plaintiffs, and the defendant prosecuted a second appeal with a bill of exceptions, as Cal. Code Civ. Proc. § 960, required the appellant from the judgment only to bring up the judgment roll and a bill of exceptions or statement in the case upon which he relies; hence the respondent was precluded upon the prior appeal from having any consideration by the court of errors, which, if the judgment had been adverse to him, might have been sufficient for a reversal. Even though a bill of exceptions containing these errors had been settled, it would not be considered by this court upon an appeal from a judgment in his favor. *Klauber v. San Diego Street-Car Co.* 98 Cal. 105.

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See also *Rice v. Wheatly*, 9 Dana, 271, subd. b; *Matthews v. Sands*, 29 Ala. 136, subd. n.

K. Where prior decision is not final.

A decision that is not intended to be final has been regarded as not concluding the parties on a subsequent appeal. But in Maryland, on remanding without reversing or affirming, an opinion expressed on points made before the court was held conclusive on final proceedings.

So, the decision on a prior appeal was not conclusive upon the second appeal, where the former decision simply remanded the case for another trial. The opinion or reasoning of the judgment in such a case was no part of it, and the judgment itself was not final between the parties and not conclusive. *White v. Downs*, 40 Tex. 225.

And where the prior decision was a judgment of the Illinois appellate court, reversing a judgment of the lower court and remanding a cause, and was not final, and the subsequent appeal was from a later judgment of the superior court to the supreme court, as no appeal could be taken from the former judgment. *Chicago Bd. of Trade v. Nelson*, 162 Ill. 431.

And where the question of damages was not passed upon by the supreme court in reversing a judgment for the recovery of possession of land. *Busby v. Mitchell*, 29 S. C. 447.

And where the defendant on the first appeal in a criminal case obtained a "reversal" because the crime charged was not sustained by the record, and on the reversal the court discharged the defendant on his motion, and the state prosecuted a writ of error from such ruling. The reversal in effect only granted the defendant a new trial. *State v. Newkirk*, 49 Mo. 472.

And where the prior decision simply reversed the judgment for reasons therein stated, as on a new trial different questions might be presented. "We are no more bound by that opinion of the court as to the law laid down than in any other case, between other and different parties. The rule in a chancery case would be different, where the decree made could settle the rights of the parties upon the facts of the record." *Bynum v. Apperson*, 9 Helak. 632.

And where the first appeal from an order denying a new trial was dismissed and the second appeal was from a judgment entered on the verdict, and the question might have been, but was not raised on the prior appeal. The abandonment of plaintiff's appeal from an order denying a motion for a new trial did not prevent the plaintiff from raising any question on appeal from the judgment, which he could have raised had the first appeal

A ruling so made is said to become "the law of the case." As a preliminary to the discussion of the application of the rule to this case, it may be well to review the former decisions of this court, and ascertain to what extent it has committed itself to the doctrine contended for. In *Hiett v. Brooks*, 17 Neb. 83, the court stated the rule in the syllabus as follows: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." The opinion contains no discussions of the rule, but only a statement that the court would adhere to the views expressed in the former opinion, followed by the statement that it would be inadmissible to review the

grounds of such opinion, now that the trial court has obeyed the order before made, with the result logically following. No authorities are cited in the opinion, but the statement of the rule in the syllabus is followed by a citation of "*Phelan v. San Francisco*, 20 Cal. 45, quoted in *Wells' Res Adjudicata*." From this method of citation it would seem probable that the court had not consulted the decision cited, but only the text-book; and from the summary method on which the opinion disposed of the question it is evident that it was not one considered very important to the disposition of the case. In *O'Donohue v. Hendrix*, 17 Neb. 287, the case had already been before the court, and this language was used in the opinion: "The first and third objections were considered on the former hearing, and decided against the plaintiff. No motion for a rehearing was filed, nor was any objection made to the decision of the court. Those questions, therefore,

never been taken. Had the order been affirmed on the merits or under the rules of court all questions that might have been raised would be conclusive. But a dismissal of the appeal did not have this effect. *Adamson v. Sundby*, 51 Minn. 460.

And where the prior appeals were from a judgment sustaining a demurrer to a complaint, and another from an order granting a new trial after a judgment of nonsuit, and the third was only from an order denying a new trial. The court on the last appeal was limited to a consideration of a review of the action of the court upon the ground upon which the new trial was held. The court said: "Nor are we required upon this appeal to determine what is the law of the case, as established by the opinions upon the former appeals, or whether the allegations of the complaint were sustained by the evidence offered at the trial, as neither of these questions has any relevancy in determining whether the court committed error in admitting or excluding evidence, or made its findings of fact without sufficient evidence to support them." *Wheeler v. Bolton*, 22 Cal. 159.

And where the questions presented on the second appeal might have been made upon the prior appeal under Cal. Penal Code, § 1237, providing for an appeal from a judgment and from an order denying a new trial, and the former appeal was from a judgment alleging errors in instructions, and the second appeal was from an order denying a new trial. The true rule is that the defendant may prosecute both appeals, but can have but one decision of the same point, and in this case the questions now raised as to instructions were not presented on the prior appeal from the judgment. *People v. Thompson* (Cal.) 46 Pac. 912.

And where two appeals were allowed by law in the same case, one from the judgment and the other from the order denying a new trial; and the fact that the rule of law was declared in deciding the appeal first reached for decision, and upon which no action could be taken until the second appeal was disposed of, did not prevent the court from deciding the second appeal, and modifying or wholly changing its former decision. *Sharon v. Sharon*, 79 Cal. 633.

And where, on the prior appeal, the supreme court affirmed an order granting a new trial, which was granted on the ground that the verdict was not sustained by the evidence. *Moore v. Murdock*, 26 Cal. 514.

In *Mahan v. Wood*, 44 Cal. 462, the supreme court held that a note sued upon was void for want of consideration, and reversed the judgment and remanded the case for a new trial. On a retrial the lower court granted a new trial (evidently after a

trial and findings in favor of the defendant), and an appeal was taken from the order granting a new trial. On the second appeal, in 79 Cal. 258, it was affirmed and held that although principles decided on a prior appeal were conclusive on a second appeal, and the evidence was the same on both appeals, yet, as there were no findings of fact on the second appeal, they having been set aside, the parties had a right to a judgment of the trial court upon conflicting evidence as to the facts. The supreme court could not say what the facts were without usurping the functions of the trial court.

And where the mandate was but the expression of the opinion of the court upon the case as then presented, and how it must be ultimately determined if no supervenient facts should be brought on to the record, and was not intended to be absolute and conclusive. *Filint v. Johnson*, 59 Vt. 190.

But the decision upon a prior appeal was conclusive upon a second appeal where the cause was remanded without reversing or affirming, and the court of appeals expressed an opinion on points made before that tribunal, or which was presented by the record, as this controlled subsequent proceedings. *Dennis v. Dennis*, 15 Md. 73.

See *Campbell v. Campbell*, 22 Gratt. 649, subd. m; *Ryan v. Tomlinson*, 39 Cal. 639; *Johnson v. Bailey*, 17 Colo. 59; *Kimball v. Semple*, 25 Cal. 455, subd. r.

I. As to matters of pleading.

It is generally held that a prior decision is conclusive upon a second appeal, where such decision settles a principle of law upon a pleading, although it may arise in a different manner subsequently in the case; and this has been applied to a dismissal of a complaint, or a refusal to dismiss the same, or the sufficiency of the complaint, or where pleadings are similar, or where the amendments are not supported by evidence. On the question of demurrer the majority of the cases hold that a decision on demurrer becomes the law of the case where the same question subsequently arises, although it may be presented in a different form. To this there are some exceptions, one in Vermont, but changed since by statute, and one in Tennessee, where the decision did not show the precise ground for the ruling. On the question as to the effect of a decision of the prior appeal on instructions, and a second appeal by the opposite party as against the plaintiff's pleadings, there is some conflict.

So, the decision upon a prior appeal was conclusive upon the second appeal, where the prior decision directed the complaint to be dismissed with costs. *Mellen v. Mellen*, 47 N. Y. S. R. 980.

And where the prior decision held that a com-

will not now be again considered. *Hiatt v. Brooks*, 17 Neb. 38." In *Leighton v. Stuart*, 19 Neb. 546, a quotation is made from the former opinion in the same case, followed by this language: "In *Hiatt v. Brooks*, 17 Neb. 38, it was held, and I think correctly, that," etc. (quoting the syllabus in *Hiatt v. Brooks*). The court then adds that there is no doubt, independent of this principle, that the conclusions of law already arrived at were correct. The rule in *Hiatt v. Brooks* was invoked in support of the decision of questions of fact in *Lane v. Starkey*, 20 Neb. 546, and the court there held that the rule must be applied only to the decision of legal principles, but that it did not require the following of former decisions on questions of fact. In *Marion v. State*, 20 Neb. 238, 57 Am. Rep. 825, there is no reference to the doctrine in the syllabus, but certain conclusions reached on a former appeal of the case were adhered to, the following being

the only reference to the subject in the opinion: "We adhere to our former holdings upon this part of the case, both upon the ground that we believe them to be correct, and for the further reason that, having been so decided in this case on its previous hearing, . . . it has become the law of the case;" citing *Hiatt v. Brooks* and *Leighton v. Stuart*. In *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740, the language of the syllabus in *Hiatt v. Brooks* is quoted in the syllabus. In the opinion the following is the only language addressed to the subject: "This point was distinctly presented in this case when it was first before this court, and distinctly decided. Under the well-known rule of *stare decisis*, that decision remains the law of this case." It may be here remarked, that in *Hiatt v. Brooks* the court refers to the principle of *res judicata*, while in *Chicago, B. & Q. R. Co. v. Hull* it is referred to the doctrine of *stare decisis*. In *Meyer v. Shamp*, 26-

plaint was erroneously dismissed. *Morrison v. Metropolitan Teleph. & Teleg. Co.* 56 N. Y. S. R. 387.

And where the prior decision held that a petition for an order of sale of real estate stated a cause of action, and that a nonsuit should not have been allowed. *Re Couts's Estate*, 100 Cal. 400.

And where the question on the prior appeal was as to the sufficiency of the complaint, and that evidence should have been admitted, and the same question was presented on the second appeal. *Tanderup v. Hansen* (S. D.) 68 N. W. 1073.

And where the pleadings remained unchanged, and the same question was presented. *Auburn Opera-House & P. Assn. v. Hill* (Cal.) 45 Pac. 645.

And where the question was upon the pleading, and upon the second trial the pleading was substantially the same. *Roundtree v. Turner*, 38 Ala. 555.

And where the pleading was the same, which was held on the prior appeal to be insufficient. *Lincoln v. Ragsdale*, 9 Ind. App. 555.

And where the first decision held that an action was barred by limitation and the complaint was not amended on the second trial. *Taylor v. McLain*, 64 Cal. 518.

And where the second trial was substantially the same without any change in the pleadings, and the majority of the court on the second appeal regarded the question as conclusively settled. *Western U. Teleg. Co. v. Smith* (Tex. Civ. App.) 30 S. W. 937.

And where the same question was settled and there were no changes of the issue or other circumstances of the case. *Minnesota Linseed Oil Co. v. Moninger*, 65 Iowa, 67.

And where no new question was presented by the amendment or by the evidence. *Roome v. Jennings*, 64 N. Y. S. R. 880.

And where the pleadings were amended but did not materially change the issues. *Thompson v. Hawley*, 16 Or. 251; *Johnson v. Hoeford*, 110 Ind. 572; *Logansport v. Humphrey*, 106 Ind. 146.

And where the matters set up in an amended pleading, which was refused, were the same as those considered on the prior appeal. *Lewis v. Lewis*, 11 Ky. L. Rep. 413; *Agnew v. Brall*, 25 Ill. App. 190; *People v. Holladay*, 102 Cal. 661.

And where the prior decision was on the merits, and the amendment to the complaint stated no new facts. *Baker v. Brickell*, 102 Cal. 620.

And where the former suit was against a justice of the peace carelessly entering judgment against a party, and the second appeal was on an amended complaint charging fraud. *Kress v. State*, *Wagoner*, 65 Ind. 106.

And where the complaint had been amended so 34 L. R. A.

as to present the question of estoppel, the court saying: "We adhere to our former decision, and hold that there is no estoppel." *Excelsior Brick Co. v. Haverstraw*, 50 N. Y. S. R. 518.

And where the facts were the same, and the amended pleadings were not sustained by additional evidence. *Wilkinson v. Merrill*, 56 Cal. 550.

And where the same question was presented. But new matter presented by amended pleadings may be examined. *McDonald v. Green*, 9 Smedes & M. 138.

The decision on a prior appeal was conclusive on the subsequent appeal where the prior decision was on a demurrer and presented the same question. *Star Wagon Co. v. Swezy*, 63 Iowa, 620; *Ellis v. Northern P. R. Co.* 80 Wis. 459.

And where the prior decision was upon the sufficiency of the complaint on demurrer, which decision became the law of the case in all subsequent proceedings. *Bartholomew County Comrs. v. Jameson*, 56 Ind. 154; *Wise v. Williams*, 68 Cal. 30; *Daniels v. Andes Ins. Co.* 2 Mont. 500; *Barker v. Laney*, 7 App. Div. 352; *Walker v. Daly*, 84 Wis. 322; *Oshkosh Fire Dept. v. Tuttle*, 50 Wis. 552.

And where the first decision was on a demurrer to a bill and the question presented on the second appeal on bill, answer, and evidence did not substantially change the case. If the case was an original one it might be different. *Bane v. Wick*, 6 Ohio St. 13.

And where the prior decision was a final judgment upon a demurrer to a bill, and a subsequent bill was filed presenting the same question. *Smith v. Horneby*, 70 Ga. 553.

And where the amendment did not materially change the question, and the prior decision was on a demurrer to a complaint. *New Pittsburgh Coal & C. Co. v. Peterson*, 14 Ind. App. 634.

And where the first decision was on a demurrer to a bill, and construed a will, and on remanding the case an answer was filed relying on a decree of another state where the testator was domiciled at the time of his death, and which decree was the reverse of the decision on prior appeal. But the plea did not show that a partition had taken place and title to the property had been perfected under the foreign decree. *Bridgeforth v. Gray*, 39 Miss. 136.

And where the same question was presented in regard to the construction of a will, and the prior decision was on the same complaint on demurrer. But as to any new question not considered or decided the same was open. *Brown v. Critchell*, 110 Ind. 31.

And where the prior decision was on demurrer for insufficiency of the complaint, and the second appeal was from a ruling on the motion for a new

Neb. 739, the rule is stated in the syllabus as follows: "A judgment or ruling of this court in a case or point distinctly and finally made will be held to be the law of the case in which made, throughout its course of litigation, without regard to the number of times it may be brought before the court, or to the intrinsic merits of such judgment or ruling." The court refers to *Hiatt v. Brooks* and several of the cases we have already cited, and says that the rule there stated "is believed to be the law."

The foregoing comprises, we believe, all that has ever been said by this court on the subject. Of these decisions we have the following observations to make: In the first place, in each case, either by the language employed or by the adoption by citation of the language in *Hiatt v. Brooks*, the rule was limited to rulings formerly made on points distinctly presented for decision. Inasmuch as the plaintiff in error here, as we have seen,

can invoke only an implied decision, and not one on any point distinctly made on the former hearings, we do not think that any of the cases cited by its terms controls this case. A further observation is that, notwithstanding the repeated statements of the rule, there has never been in any case a discussion of its correctness, or a reason advanced for its application. In the third place, it twice, at least, appears from the opinions that, notwithstanding the rule, the court had reconsidered the questions presented by the former appeal, and believed the former ruling to be correct; and in no case has any doubt been expressed as to the correctness of the former decision. In other words, the court has never yet been confronted with the problem which we are now facing,—that of overruling a former decision in the same case, or else abiding by it, because of the doctrine stated, although such former ruling was manifestly wrong, and opposed to the later deci-

trial, and the complaint was again questioned on error assigned. *Armstrong v. Harshman*, 93 Ind. 37.

And where the prior decision was on demurrer to the petition, and the question on the second appeal was on a motion on arrest of judgment on the same ground. *Haridan v. Central Iowa R. Co.* 69 Iowa, 327.

And where the questions settled were the same, and this rule prevailed although the questions raised in the subsequent proceedings were made in a different way by excepting to the conclusion of facts, and the prior decision was on a demurrer to complaint. *Braden v. Graves*, 85 Ind. 82.

And where the prior decision was on a demurrer, and the judgment could not have been reached without expressly or impliedly deciding the question presented on the second appeal. *Learned v. Castle*, 78 Cal. 458.

And where the prior decision was on a demurrer to a declaration, as this must of necessity have construed the contract upon which the action was brought. *Norfolk & W. R. Co. v. Mills*, 91 Va. 612.

And where the prior decision was upon a demurrer, and involved the same question of the statute of limitations. *Clay Dist. Twp. v. Buchanan Independent Dist.* 69 Iowa, 58.

And where the prior decision was on a demurrer to a pleading, and the second decision was in regard to evidence involved in the demurrer. *Aetna L. Ins. Co. v. Pleasant Twp.* 53 Fed. Rep. 214; *Merrill v. Merrill*, 102 Cal. 817.

And where the prior decision on demurrer held that an answer presented a valid defense, and the court below on the second trial erroneously refused evidence tending to sustain the same. *Ferry v. Hammond*, 50 Cal. 22.

And where the prior appeal was from a judgment sustaining a demurrer, and the second appeal was from a judgment on the merits involving the same question. *Brown v. Pontiac Min. Co.* (Mich.) 3 Det. L. N. 212.

And where the prior decision was on a demurrer to a complaint, and was made by a divided court. *Lathrop v. Knapp*, 37 Wis. 307.

And where the former decision was on a demurrer to a complaint, and this was the rule whether the prior decision was sound or unsound. *Oshkosh Fire Dept. v. Tuttle*, 50 Wis. 552.

And where the prior ruling was upon a demurrer. The court said: "This court has held that it is not absolutely bound by its former adjudication, though rendered upon a previous appeal in the same case; but it is expressly decided that only in exceptional cases will a former ruling be departed
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from, upon the same question, when presented a second time in the same case." *Bomar v. Parker*, 68 Tex. 435.

And where the first decision was upon a demurrer to a declaration to set aside a judgment for want of notice, and the point made upon the second appeal was that the judgment could not be set aside as it was founded on a just demand. The declaration having been held sufficient without regard to the justice of the demand, that question could not be made on the second trial. *Sawyer v. Cross*, 68 Vt. 616.

In *Hazen v. Smith*, 2 Tyler (Vt.) 59, the decision upon a prior appeal was not conclusive upon the second appeal, where the first decision was the review of the cause decided upon a demurrer. "The case of the review of a judgment rendered on an issue at law cannot compare with a writ of error brought to reconsider a bench decision, as a review supposes the cause not to have been sufficiently investigated." The declaration was held insufficient on the first hearing and was held good on the second. This case was not referred to in *Sawyer v. Cross*, *supra*.

In *Herriek v. Belknap's Estate*, 27 Vt. 699, the case of *Hazen v. Smith*, *supra*, was referred to, and distinguished on the ground that under the former practice in this court, before the right of review was taken away, the party upon review in this court was allowed, as a matter of right, to reargue the same question of law if he chose; but since 1825, when reviews in this court were abolished, every decision of a question of law is conclusive upon a particular case.

The decision upon a prior appeal was conclusive upon the second appeal, where the prior decision overruled a demurrer to a bill of complaint, and approved an award made by the court of arbitration, and made a final decree upon the question of estoppel, and the same question was afterwards made by excepting to a referee's report. *Grommes v. Theime*, 13 Lea, 320.

And where the decree upon the prior appeal overruled a demurrer to a bill, and the question presented on the second appeal from an order dismissing the bill was involved and disposed of in the decision on the prior appeal, and the question had become *res judicata*. *McNairy v. Nashville*, 2 Baxt. 251. But see *Battle v. Street*, *infra*.

And where the prior decision was upon a demurrer to a bill, and Tennessee special statute provided for appeals from decrees overruling demurrers, and the object of such an appeal was to obtain a final adjudication of the question raised by the demurrer, and such a decree was final and raised the question of jurisdiction which was in-

sions of the court. Had the court on former occasions entertained any doubt of the correctness of the ruling on the first appeal, it can hardly be that such doubt would have been thrust aside without a consideration of the reason for the rule requiring it to be thrust aside, and the statement of some reason in support of such a rule. In a sense, therefore, all the statements which we have quoted may be said to be *obiter*, and we feel not only at liberty, but required, now, when the application of the rule for the first time would demand adherence to a decision manifestly wrong, to carefully examine the subject, even though such examination may lead to a modification of a rule of practice which has obtained for many years.

In this discussion, before examining the question upon principle, we shall endeavor to examine it in the light of the authorities, and

ascertain how the doctrine arose, and to what extent it has received the support of other courts. In *Hiatt v. Brooks* it was expressly adopted from *Phelan v. San Francisco*, 20 Cal. 45, and in all subsequent cases it has been based solely upon the authority of *Hiatt v. Brooks*. It may be said, then, that we have adopted the doctrine from California, and we shall look first at the decisions of that state. The case in which we first find the rule announced in California is that of *Dewey v. Gray*, 2 Cal. 374. It would seem from the report that the case had once before been before the supreme court, but we have been unable to find the first decision reported. The action was one for rent, to which it was pleaded that the landlord had re-entered before the expiration of the lease, and relet the premises to another. The court says that it before held that the re entry and reletting discharged

involved in that decision. *Jameson v. McCoy*, 5 Helsk. 108.

But in *Battle v. Street*, 85 Tenn. 282, it was held that a decision on a prior appeal was not conclusive upon the second appeal, where the prior decision in general terms simply overruled a demurrer and remanded the case for further proceedings without filing an opinion, and the decision did not show the precise ground for the ruling. Such a decree adjudicated only that there was sufficient equity upon the face of the bill to require an answer; citing on the last proposition *Rodgers v. Dibrell*, 6 Lea, 69, and *Kirkpatrick v. Utley*, 14 Lea, 97, and saying: "In so far as these cases differ from the earlier cases of *McNairy v. Nashville*, and *Jameson v. McCoy*, *supra*, they necessarily modify the earlier opinions."

In *Collins v. North British & M. Ins. Co.* 91 Tenn. 422, it was held that a prior decision upon a demurrer to a bill of complaint on an insurance policy, holding that the action was barred by limitation, was conclusive upon a subsequent appeal upon an answer raising the same question as to the bar of limitation. This case does not refer to the prior decisions, and may be regarded as establishing the rule in Tennessee that upon a subsequent pleading a prior decision upon a demurrer on the same question would be conclusive.

The decision upon a prior appeal was conclusive upon the second appeal where the same question was involved in that decision and on the second appeal the question was as to the sufficiency of the declaration, and the first appeal was by the plaintiffs below and the judgment was reversed for erroneous instructions, and they could not have been injured by erroneous instructions if the declaration would not have justified a recovery. *Great Western R. Co. v. Hawkins*, 18 Mich. 427.

And where the same question was presented, but the court on second appeal passed on the sufficiency of the plaintiff's petition, although the former appeal reversed the judgment because of an erroneous instruction on the merits. *Senate v. Chicago, M. & St. P. R. Co.* 57 Mo. App. 223.

And where the question as to the sufficiency of the plaintiff's statement in the second appeal was necessarily involved on the rulings on instructions in the first appeal. *Forester v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 123.

And where the same question was presented. It was conceded that the former appeal was not conclusive on the question of capacity of plaintiff to sue where the first decision was reversed for error in instructions, and the point decided was whether a common carrier carried goods under a special or general contract. *Hance v. Wabash & W. R. Co.* 63 Mo. App. 60.

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But the decision on a prior appeal was not conclusive on a second appeal where the question in the first appeal was as to ruling on the instructions, and the question on the second appeal was as to the sufficiency of the petition, and a ruling upon the petition had not been asked on the prior hearing. *Lampert v. Laclede Gaslight Co.* 14 Mo. App. 376.

And where the judgment was reversed on prior appeal with directions to the lower court to sustain a demurrer to the complaint, and on the second appeal matters of estoppel were added to the complaint by amendment, although such matters were set up in the answers before the first appeal but the evidence given on the first trial was not before the court on that appeal. *Cluggish v. Koons* (Ind. App.) 43 N. E. 158.

And where the points presented on the prior appeal were not the same, and the decision on appeal did not conclusively determine incidental or collateral questions, and the decision upon the sufficiency of the complaint would not determine subsequent questions on evidence unless substantially the same. *Union School Twp. v. First Nat. Bank*, 102 Ind. 464.

As to demurrer, see *Linton Coal & M. Co. v. Persons* (Ind.) 43 N. E. 651, subd. b; *Wheeler v. Bolton*, 22 Cal. 159, subd. k; *Rinard v. West*, 22 Ind. 359, subd. n.

As to pleading, see *Gwinn v. Hamilton*, 76 Cal. 265, subd. q.

m. As to injunctions and interlocutory orders.

In regard to injunctions and interlocutory orders, where the decision upon a prior appeal is on the same facts as those presented on the second appeal, or where the decision on the first appeal is a final decree, the same is conclusive. But where new facts are shown or new questions presented, the same is not conclusive.

So, the decision upon a former appeal was conclusive upon the second appeal, where an interlocutory order was affirmed and the transcript was the same on the second appeal except the addition of final judgment in accordance with the decision. *Wilmington & W. R. Co. v. Alsbrook*, 110 N. C. 437.

And where the former decision held that a complaint did not entitle an injunction granted upon the complaint alone, and the second judgment was rendered on the trial of the case of the same complaint. *Moulton v. Knapp*, 28 Cal. 444.

And where the second decision was rendered on a bill and answer, and the former appeal was from an interlocutory decree dissolving the injunction on the answer, and the record on the second appeal presented no material fact or question not consid-

the tenant from his covenant, with the exception that the landlord was still entitled to recover any rent which had accrued at the time of the re-entry. Then follows this remarkable language: "The latter portion of that decision is in abrogation of one of the plainest principles of law, and, if this case was a new one, I would not hesitate to overrule it; but legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and is not now the subject of revision." The sole authority cited in support of this radical statement is *Washington Bridge Co. v. Stewart*, 44 U. S. 3 How. 418, 11 L. ed. 658, a case which we shall show hereafter is not in point, and depends upon entirely different principles, which the California court, as well as others, seems to have overlooked. Hardly less remarkable than the language here used is the fact that it was manifestly *obiter*. The jury had found a ver-

dict for the plaintiff for the full amount of the rent claimed. Under the instructions, this involved a finding that there had been no re-entry; so it was entirely immaterial to the decision of the case whether in case of a re-entry, recovery could be had for rent accrued to that time. But behold to what length a too rigid adherence to the doctrine of *stare decisis* may lead us! In *Clary v. Hongland*, 6 Cal. 695, the action was one of forcible entry, and had begun in the county court, where judgment had gone in favor of the plaintiff. The supreme court reversed the judgment, and remanded the cause for a new trial. The case was again presented to the supreme court on certiorari to review proceedings wherein the county court had, by mandamus, commanded its clerk to issue a writ on the original judgment. A motion to dismiss the writ was denied, and a rehearing was allowed on the question as to whether the former judgment was conclusive on the parties,

ered on the first appeal. *Maulden v. Armistead*, 30 Ala. 480.

And where the prior decision held that the complaint was insufficient and did not sustain the judgment, and the second appeal was from an order denying a motion to dissolve a preliminary injunction upon the complaint, which was not amended. *Pister v. Wade*, 50 Cal. 273.

And where the first appeal was on an interlocutory order. If the party failed to complain of error in the decree, he would be excluded from assailing the same, and Va. act June 28, 1870, amending Code, chap. 182, § 23, providing that the appellate court shall affirm or reverse a judgment decree or order, does not authorize any interference with the decree rendered upon the former appeal. Every decree of this court is a final decree so far as the principles of that case are concerned, even though it be on an appeal from an interlocutory order. *Campbell v. Campbell*, 22 Gratt. 649.

And where the same question was involved, although it was admitted that the general rule was that a decision upon an order as to an injunction was not decisive upon the final hearing; but on the prior appeal from an order continuing an injunction there were no disputed facts, and the question involved was the constitutionality of the validity of an act, and the second decision on that question could not be different without overruling the prior decision. *Rogers v. Rochester*, H. & P. C. R. Co. 21 Hun, 44.

But in *Trinity County v. McCombs*, 25 Cal. 117, it was said that the decision on an appeal would not be conclusive upon a second appeal, where the first appeal was taken from an order refusing to dissolve a preliminary injunction and the order was reversed, if on the second appeal a new state of facts should be shown.

And where the former decision was upon an order granting a temporary injunction to restrain the collection of a judgment, and such decision determined nothing as to the merits of the case, and only held that the complaint assuming its allegations to be true in point of fact was sufficient to support the injunction, and on the trial of the case judgment was rendered for the defendant. *Beaudry v. Felch*, 47 Cal. 183.

As to questions which might have been made on prior appeal.

As to questions which should have been presented on the prior appeal, or which should have been made on the prior trial of the case before it was presented on the prior appeal, the decision then made is conclusive. But in *Missouri and Indiana* there is some conflict of the cases, and in the latter 34 L. R. A.

state the rule is now that the law of the case is limited to the point expressly decided.

So, the decision upon a prior appeal was conclusive upon the second appeal where the same question presented should have been urged on the prior appeal. *Gray v. Dickinson*, 11 Ky. L. Rep. 990; *Davis v. McCorkle*, 14 Bush. 746; *Brasfield v. Baugh*, 7 J. J. Marsh. 830; *Bassett v. Shepardson*, 57 Mich. 428; *Richardson v. Richardson*, 100 Mich. 354; *Malmgren v. Phinney* (Minn.) 67 N. W. 649; *Mason v. Mason*, 5 Bush. 187; *Tilleny v. Wolverton*, 54 Minn. 75; *State v. Speaks*, 95 N. C. 689; *Findlay v. Trigg*, 88 Va. 539; *Effinger v. Kenney*, 79 Va. 551; *Dennis v. Kass*, 18 Wash. 137; *Pearce v. Germania Ins. Co.* ("The Lady Pike"), 96 U. S. 461, 24 L. ed. 672; *Roby v. Calumet & C. Canal & D. Co.* 154 Ill. 190; *Pitkin v. Shacklett*, 117 Mo. 547.

And where the question presented existed on the record in the appeal, and could have been considered if presented. *Pollock v. Cohen*, 32 Ohio St. 519.

And where the errors assigned upon the second appeal should have been presented and were necessarily involved on the first appeal. *Warren v. Raymond*, 17 S. C. 163; *Wolverton v. George H. Taylor & Co.* 167 Ill. 485.

And where the questions presented on the second trial might have been and should have been presented on the prior appeal before a decree was made which was absolute. *The Santa Maria*, 23 U. S. 10 Wheat. 442, 6 L. ed. 361.

And where the only question in the case was as to a rate of interest. Questions that should have been made by exceptions to previous rulings could not thereafter be made. *Ellis v. Sanders*, 34 S. C. 238.

And where on the prior trial the question was tried on the issue of usury, and on the second appeal the question was made of tender, which was inconsistent with the order remanding on the first trial, and should have been made on the first appeal. *Doyle v. Sanford*, 26 Ill. App. 155.

And where the question of jurisdiction might have been raised when the case was before the court upon the first writ of error. *Magwire v. Tyler* ("Tyler v. Magwire"), 84 U. S. 17 Wall. 282, 21 L. ed. 583; *Dilworth v. Curtis*, 139 Ill. 508; *Affirming Phelps v. Curtis*, 38 Ill. App. 93.

And where the appellant failed to raise the question of jurisdiction of the trial court until the second appeal, and then to have sustained the question would have barred all claim by reason of limitation. *Boone v. Shackelford*, 64 Mo. 497.

And where the prior decision affirmed, by a divided court, the judgment of the court below, and it was insisted on the second appeal that the su-

the supreme court having in the meantime determined that in such case the district court had no appellate jurisdiction, and the case having been first brought to the supreme court through the district court by an attempted appeal. Here, it will be observed, the court was called upon to say whether or not in subsequent proceedings in a case the parties and the court were bound by a decision announced in an appeal over which the supreme court had no jurisdiction. The court again cited *Washington Bridge Co. v. Stewart*, and carried the doctrine of *Dewey v. Gray* to its logical conclusion, holding that, although it had no jurisdiction in such cases, still, having in this particular case entertained jurisdiction, the parties were bound by the result. Not only this, the question of jurisdiction was not raised on the former hearing, but the court said that it must always be implied that a court at the very first decides the question of its jurisdiction, and, hav-

ing entertained the case on its merits, the question of jurisdiction must be considered as having been decided, although not in fact raised or considered. In *Davidson v. Dallas*, 15 Cal. 75, the doctrine was again stated very nearly in the language in which it appears in some of the Nebraska cases. *Dewey v. Gray* is quoted at length, and, in addition thereto, there are cited *Washington Bridge Co. v. Stewart* and several other cases in the supreme court of the United States. Also *Hosack v. Rogers*, 25 Wend. 318; *Stiver v. Stiver*, 3 Ohio, 19; *Booth v. Com.* 7 Met. 286, and *Russell v. La Roque*, 18 Ala. 151. Only one of these cases, we shall undertake to show, was in point. The case we are considering is, however, noteworthy as being one of a very few cases in which the court has attempted to give a reason for such a rule of law, and the reason given is that, after a mandate, the appellate court loses jurisdiction over the case, and that questions decided

preme court had not jurisdiction on the first appeal, as it was discovered that the appeal was from an interlocutory order, and not a final decree. The question should have been made on the first appeal. *Washington Bridge Co. v. Stewart*, 44 U. S. 3 How. 413, 11 L. ed. 658.

In *Fowler v. Bishop*, 32 Conn. 199, where the question had been reserved by the superior court and decided by the supreme court at a prior hearing and came up on error again, the supreme court said that on all questions that could have been presented on the prior hearing the defendant should be concluded. But the court then proceeded to discuss the question of jurisdiction of the superior court and of the supreme court, which was really involved on the prior hearing.

The decision on a prior appeal was conclusive upon a second appeal where the first decision held that evidence of a mortgage on property before the assignment of a policy should have been admitted, and on second trial it was contended that it should not have been admitted because the assignment was with the assent of the company. This question should have been made before. But the court discussed the question as though it was not *res judicata*. *Ellis v. State Ins. Co.* 68 Iowa, 578-56 Am. Rep. 865.

And where the questions involved were the same, or where the matters presented on the second appeal should have been presented on the first appeal, as where on the first appeal the court sustained a tax deed on certain grounds, upon the second appeal without new issues the deed should not be held invalid. *Smyth v. Neff*, 123 Ill. 310.

And where upon an appeal from an order denying a new trial, the order was affirmed under Minnesota supreme court rules 14 for failure of the appellant to serve copies of the case and of his points, the questions that might have been presented on the prior appeal were *res judicata* on the second appeal. *Schleuder v. Corey*, 30 Minn. 501.

And where error that might have been assigned existed prior to the former decision, and was not presented for review. *Rehmyer v. Odell*, 45 Ill. App. 616; *Union Mut. L. Ins. Co. v. Kirchoff*, 51 Ill. App. 67, Affirmed 149 Ill. 536; *Hook v. Richeson*, 115 Ill. 431; *Henry v. Davis*, 13 W. Va. 252; *Hobson v. Doe*, *Harper*, 4 Blackf. 499; *Brooks v. Brooks*, 16 S. C. 621; *Meredith v. Clarke*, *Sneed* (Ky.) 189.

And where, on a prior writ of error, the defendant in error had pleaded that there was no error in the record, and the judgment had been affirmed, and the errors alleged on the second appeal existed before the first appeal. *Booth v. Com.* 7 Met. 285.

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And where the errors complained of occurred before the first decision. But as to errors since the first decision, they might be reviewed. *Smith v. Brittenham*, 94 Ill. 624.

And where it did not appear that the matters presented differed from those alleged in the former action, or which then existed and might have been alleged, or that they were not within the knowledge of the plaintiff when the action was tried. *Guest v. Brooklyn*, 79 N. Y. 624.

And where the matters were the same and should have been put in issue in the former proceedings. *Watkins v. Lawton*, 69 Ga. 671.

And where the error alleged occurred prior to the former appeal. All errors not assigned will be considered as waived, and cannot afterwards be urged. *Union Mut. L. Ins. Co. v. Kirchoff*, 149 Ill. 536.

And where the same question was involved, and it was said that matters once determined could not be reopened, and this was true whether actually adjudicated or not. If they could have been adjudicated in that suit they were settled. *Carter v. Hough*, 39 Va. 508.

And where the case had been remanded with directions as to the decree that should be entered. The appellant cannot assign errors on the second appeal that occurred prior to the first appeal. *Ogden v. Larrabee*, 70 Ill. 510.

And where the prior decision refused to set aside a sale and sent back the case for further proof before confirmation, and an attempt was made on the second trial to have the sale set aside by reason of evidence that should have been and was not used on the first trial. *Hill v. Hoover*, 9 Wis. 16.

And where the prior decision confirmed a sale, and on the second trial it was attempted to be set aside by reason of evidence that should have been used on the first trial. *Pierce v. Kneeland*, 9 Wis. 24.

And where on the prior appeal the sale was set aside, and subsequently the trial court upheld the sale for matters which existed before the prior decision although the prior decision had reversed the judgment and remanded the case for further proceedings, but at the same time and in the same decree the sale was set aside. The trial court had no jurisdiction to ignore any part of the prior decision. *Hill v. Draper* (Ark.) 37 S. W. 574.

And where the facts were the same. It was said, not only the facts which were formerly pleaded, but those which might have been known with proper diligence, were included with all questions growing out of them in the prior judgment, and that the court had no power to interfere with such judgment. *McWilliams v. Walthall*, 77 Ga. 7.

And where the plaintiff took the first appeal from

leading to the judgment and mandate constitute a final adjudication. This reason is undoubtedly sound as applied to a certain class of mandates, as is illustrated in a class of cases which the California court has considered as supporting its doctrine. But we cannot see how it is applicable to a mandate reversing a case, and remanding it for a new trial. In the latter case the whole case is tried anew, and nothing is settled by the first appeal beyond the fact that the first trial was erroneous, and that all the issues must be tried again. The case of *Phelan v. San Francisco*, 20 Cal. 40, being the only case which our court has cited in support of the doctrine, states it in the language of the syllabus in *Hiatt v. Brooks*, citing *Davidson v. Dallas*; but there is no discussion of the doctrine. In the same volume, however, appears the case of *Leese v. Clark*, 20 Cal. 388, where Judge Field delivered the opinion of the court, and again stated the doc-

trine. He says that the court entertained no doubt of the correctness of the former decision; then cites *Dewey v. Gray*, and the other California cases, and three of the cases cited in *Davidson v. Dallas*. The reason is stated to be that the court, by its mandate, abandoned jurisdiction of the first appeal, and lost the power to modify its judgment therein expressed. A number of California cases later than the 20th might be cited supporting the contention of Foxworthy. It will not be necessary to review them. It is sufficient to say that the California court has by repeated decisions adhered to that doctrine, and that all these cases fairly support Foxworthy's contention. Inasmuch as our cases, if adhered to, based as they are on the authority of California, would require a decision herein in favor of Foxworthy, we have reviewed the cases down to the 20th, at which point our court adopted their doctrine, for the purpose of

a judgment discharging a garnishee, and the judgment was reversed and the fund held liable, and the second appeal was by a claimant of the fund who was a party to the former appeal, and should then have claimed that the attachment was void in its face, although the prior decision was erroneous. It was said that the second decision would not bar another appeal by the garnishee or defendant under Ala. Code, § 2555, providing for an appeal by the defendant or garnishee. *Matthews v. Sands*, 29 Ala. 126.

But the decision upon a prior appeal was not conclusive upon the second appeal, where the question involved was an erroneous instruction, although the same instruction was in the first bill of exceptions, but it was not directly called in question and made a ground of complaint on the first appeal, and was not discussed or decided. *Haynes v. Trenton*, 123 Mo. 226.

And where the error in the second appeal was an instruction on the theory of abandonment in forcible entry, and a similar instruction was in the record of the prior appeal, but no special objection was made, and that question was not discussed upon the prior appeal. *Walser v. Graham*, 60 Mo. App. 323.

In *Davis v. Krug*, 95 Ind. 1, the decision on a prior appeal was not conclusive upon the second appeal, where the question might have been but was not decided and considered on the first appeal. The court cites the cases sustaining the proposition that the prior decision was conclusive upon the second appeal upon the questions decided, and says: "The law of the case, thus limited to the point decided, is approved. But this does not preclude us from deciding questions which might have been but were not considered and decided, as the case was presented on the first appeal. Such claim seems to us unreasonable although we are aware that it is supported by many respectable authorities, and even by the language used in some of the reported opinions of this court."

So, the decision upon a prior appeal was not conclusive on a second appeal where upon the prior appeal the complaint was held good upon demurrer, but on the second appeal other defects were shown which were not discussed or considered upon the prior appeal. *Rinard v. West*, 92 Ind. 359.

And where the prior decision was reversed because it did not appear to be by the consent of parties, and a supplemental cross bill was filed after the case was remanded, setting up that the decree was by consent, although this question could have been presented on the original appeal by a plea of release of errors. *Hogerson v. Fanning*, 38 Ill. App. 326.

And where the question was not decided on the prior appeal and there was some change in the evidence, although the point made upon the second appeal might have been and was not raised on the prior appeal. The circuit court of appeals rule 24, requiring counsel on both sides to specify the grounds upon which they will rely, either for a reversal or for an affirmance, limits the questions decided on such appeal to the points made. *Belch v. Haas*, 78 Fed. Rep. 974. See further, *Klauber v. San Diego Street Car Co.* 98 Cal. 105, subd. 1; *Adamson v. Sundby*, 51 Minn. 460; and *People v. Thompson* (Cal.) 46 Pac. 912, subd. k.

o. As to excessive verdicts.

Some cases hold that the fact that a verdict was held excessive on a prior appeal is not conclusive as to the amount on the second appeal, although one case regards an increased verdict as a contempt of the decision.

So, the decision upon a prior appeal was not conclusive upon the second appeal where the prior decision required a reduction of the verdict to \$2,000, and upon the second trial the verdict was obtained for \$4,000, as it could not be said in the last case that the jury acted with prejudice. *Holmes v. Jones*, 60 Hun. 346.

And where on a prior appeal the plaintiff was required to remit a part of his verdict before a new trial would be granted, and he refused to remit, and a judgment was obtained larger than that to which the former remission would have reduced it, the former decision cannot be urged as binding. *Ibid.*

In *Mahar v. Simmons*, 47 Hun. 479, where the prior decision set aside a verdict of \$200 as excessive, and on the second trial on the same facts the verdict was increased to \$750, and appeared to be in contempt of the advice of the supreme court, the court refused to accept this verdict, saying: "If the verdict had been the same it would have indicated that the appellate court was mistaken in supposing it to be unjust, or that it was inexpedient to prolong the litigation, and if the plaintiff will reduce the verdict to \$200 it will be allowed to stand."

p. Change of court.

That the former decision was made by one court and the last appeal was to a court succeeding the same, or where the members of the same have changed, will not prevent the prior decision from being conclusive.

So, the decision upon a prior appeal was conclusive upon the second appeal where the same question was involved, although the second court was not the same but the successor of the prior

showing that they originated in California in an *obiter dictum*, and that California traces the doctrine to certain cases in the Supreme Court of the United States and elsewhere, which do not support the doctrine; and for the further reason of showing that the California court has given a reason for its decisions applicable to those cases which it cites, and furnishing a sufficient ground for those decisions, but which does not in any way apply to the cases decided in California, or to such a case as the one now before us. The California doctrine is not without support in the decisions of some other states. In *Russell v. La Roque*, 18 Ala. 149, the opinion opens as follows: "This cause has been tried before this court, and the rules applied to it then is the law of it now." In better English, but just as bluntly, the same court said in *Thomason v. Dill*, 84 Ala. 175, that propositions laid down on a former appeal "are the law of this case, and must not

be lost sight of." In neither case was any doubt expressed as to the correctness of the former decision, and there is no discussion of the rule announced.

In *Rector v. Danley*, 14 Ark. 804, the opinion opens with a statement that it is a settled doctrine that a decision made when the cause was in the court before is the law of the case, and nothing then determined can be reviewed. Here, again, no authority is cited and no reason is given. Precisely of the same nature is the case of *Mynning v. Detroit, L. & N. E. Co.* 67 Mich. 677. The doctrine has also been adopted in Indiana, the rule being stated there also, unaided by argument or authority. *Kress v. State, Wagoner*, 65 Ind. 106; *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 110 Ind. 225; *Continental L. Ins. Co. v. Houser*, 111 Ind. 266. The doctrine also receives apparent support in the cases of *Hill v. Hoover*, 9 Wis. 16, and *Pierce v. Kneeland*, Id. 19, although both of those

court. *Plymouth County Bank v. Gilman*, 3 S. D. 170; *Spicer v. Norton*, 13 Barb. 542.

And where the same question was involved, and the first decision was rendered by the supreme court of the District of Columbia, and the second appeal was to the court of appeals, which succeeded to the jurisdiction of the former court. *Holcomb v. Dearing*, 24 Wash. L. Rep. 236.

And where on former trial a defeasance of a right of way was established for nonuser, and on the second trial an attempt was made to show an intent to resume the use, although since the former decision there had been an entire change of the members of the appellate court with one exception. *Hickox v. Chicago & C. S. R. Co.* 94 Mich. 237.

In *Ten Eyck v. Whitbeck*, 60 Hun. 450, on a second appeal the court said, although the members of the court have changed, yet on the same case it could hardly be expected that a different conclusion could be reached. "If we are not concluded by the former determination the opinion may be deemed an authority," and under the circumstances the court is not called upon to discuss the case, and then the court discusses the case.

q. As to effect of dicta.

The general rule is that a decision which is an *obiter dictum* is not conclusive, and so held in Alabama, Arkansas, California, Missouri, Vermont, and Federal courts. But decisions on issues made on a former appeal, that were not necessary to the question disposing of the appeal, have been held conclusive, where the party insisted on a decision on a particular question, and where a pleading was construed.

So, the decision on a prior appeal was not conclusive on the second appeal where on two prior appeals a lease was regarded and treated as valid by all the parties and by the court, and on the last trial was held void for want of proper acknowledgment. *McLeran v. Benton*, 73 Cal. 329.

The decision upon a prior appeal was conclusive on the second appeal, where the matters were the same, but was not conclusive as to *dictum* of the former case. *Jesse v. Cater*, 28 Ala. 475; *Price v. Price*, 23 Ala. 609.

The decision upon a prior appeal was not conclusive on the second appeal where the former decision was an *obiter dictum*. *Wixson v. Devine*, 80 Cal. 386; *Mulford v. Estudillo*, 82 Cal. 131.

And where the question on the second appeal was passed upon in a *dictum* of the prior case, and was not in issue, and was made subsequently by amended pleadings. *Clark v. Hershey*, 52 Ark. 473.

And where an opinion was expressed not at all

material to the decision, and was a *dictum*. *Barney v. Winona & St. P. R. Co.* 117 U. S. 223, 29 L. ed. 858.

And where the question on appeal was the validity of an instruction, and the court passed on the sufficiency of evidence, which was only an *obiter dictum*, and the sufficiency of evidence was not a direct question with which the court was dealing, and the court did not intend in passing on the sufficiency of evidence to foreclose the trial court from declaring it insufficient to establish a prima facie case. *Mattingly v. Pennie*, 105 Cal. 514.

And where the question was decided by mere implication from the general disposition of the case, or was merely collateral to the matter actually considered. To the general rule that the prior decision was *res judicata*, the Missouri cases have made exceptions. *Gwin v. Waggoner*, 116 Mo. 143.

And where the appellate court made a suggestion as to a mode of relief which was acted on by the lower court, but which suggestion was not equivalent to a declaration of law and was not on a question actually in issue in the prior appeal. *Meeker v. Swift*, 45 Mo. App. 183.

And where what was said by the court was outside of the record, and was not presented to the court for its decision, and was not necessary to a decision of the question involved. *Chicago, S. F. & C. R. Co. v. Swan*, 120 Mo. 30.

But the decision upon a prior appeal was conclusive on the second appeal where the error assigned was the refusal to transfer the case to the equity docket and the question was considered by the court in appeal, although not disposed of by the opinion rendered. *Com. v. Tate*, 17 Ky. L. Rep. 1045.

And where a party on the former appeal insisted on an opinion which as to that appeal might have been only a *dictum*. (This is really on the ground of estoppel.) *San Francisco v. Spring Valley Waterworks*, 53 Cal. 608.

And where the decision was upon a point which arose in the case, although it was not necessary to the disposition of the appeal. The former judgment was reversed because a part of the demand was barred by limitation, and the court held in addition that the complaint stated a cause of action. *Gwinn v. Hamilton*, 75 Cal. 265.

In *Hosack v. Rogers*, 25 Wend. 313, the question was made as to the effect on a second appeal of an *obiter dictum* on the first appeal. Four of the members of the court were divided on the question, and were the only members who took part in the discussion. The second appeal was affirmed by a vote of eleven to eight.

cases might have been solved under a strict and correct application of the doctrine of *res judicata*. Of the same character is the case of *Hopkins v. Hopkins*, 40 Wis. 462. In none of these cases was the first reversal general, but the cause was remanded with certain features finally adjudicated, so that they could not again properly arise in the further proceedings in the case. In *Stacy v. Vermont C. R. Co.* 32 Vt. 551, the court, while intimating some doubt as to the correctness of the doctrine, states that it had been so long established that it will not be departed from; but also states the reason for it to be, in the first place, that the former decision has the same weight as authority as a decision in another case, and, in the second place, that it is an adjudication between the parties. The latter reason is the only one which could be advanced for holding the decision conclusive upon the court; and the Vermont court says that it is not conclu-

sive as a matter of law, because the court may revise and reverse it. Thus this case is, after all, ambiguous, leaving the former decision in scarcely any stronger position than a decision of the same question between other parties. In *Simple v. Anderson*, 9 Ill. 546, the rule seems to be for the first time in Illinois announced, and the court cites in support of its conclusion the cases in the Supreme Court of the United States cited by the California court, and *Booth v. Com.* 7 Met. 286. As we have already stated, we shall show that these cases are based upon a different principle, which is illustrated by the case of *Hol'oubush v. McConnel*, 12 Ill. 203. In that case the opinion was by Judge Trumbull. On the former appeal the cause had been remanded for certain specified proceedings, not remanded for a new trial generally. In the inferior court an effort was made to relitigate the questions which had been finally determined by the first appeal,

r. Where the questions are different.

The rule is clear that where the facts are different so that the principles of law announced on the first appeal are not applicable, as, where there are material changes in the evidence or pleadings or findings, a prior decision is not conclusive upon questions presented on the second appeal and are only conclusive so far as the principles are applicable.

So, the decision upon a prior appeal was not conclusive upon the second appeal, where the evidence materially changed the question of contributory negligence, and negligence on the part of the defendant. *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67.

And where the pleadings were amended and the evidence was different. *Greenberg v. California Bituminous Rock Co.* 107 Cal. 667.

And where upon the second trial the evidence was materially different. *Fellows v. St. Louis Bridge Co.* 45 Ill. App. 589; *Central R. & Bkg. Co. v. Smith*, 80 Ga. 526; *McNamara v. Pengilly* (Minn.) 67 N. W. 661; *Hart v. Delaware, L. & W. R. Co.* 76 Hun, 226; *Walker v. Cole* (Tex. Civ. App.) 27 S. W. 832.

And where the previous decision, which granted a new trial, was based upon an erroneous translation of a document, and the correct translation was presented on the second appeal. The binding ruling of the prior decision can only be invoked when the fact appears under the same circumstances in which it was originally presented. *Nieto v. Carpenter*, 21 Cal. 455.

And where the evidence in the first appeal was not in the record, and it was not shown that it was the same in both cases. *Société des Mines v. Mackintosh*, 7 Utah, 35.

And where the first decision held that the deceased was a passenger and on the second trial the evidence was different. *Chicago, St. P. M. & O. R. Co. v. Bryant*, 65 Fed. Rep. 990, 27 U. S. App. 681.

And where the judgment was reversed and the cause remanded and new evidence was introduced on the second trial, and it was not apparent that the opinion of the supreme court was intended to be a final disposition of the cause. *Ryan v. Tomlinson*, 39 Cal. 639.

And where the case made upon the second appeal was an entirely different one from the prior one, under an order opening the case upon the issues. *McLennan v. Prentice*, 85 Wis. 427.

And where the evidence materially differed in many respects so far as any legal principle was involved. The prior decision was conclusive as to matters common to both cases. *Lane v. Starkey*, 20 Neb. 566.

And where the evidence was materially different, 34 L. R. A.

It was said that the principles of law established on former appeal, so far as applicable, remain the law of the case through all its subsequent stages, and must be adhered to whether right or wrong. *Ohio & M. R. Co. v. Hill*, 7 Ind. App. 255.

And where the evidence as to an agreement on the first trial was uncertain and ambiguous, and on the second trial on a supplemental pleading the evidence was clear and direct. *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503.

And where the first decision was that when nothing appeared but a mortgage and a quitclaim, the mortgage title would be regarded prima facie as merged in the quitclaim, and the second trial overcame this presumption by showing a different intention. *Stantons v. Thompson*, 49 N. H. 275.

And where the first decision held that the judgment was against the weight of evidence, and there was a trial without a jury, and on the second trial there was a jury, and there was a change in the witnesses. *New York Small Stock Co. v. Third Ave. R. Co.* 16 Misc. 64.

And where new and different facts were presented, requiring the application of a different rule of law from that applied on the former appeal. *Bloomfield v. Buchanan*, 14 Or. 181.

And where the question presented on the first appeal was in regard to the facts on conflicting evidence, and there was a different state of facts on the second appeal. *Wallace v. Sisson* (Cal.) 45 Pac. 1000.

And where there was an essentially different state of facts. *Baxter v. Rollins* (Iowa) 68 N. W. 721; *Ocean S. S. Co. v. Cheeny*, 95 Ga. 381; *Elston v. Kennicott*, 52 Ill. 272; *Mitchell v. Davis*, 23 Cal. 381; *People v. Hamilton*, 108 Cal. 496.

And where the facts were different, and the opinion was not intended to be *res judicata*, but remanded the case for a trial *de novo*. *Johnson v. Bailey*, 17 Colo. 59.

And where the same questions were not again presented on the same state of facts. *McKinlay v. Tuttle*, 42 Cal. 570.

And where a different question was presented, and the pleadings were amended and what was said in the former opinion only applied to the facts as disclosed. *Burton v. Perry*, 146 Ill. 71.

And where the pleadings were amended and the facts were not the same. *Cross v. Zellerbach*, 63 Cal. 623; *Heldt v. Minor*, 113 Cal. 385; *Chickering v. Failles*, 29 Ill. 304; *Pressley v. Lamb*, 105 Ind. 171; *Green v. McDonald*, 13 Smedes & M. 445.

The decision upon a prior appeal was conclusive upon the second appeal where the facts were the same; but while the prior decision held that a judgment of divorce was void for want of jurisdiction,

and which were not within the scope of the mandate. The court properly held that these issues were *res judicata* and cited *Washington Bridge Co. v. Stewart*, 44 U. S. 8 How. 418, 11 L. ed. 658, which is in point on this proposition. Unfortunately, however, in *Cook v. Norton*, 61 Ill. 285, the court, on the sole authority of *Hollowbush v. McConnel* applied the doctrine to a case remanded generally for a new trial, losing sight of the distinction between a final order adjudicating an issue and an order remanding a case for a new trial throughout, leaving all issues still undetermined. Later Illinois cases have followed the doctrine in *Cook v. Norton*, the question not seeming to have ever again been examined on its merits.

We have now referred to the decisions of all states which, in our opinion, lend either actual or apparent support to the doctrine of the California court. We have seen that in every case the rule first originated in a bald dictum without the support of reason or argument, or else it was based on the authority of certain cases in the Supreme Court of the United States, or of New York, Massachusetts, and Ohio. The New York case cited is *Hosack v. Rogers*, 25 Wend. 318. This was a case before the court for the correction of

errors. A doctrine somewhat akin to that here contended for is stated in the syllabus prepared by the reporter. There is only one opinion supporting that view; three adverse thereto. The vote of the court was eleven to eight for affirmance, and it nowhere appears that that vote was because a majority of the court agreed with the one member who advanced the "law of the case" doctrine, except by a note of the reporter to the effect that it was "generally understood" that, but for the principle of *stare decisis*, the judgment would have been reversed. The case of *Booth v. Com.* 7 Met. 285, often cited in support of the doctrine, was where a judgment had been affirmed, and the plaintiff in error undertook to sue out a second writ of error from the same judgment. The court, of course, held that this could not be done; but we cannot see how, by any stretch of the imagination, the rule here contended for can be discovered as involved in that question. The case of *Stier v. Stier*, 8 Ohio, 19, is also cited. But that case merely held that a bill in chancery would not lie to correct a judicial error. *Polock v. Cohen*, 82 Ohio St. 514, was precisely like *Booth v. Com.*

The cases most frequently cited as supporting the doctrine are, however, those in the

the second appeal on an amended pleading showing an estoppel might require a different judgment. *Israel v. Arthur*, 18 Colo. 169.

So, the decision upon the prior appeal was conclusive upon the second appeal where the facts involved were the same: but when the judgment was reversed for defective pleading and proof, and an amendment was made presenting new facts, the decision was not applicable. *Castagnino v. Balletta*, 82 Cal. 250.

The decision on a prior appeal was not conclusive on a second appeal where the question then presented was not necessarily involved in the first decision. *Clews v. Bank of New York Nat. Bkg. Assn.* 106 N. Y. 398.

And where the same question was not presented. *Thompson v. White*, 78 Cal. 381.

And where the former decision declared a trust and directed a partition, and on the partition proceedings it was disclosed that the ancestor's title was devised under a deed of trust made by him in his lifetime, and the question in the second appeal was admitting that a trust was established, it was defeated by the deed of trust. *Kingsbury v. Buckner*, 70 Ill. 514.

And where the prior decision did not settle the question in regard to boundary lines that were presented on the second appeal. *Pearl v. Pittman*, 15 Ky. L. Rep. 16.

And where the prior decision only held a tax deed not invalid on account of the description, and another question was made on the second trial. *Anderson v. Hancock*, 64 Cal. 455.

In *Baker v. Baker*, 87 Ky. 461, where a case was reversed and came up on appeal on amended pleadings, the court did not discuss the effect of the prior decision.

In *Kimball v. Semple*, 25 Cal. 455, it was said that if we mistake the facts for evidence, it cannot injure either party in a new trial of the action, for in that forum the parties must again produce their evidence and have the facts found in the same manner as required at the first trial.

a. As to ambiguous decisions.

Where the prior decision is ambiguous, it is not conclusive.

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So, the decision upon a prior appeal was non-binding on a subsequent appeal, where this was the third appeal and the decision on the first and second were in conflict with each other. *Moore v. Barclay*, 28 Ala. 739.

And where such prior decision by inadvertence determined two principles of law standing in such opposition to each other as to be incapable of a harmonious construction. *Gage v. Downey*, 94 Cal. 241.

t. As to limited decisions.

Where the prior decision is limited by its express terms it will not be conclusive upon a second appeal except as to matters within the limitation.

So, the decision on a prior appeal was not conclusive on the second appeal as to the effect of *its pendens* where on a rehearing of the first decision the effect of the *its pendens* was expressly omitted from that determination. *Welton v. Cook*, 61 Cal. 481.

And where the court in expressing the former judgment waived an examination of the law in some of the exceptions, and did not examine or decide as to them. These exceptions may be re-examined. *Duval v. Farmers' Bank*, 9 Gill & J. 81.

And where the supreme court expressed an opinion upon an incomplete case, and carefully avoided passing finally upon the rights of the parties, and the second appeal was to the circuit court of appeals. *The E. A. Packer*, 58 Fed. Rep. 251, 14 U. S. App. 684.

See also *Mattingly v. Pennie*, 105 Cal. 514, subd. q; *Balch v. Haas*, 73 Fed. Rep. 974, subd. n.

u. As to decisions by a divided court.

A decision by a divided court has been held conclusive in some cases, but a case in New York holds the contrary.

So, the decision upon a prior appeal was conclusive upon a second appeal where on the prior appeal the members of the supreme court were equally divided upon one or more questions and the judgment was reversed upon other questions upon which the court agreed. The opinion of the judges who agreed with the court below on the question about which there was a division becomes

Supreme Court of the United States, and we shall now proceed to their examination. The first case in point of time is *Himely v. Ross*, 9 U. S. 5 Cranch, 313, 3 L. ed. 111. This was an admiralty case. There had been an appeal, in which the sentence was reversed with a direction as to what the sentence should be, and an order remanding the case for the entry of a sentence in accordance with the opinion. For the purpose of entering such a sentence the circuit court referred the case to auditors, and there was an appeal from the auditors' report. In arguing this appeal Mr. Martin was about to open a question covered by the first appeal when Chief Justice Marshall remarked: "Nothing is before this court but what is subsequent to the mandate." It will be observed that the Chief Justice in effect stated that everything prior to the mandate had been adjudicated, and this was undoubtedly correct. The mandate did not send the case back for a new trial, or for a new hearing, but with specific instructions as to further proceedings. The propriety of such further proceedings was, therefore, finally adjudicated, and not involved in the second appeal. In *Skellern v. May*, 10 U. S. 6 Cranch, 287, 8 L. ed. 220, a cause had come to the supreme court from the circuit court for the district of Kentucky. The decree of that court had

been reversed, with directions to make partition. When the cause came up before the circuit court upon the mandate, it was discovered that the jurisdiction of the circuit court was not pleaded, and the case, again, came to the supreme court on a certificate of division as to whether the circuit court should then dismiss the cause for want of jurisdiction. The supreme court wrote no opinion, but merely entered an order that it was the duty of the circuit court to obey the mandate. This case certainly involved no question of the power of the supreme court to change its conclusion. It merely repeated to the circuit court what the mandate had already directed. The next case is the famous case of *Martin v. Hunter*, 14 U. S. 1 Wheat, 304, 4 L. ed. 97. The case had been brought to the Supreme Court of the United States on a writ of error to the court of appeals of Virginia. The supreme court had reversed the case and remanded it to the court of appeals, which refused to execute the mandate, on the ground that the Supreme Court of the United States had no jurisdiction. A writ of error was then taken to review the refusal of the court of appeals to obey the mandate, and it was argued that, if the supreme court had no jurisdiction of the first writ, all subsequent proceedings were void. To this the supreme court answered

the law of the case in all further progress of the case. *Smith v. Brannin*, 79 Ky. 114.

And where upon a prior appeal the case was affirmed because the court was equally divided, and such decision could not be changed even if the court was then disposed to change it. *Chahoon v. Com.* 21 Gratt. 822.

And where the same question was involved, although the prior decision was not the unanimous opinion of the court, but nothing new by way of reargument was presented. *Allen v. Colorado C. R. Co. (Colo.)* 43 Pac. 1015.

But the decision upon a prior appeal was not conclusive upon the second appeal where the members of the court were not unanimous in the former decision, and the reasoning of those who concurred was not in harmony, and the question was one of some doubt. *Oakley v. Aspinwall*, 13 N. Y. 600.

See also *Washington Bridge Co. v. Stewart*, 44 U. S. 3 How. 413, 11 L. ed. 658, subd. n; *Lathrop v. Knapp*, 37 Wis. 307, subd. l.

v. Statute and Constitution changing the rule.

In Alabama the statute prevents a prior decision from being conclusive.

So the decision on a former appeal was not conclusive on a second appeal where Ala. Rev. Code, § 3810, required the supreme court to disregard such decision if it was erroneous, and the adoption of this rule by an interior court was approved. *Moulton v. Reid*, 54 Ala. 320. See also *National Commercial Bank v. McDonnell*, 92 Ala. 387, and *Stoudemire v. De Bardelaben*, 85 Ala. 85, subd. l.

Missouri Const. art. 6, Amended Laws of 1888, p. 215, § 6, provides that when any one of the courts of appeals shall render a decision which any one of the judges therein sitting shall deem contrary to a previous decision of any one of said courts of appeals or of the supreme court, the court of appeals must of its own motion certify, the same to the supreme court, and the last previous rulings of the supreme court shall control.

w. Rule in intermediate courts.

The law of the case has generally been applied to cases where the prior decision was by the court of 34 L. R. A.

highest resort; but it seems that it is also applicable to intermediate courts, although there have been some decisions and intimations to the contrary.

The decision upon a prior appeal was conclusive upon the second appeal where the questions presented were the same. This applies to the judgments in the appellate court of Illinois as well as in the supreme court of Illinois. *Henning v. Eldridge*, 146 Ill. 805.

And where both appeals were in the Illinois appellate court, and the decision on the prior appeal was not criticized by the supreme court to which the case had been taken. *Kankakee Coal Co. v. Crane Bros. Mfg. Co.* 88 Ill. App. 555.

And where the prior decision was rendered by the supreme court of the territory of Utah, although it was contended that the territorial supreme court was not a court of last resort. The rule seems to be that when an appellant ceased to pursue his appeal from one appellate court to a higher, the decision of the court where he sees fit to rest is a final one within the meaning of the rule. *Silva v. Pickard (Utah)* 47 Pac. 144.

The contrary was decided in *Jungk v. Reed (Utah)* 42 Pac. 222, but the decision of *Silva v. Pickard*, *supra*, in effect overruled that decision without referring to the same.

In *Ogle v. Turpin*, 8 Ill. App. 458, it was held that the doctrine of *res judicata* applies to the appellate court of Illinois in regard to former decisions, although such court was not a court of last resort.

In *Lawrence v. Ballou*, 37 Cal. 518, it was said that the conclusiveness of a prior decision upon a subsequent appeal applies only to a court of last resort.

The decision upon a former appeal was conclusive upon the second appeal where the questions presented were the same. But the dissenting opinion said that the opinion of the Supreme Court of the United States, made since the former appeal upon a similar question, indicates that it would be useless to apply the rule of a decision which would not be regarded by the higher tribunal and prevents the former decision from being the "law of the case." *Carr v. Quigley*, 79 Cal. 130. I. T.

that the former record was not before it, and that the second writ of error did not draw in question the propriety of the first judgment. In *Hunter v. Martin*, 4 Munf. 1, the first mandate is set out at length, from which it appears that the supreme court remanded the case with directions to the court of appeals to enter a judgment for Martin. It will be observed that the first judgment of the supreme court was a final one upon the merits, constituting an adjudication of title. The cause was not remanded for a new trial, and no question had been left open. In the case of *The Santa Maria*, 23 U. S. 10 Wheat. 431, 6 L. ed. 359, the supreme court on the first appeal had entered a decree and issued a mandate to carry that decree into effect. Pending the appeal a claim had been interposed for insurance and other charges on the boat. On the second appeal this claim was resisted, on the ground that the petitioner was a *mala fide* claimant. The court remarked that no question could be raised which had been before the court on the first appeal; but that all new questions were opened for determination, and the whole record before the court for that purpose. This was another case of final adjudication by the first appeal. The matters there involved had not been reopened for a new hearing. *Sibbald v. United States*, 37 U. S. 12 Pet. 488, 9 L. ed. 1167, was a similar case. The case most frequently cited by the courts which have adopted the doctrine contended for by Foxworthy is *Washington Bridge Co. v. Stewart*, 44 U. S. 8 How. 415, 11 L. ed. 638. In that case an assessment had been made on the stockholders of the bridge company. Stewart and others, who were stockholders, did not pay, and the company undertook to forfeit their stock. Congress passed an act to purchase the bridge, whereupon these stockholders filed a bill in the circuit court for participation in the purchase money. The court entered a decree holding that the plaintiffs were still stockholders, but that, before division of the purchase money, certain other stockholders should be reimbursed from that fund for advances which they had made. The decree also ordered a reference to an auditor to state an account in accordance with the decree. An appeal was immediately taken from this decree, and the decree affirmed by the supreme court. The auditor then proceeded to state the account, after which a final decree was entered. An appeal was taken from this decree by the bridge company, which had also been the appellant before. The company undertook to question the propriety of the first decree on the ground that it was interlocutory merely, and therefore not appealable; and that the bridge company was not estopped by the decision on the first appeal. The supreme court held that, the bridge company having appealed from the interlocutory decree, and no exception having been taken to the jurisdiction, and the case having been decided on its merits, the parties were now estopped from alleging the want of jurisdiction, and that the first decree, affirming the interlocutory decree of the circuit court, constituted an adjudication of all matters therein involved. This case was like all the others. The refusal of the court on the second appeal to reconsider the questions was

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based, not on any want of power to do so after a new trial in the same case of the same issues, but was based on the fact that the first appeal had led to a judgment in the supreme court finally adjudicating the issues, and leaving none of those already disposed of to be retried after the mandate.

The foregoing are the cases usually cited by the advocates of the California rule. Many others of like character in the Supreme Court of the United States might be cited, but that court has never laid down the California rule, and has never decided a case which lends any support to it. We need not review the decisions of the courts of the other states. We have examined very many of them. We find many cases like those in the Supreme Court of the United States, and, indeed, this court has applied the principle therein involved. *Younkin v. Younkin*, 44 Neb. 729. On the other hand, many courts have, without question, on a second appeal, after a mandate reversing a case for a new trial, reconsidered questions presented on the second trial which had also been presented on the first. The distinction which we have endeavored to point out—a distinction ruling the decisions of the Supreme Court of the United States, and one which the California court failed to observe—was distinctly recognized in *Adams County v. Burlington & M. R. R. Co.* 55 Iowa, 94. It was there urged that a decision did not become *res judicata* so long as the case remained pending. The court said: "Whatever force there might be in this position in an action at law where the right to introduce new evidence after verdict involves the retrial of the whole case, we think it cannot be maintained in a case like this." On a rehearing the same result was reached, upon the ground that when the cause was first reversed it was remanded for a single purpose; for all other purposes there was held to have been an adjudication. In *Davis v. Curtis*, 70 Iowa, 398, general language was used to the effect that a ruling once made became the law of the case. *Adams County v. Burlington & M. R. R. Co.* was the only authority cited; and *Davis v. Curtis* was a case like that, the first appeal having determined the rights sought to be relitigated. On this branch of the case we shall refer to only three other authorities. These are *Bane v. Wick*, 6 Ohio St. 18; *Bell v. Lamprey*, 58 N. H. 124; and *Frankland v. Cassaday*, 62 Tex. 418. The doctrine of these cases is that conclusions reached on questions of law on the first appeal will ordinarily not be examined on a second appeal, but that in exceptional cases, when the court is very clearly satisfied that its former opinion was erroneous, this rule will not be applied.

In the discussion of the authorities we have gone far beyond the proper limits of most opinions. We have done so because we deem the question one of very great importance, and have felt the necessity of a close examination, both upon principle and upon authority. The general course of the review has been to trace the doctrine back. Adopting now the contrary course, it will be observed that its history is this: The Supreme Court of the United States and other courts, having once entered judgments or decrees finally adjudicating certain issues, decided very properly that on a

second appeal nothing so adjudicated could be relitigated. Other courts declined to permit a party, after an unsuccessful appeal, to prosecute a second appeal from the same judgment. A few courts,—notably California,—failing to draw the distinction between a judgment upon the merits and a *venire de novo*, adopted these cases as authority for the proposition that, where a new trial had been awarded, the court could not, on a second appeal, re-examine any questions of law decided on the first. Having gone so far, they were driven to the further conclusion that the principle applies to every question involved in the first appeal, whether in fact examined or not. Then, in a very few instances, after this doctrine had been established, but never in a case of first impression, some reasons have been given in its support. That usually given is that the first opinion is an adjudication. It needs but a moment's reflection to show that there is no adjudication by the expression of an opinion on a point of law where no judgment is entered in accordance with that opinion, but the cause is remanded generally. The only thing adjudicated is that there was error in the record, and that the whole case should be relitigated. To apply the rules of *res judicata* to such a case would require a further holding that, where a court has overruled a demurrer, it may not afterwards, on the trial, dismiss the case, because no cause of action is stated; or, having granted a temporary injunction, that it may not dissolve that injunction if it becomes satisfied that it was improvidently granted. Another reason given is that there must be an end to litigation. This is a salutary maxim, but to say that a court may not correct its own mistakes for this reason is to push it to an absurd conclusion. A third reason somewhere given is that on a second appeal the court only reviews the record for error on the second trial; that it is the duty of the trial judge to follow the opinion of the appellate court, although he may think it is erroneous, and technically he never errs when he does so. It is true that it is the duty of the trial judge to follow the directions of the appellate court, but, when the case comes again before the appellate court, the question is not, Did the trial judge proceed according to its former opinion? but, Were his rulings correct in law? To enforce erroneous rulings simply because the appellate court had directed the error would be to pervert the law, and sacrifice justice to the technicalities of practice. That the rule is not well-founded in principle may be seen by the confusion of the courts in their efforts to base it upon a known principle. Some courts trace it to the principle of *res judicata*; some to that of *stare decisis*; and some, evidently realizing that it falls within neither principle, fall back upon the indefinite term "the law of the case," as if it were possible, under our system of jurisprudence, that there should be one law for one case and a different law for other cases entirely similar thereto.

It has never been doubted that an appellate court is not bound blindly to follow precedent. A rule of law once announced affords a guide for similar cases, and will ordinarily control their decision; but, having announced a rule, when another case arises, presenting the same question, if the court is satisfied that its former

opinion was wrong, it may, and frequently does, overrule it. The limitations resting upon courts in this respect are usually stated to be: First, that a former decision will not be overruled when it has become a rule of property; and, secondly, that it will be followed, although erroneous, where more mischief will result from overruling than from following it. This is as far as the doctrine of *stare decisis* should go. When, however, a decision in one case is overruled in another, there is no remedy for the defeated party in the first case. His rights have been determined, and a decision overruling a former opinion in a different case amounts always to an admission by the court that it has subjected the unsuccessful party in the first case to an injustice which can never be remedied. Notwithstanding this, subject to the limitations we have stated, courts do overrule such opinions. Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the court, and the case in such a situation that by the correction of its error no injustice will be done, beyond, perhaps, the creation of additional costs? If the doctrine contended for is to prevail here, then it follows that the only instance in which the court is not permitted to correct its mistakes or refuses to do so, is also the only instance where the mistake can be corrected without injustice. Take the case before us. The court in the *Grant Case* decided, in effect, that its former decisions in this case should have been in favor of the city instead of Foxworthy. In subsequent cases, by reason of the decision in the *Grant Case*, the city would prevail under the same state of facts; but if the former decisions in this case are conclusive upon the court, the rule will be different for the city of Hastings and for Mr. Foxworthy in this one case than it is for all others and in other cases; and, if so, what is to be done with that part of the 14th Amendment to the Federal Constitution which forbids any state to deny to any person the equal protection of the laws? A court has no legislative power. Its duty is to declare what the law is, not to make law. To hold that it is bound to follow in a given case an erroneous decision formerly rendered in the same case would be to hold that, although the court believes the law to be otherwise, it will make a special law for the particular parties and the particular case before it, contrary to the general law; to substitute what it is pleased to call "the law of the case" for the law of the land,—for the law which every member of the court is sworn to administer. To do so it must not only legislate, but legislate specially, in a manner which our Constitution forbids to the legislative body itself.

We conclude that the principles governing the case are these: The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the question upon this trial as well as upon the others, and that it is within the power of the court to re-examine its former decisions, and apply the law correctly. We think that ordinarily the court is justified in refusing to re-examine questions of law once passed upon, and that it is only where it clearly appears that the former decision was erroneous

that this should be done. It is, however, now clearly established that the former opinions in this case were erroneous, and the court should correct the error.

In the amended petition the averment appears that the plaintiff was confined to his bed and house for more than ten weeks, and was wholly incapacitated, mentally and physically, to do any business or transact any affairs until the 1st day of May thereafter. On the trial a witness testified that for six or eight weeks Mr. Foxworthy suffered intense pain, and that for a month or six weeks he was insane through pain. It will be remembered that the injury was sustained January 21, and the statement was filed with the city council July 28. Do the facts so pleaded and proved excuse the delay? We think not. The filing of the statement was a condition precedent to the maintenance of the action. It was not in the nature

of a limitation, and the existence of a disability preventing plaintiff from filing a claim would not extend the time for filing it for the statutory period after the disability was removed. We think the uniform line of authority on this subject is that the condition must still be performed within the time specified, provided a reasonable time after the removal of the disabilities remain for that purpose. It has been so held even in the case of a limitation by contract. *Steel v. Phœnix Ins. Co.* 47 Fed. Rep 863; *Blanks v. New Orleans Hibernia Ins. Co.* 86 La. Ann. 599. Giving the utmost possible effect to the pleadings and evidence in regard to Mr. Foxworthy's disability, there remained, after its removal, several months within which the statement might have been filed.

Reversed and remanded.

Rehearing denied March 5, 1890.

CALIFORNIA SUPREME COURT.

Amanda P. EVERETT *et al.*, *Repls.*,

v.

LOS ANGELES CONSOLIDATED ELECTRIC RAILWAY COMPANY, *Appts.*

(.....Cal.....)

1. A person riding between the rails of an electric street railway upon a bicycle has the duty to look out for and endeavor to avoid danger from the electric cars.
2. It is matter of common knowledge that a bicycle under a rider of ordinary strength and experience can attain a much higher rate of speed than that of an electric car running about 10 miles an hour, and by mere pressure of the hand can be instantly turned aside so as to leave a street-car track on which it is going.
3. The motorman of an electric car seeing a bicycle rider going on the track in front of him may assume up to the last moment that the rider will get out of the way by increasing his speed or turning aside in time to avoid the danger.
4. The negligence of a bicycle rider who continues to ride on the track of an electric car up to the very moment when he is struck, when by the slightest care and effort on his part he could have put himself out of danger up to the last moment, is a contributing and efficient cause of the injury, which precludes the conclusion that the negligence in managing the car was later in time and therefore the proximate cause of the injury.

(Beatty, Ch. J., and Temple and Heushaw, JJ., dissent.)

NOTE.—As to negligence in running a cable car too closely behind a buggy on the track, see *Hicks v. Citizens' R. Co.* (Mo.) 25 L. R. A. 508 (annotated on the question of street-car collisions with vehicles or horses).

For injury to a pedestrian by a street car overtaking him, see *Montgomery v. Lansing City Electric R. Co.* (Mich.) 29 L. R. A. 287.

34 L. R. A.

(January 9, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiffs in an action brought to recover damages for the alleged negligent killing of plaintiff's husband and father. *Reversed.*

The facts are stated in the opinions.

Mr. John D. Pope, for appellant:

Defendant had the superior right to the space covered by its tracks for the movement of its cars, and it was the duty of the deceased to get off the track and permit defendant's train to pass.

Booth, Street Railways, § 303.

Defendant was not bound to anticipate the negligence of the deceased, and had a right to act upon the assumption that he would move to one side and permit the train to pass.

Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 279; *Moore v. Philadelphia, W. & B. R. Co.* 108 Pa. 349; *Yancey v. Wabash, St. L. & P. R. Co.* 93 Mo. 433; *Holmes v. South Pacific Coast R. Co.* 97 Cal. 164.

It was the duty of the deceased, if he proposed to run along defendant's track in the direction in which he must have known that the trains of cars were running every few minutes, to look backward as well as forward, and if necessary to listen so that he might know when a train was coming and move off the track on the approach of the train and permit it to pass without stopping or slowing up.

Glasecock v. Central P. R. Co. 73 Cal. 137, *Trounclair v. Pacific Coast S. S. Co.* 80 Cal. 521; *Ereby v. Southern Pac. Co.* 83 Cal. 399;

As to contributory negligence of persons injured by street cars, see also *Newark Pass. R. Co. v. Bloch* (N. J.) 22 L. R. A. 374, and cases cited in note; also *McGee v. Consolidated Street R. Co.* (Mich.) 23 L. R. A. 800; *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276.

Holmes v. South Pac. Coast R. Co. 97 Cal. 161; *Illinois C. R. Co. v. Hall*, 73 Ill. 222; *Baltimore & O. R. Co. v. Depew*, 40 Ohio St. 127; *Carson v. Federal Street & P. V. R. Co.* 147 Pa. 219, 15 L. R. A. 257; *McClain v. Brooklyn City R. Co.* 116 N. Y. 459; *Schulte v. New Orleans City & L. R. Co.* 44 La. Ann. 509; *Booth, Street Railways*, § 313.

Being a man in full possession of his faculties,—having perfect sight and hearing,—being an experienced rider on the bicycle and having the ability to leave the track in an instant, he was inexcusably negligent in not keeping out of the way of the train. His own gross negligence was not only the cause but the sole cause of his death.

Glascok v. Central P. R. Co. supra; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 188; *Baltimore & O. R. Co. v. Depew*, 40 Ohio St. 181; *Holmes v. South Pac. Coast R. Co.* 97 Cal. 161; *Pittsburgh, Ft. W. & C. R. Co. v. Collins*, 87 Pa. 405, 83 Am. Rep. 871; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627; *Kenna v. Central P. R. Co.* 101 Cal. 26.

The motorman acted in the reasonable belief that deceased had ample time and opportunity after being fully warned of the approach of the train to get out of the way, and he lost his life solely through his own negligence, and the court should have instructed the jury that the evidence would not justify them in finding for the plaintiffs.

Geary v. Simmons, 39 Cal. 224; *Vanderford v. Foster*, 65 Cal. 49; *Fagundes v. Central P. R. Co.* 79 Cal. 97, 3 L. R. A. 8; *Toulouse v. Paire*, 103 Cal. 252.

Plaintiffs had no right to recover because of the contributory negligence of the deceased, even if it were conceded that defendant's employees were negligent.

Delaware, L. & W. R. Co. v. Converse, 189 U. S. 472, 35 L. ed. 215; *Hager v. Southern Pac. Co.* 98 Cal. 309; *Holmes v. South Pac. Coast R. Co. supra*; *Davis v. California Street Cable R. Co.* 105 Cal. 181; *Pepper v. Southern Pac. Co.* 105 Cal. 389.

The doctrine that the negligence of the person injured is no defense when it appears that the defendant after becoming aware of the peril of the person injured might by the use of reasonable diligence have prevented the injury, does not apply where the person injured, though conscious of his danger, deliberately refuses to take any steps for his own safety.

O'Brien v. McGlinchy, 68 Me. 552; *Kirtley v. Chicago, M. & St. P. Co.* 65 Fed. Rep. 886; *Holmes v. South Pac. Coast R. Co.* 97 Cal. 169.

Deceased must be held to have known of the approaching train, and to have heard the bell and the loud calls of motorman and passengers.

Patterson, Railway Accident Law, § 53; *Pennsylvania R. Co. v. Henderson*, 43 Pa. 449; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5; *Kenna v. Central P. R. Co.*, and *Pepper v. Southern Pac. Co. supra*.

Where the injury is not wantonly or willfully inflicted the ordinary rule applies that contributory negligence on the part of the person injured is a bar to an action for damages.

Maumus v. Champion, 40 Cal. 121; *Tennens*, 84 L. R. A.

brock v. South Pac. Coast R. Co. 59 Cal. 269; *Williams v. Southern P. R. Co.* 72 Cal. 120; *Glascok v. Central P. R. Co.* 73 Cal. 187; *Trouclair v. Pacific Coast S. S. Co.* 80 Cal. 525; *Hager v. Southern Pac. Co. supra*.

Where the negligence of the person injured is a proximate cause, and is subsequent in time to the negligence of the person who inflicts the injury, there can be no recovery.

Beach, Contrib. Neg. § 19; *Irwin v. Sprigg*, 6 Gill, 200, 46 Am. Dec. 667; *Gothard v. Alabama G. S. R. Co.* 67 Ala. 114; *Toledo, P. & W. R. Co. v. Pindar*, 58 Ill. 447, 5 Am. Rep. 57; *Hoehl v. Muscatine*, 57 Iowa, 444; *Macon & W. R. Co. v. Winn*, 19 Ga. 440; *Walsh v. Mississippi Valley Transp. Co.* 52 Mo. 434; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812, 31 Am. Rep. 750; *Dudley v. Camden & P. Ferry Co.* 45 N. J. L. 368, 46 Am. Rep. 781.

Nor does the exception to the rule exist where the negligence of the party inflicting the injury and that of the person injured are contemporaneous.

Bigelow, Torts, 311; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476; *Fraser v. South & North Ala. R. Co.* 81 Ala. 185, 60 Am. Rep. 145; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390; *Holmes v. South Pac. Coast R. Co.* 97 Cal. 161.

The qualification of the rule as of the effect of contributory negligence, first adopted in *Davis v. Mann*, is founded upon the idea that the contributory negligence of the person on whom the injury is inflicted is only a remote cause of the injury.

Davis v. Mann, 10 Mees. & W. 546; *Kirtley v. Chicago, M. & St. P. R. Co.* 65 Fed. Rep. 886; *Patterson, Railway Accident Law*, § 58; *Holmes v. South Pac. Coast R. Co. supra*.

The test is, Did the negligence of the party injured contribute directly and approximately to the injury?

Cooley, Torts, 674; *Pierce, Railroads*, 323; *Thompson v. Flint & P. M. R. Co.* 57 Mich. 300; *Cremer v. Portland*, 86 Wis. 92; *Strong v. Sacramento & P. R. Co.* 61 Cal. 326.

Mr. William J. Hunsaker, for respondents:

Whether or not under the circumstances as developed by the evidence the servants of the defendant were guilty of negligence was a question solely for the jury.

Whether or not the deceased was guilty of contributory negligence was a question which could only be determined by the jury.

Conceding the deceased was guilty of contributory negligence in not leaving the track before the car reached him, still the question whether, after his danger became apparent to the motorman he could have stopped the car and avoided the injury to Everett, was a question which alone could be determined by the jury.

Contributory negligence was not a defense in this case unless it was the direct and proximate cause of the injury, and it was for the jury to determine whether or not, notwithstanding the contributory negligence of the deceased, if he was negligent the defendant's servants were guilty of either a want of ordinary care or of careless and wanton conduct in not stopping the car after it appeared or should have appeared, to those in charge of the car,

as reasonable men, that the deceased was in imminent danger, and that he apparently did not apprehend such danger; for it was then the duty of those in charge of the car to have brought the car under control and to stop the same, if necessary, in order to have prevented the injury.

The evidence was such that the jury might find that even though the deceased was guilty of contributory negligence, yet that, after his danger became imminent and known to the person in charge of the car, he could by the exercise of reasonable diligence have stopped the car and prevented the injury, and there being evidence which would support such a theory of the case, it was proper to submit it to the jury.

Van Praag v. Gale, 107 Cal. 438; *Davis v. Pacific Power Co.*, 107 Cal. 563; *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Esrey v. Southern Pac. Co.* 103 Cal. 541; *McNamara v. North P. R. Co.* 50 Cal. 581; *Fernandes v. Sacramento City R. Co.* 52 Cal. 45; *Dufour v. Central P. R. Co.* 67 Cal. 319; *Wilson v. Southern P. R. Co.* 62 Cal. 164; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179; *Davies v. Oceanic S. S. Co.* 89 Cal. 280; *Driscoll v. Market Street Cable R. Co.* 97 Cal. 553; *Corr v. Eel River & E. R. Co.* 98 Cal. 366, 21 L. R. A. 354; *Raub v. Los Angeles Terminal R. Co.* 103 Cal. 473; *Whalen v. Arcata & M. R. R. Co.* 92 Cal. 669; *Smith v. Occidental & O. S. S. Co.* 99 Cal. 462; *Stephenson v. Southern Pac. Co.* 102 Cal. 143; *Delaware, L. & W. R. Co. v. Connerse*, 139 U. S. 469, 35 L. ed. 213; *Noyes v. Southern P. R. Co.* 92 Cal. 285; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485; *Cameron v. Union Trunk Line*, 10 Wash. 507; *Wallace v. Suburban R. Co.* 26 Or. 174, 25 L. R. A. 663; *Lynam v. Union R. Co.* 114 Mass. 83; *Thatcher v. Central Traction Co.* 166 Pa. 66; *Lake Roland Elev. R. Co. v. McKewen*, 80 Md. 593; *Driscoll v. West End Street R. Co.* 159 Mass. 142; *Gallagher v. Coney Island & B. R. Co.* 24 N. Y. S. R. 748; *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571; *O'Toole v. Central Park, N. & E. R. Co.* 35 N. Y. S. R. 591; *Quinn v. Atlantic Ave. R. Co.* 84 N. Y. S. R. 801; *Mackie v. Brooklyn City R. Co.* 10 Misc. 4; *Kelly v. Brooklyn Heights R. Co.* 12 Misc. 568; *Pope v. Kansas City Cable R. Co.* 99 Mo. 400; *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216; *Rascher v. East Detroit & G. P. R. Co.* 90 Mich. 413; *Mills v. Brooklyn City R. Co.* 10 Misc. 1; *Jones v. Brooklyn Heights R. Co.* Id. 543; *Watson v. Minneapolis Street R. Co.* 53 Minn. 551; *Omaha Street R. Co. v. Duvall*, 40 Neb. 29; *Omaha Street R. Co. v. Loehneisen*, Id. 37; *Patterson v. Townsend*, 91 Iowa, 725, Appx.

A bicycle is a vehicle, and a person riding one upon the public highway has the same rights in so doing as persons using other vehicles.

Thompson v. Dodge, 58 Minn. 555, 28 L. R. A. 603.

The degree of care required of a person at the crossing of a highway of, or walking or driving upon, an ordinary steam railroad is not the test of care required in crossing the track of or driving or walking along a street railroad in a public street.

Beach, Contrib. Neg. §§ 288-290; *Cooke v.* 34 L. R. A.

Baltimore Traction Co. 80 Md. 551; *Shea v. St. Paul City R. Co.* 50 Minn. 895.

Street railways have no exclusive right to the use of the part of the street covered by their tracks, but all persons have the right to use the street for the purposes for which streets are ordinarily used; nor had the defendant any rights superior to those of the deceased in that portion of the public street between the tracks.

Shea v. Potrero & B. V. R. Co. 44 Cal. 414; *Robinson v. Western P. R. Co.* 48 Cal. 409; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179; *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216; *Dallas Rapid Transit R. Co. v. Dunlap*, Id. 471; *Rascher v. East Detroit & G. P. R. Co.* 90 Mich. 413; *Cincinnati Street R. Co. v. Whitcomb*, 66 Fed. Rep. 915; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *San Antonio Street R. Co. v. Mechler*, 87 Tex. 628, Affirming 29 S. W. 202; *Humbird v. Union Street R. Co.* 110 Mo. 76; *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 378; *Cooke v. Baltimore Traction Co. supra*; *Lake Roland Elev. R. Co. v. McKewen*, 80 Md. 593; *Watson v. Minneapolis Street R. Co.* 53 Minn. 551; *Omaha Street R. Co. v. Duvall*, 40 Neb. 29.

The law imposes upon the defendant the duty of employing competent and careful persons to manage and control its cars while running on its track, and it was the duty of the motorman in charge of the car to exercise proper care and keep a proper lookout in order to avoid, if possible, all accident and injury.

Booth, Street Railways, §§ 305, 306; *Shea v. Potrero & B. V. R. Co.*, and *Swain v. Fourteenth Street R. Co. supra*; *Dufour v. Central P. R. Co.* 67 Cal. 319; *Sears v. Seattle Consol. Street R. Co.* 6 Wash. 227; *Dallas Rapid Transit R. Co. v. Dunlap, supra*; *Pope v. Kansas City Cable R. Co.* 99 Mo. 400; *Brooks v. Lincoln Street R. Co.* 22 Neb. 816; *Cincinnati Street R. Co. v. Whitcomb, supra*; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47; *Chicago City R. Co. v. Robinson*, 127 Ill. 11, 4 L. R. A. 126; *Hays v. Gainesville Street R. Co.* 70 Tex. 603; *Newark Pass. R. Co. v. Block*, and *Humbird v. Union Street R. Co. supra*; *Winters v. Kansas City Cable R. Co.* 99 Mo. 509, 6 L. R. A. 536; *Cambeis v. Third Ave. R. Co.* 1 Misc. 158; *Citizens' Street R. Co. v. Steen*, 42 Ark. 321; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *Hays v. Gainesville Street R. Co.* 70 Tex. 602; *San Antonio Street R. Co. v. Mechler*, 87 Tex. 628, Affirming 29 S. W. 202; *Bunyan v. Citizens' R. Co.* 127 Mo. 12; *Baltimore Traction Co. v. Wallace*, 77 Md. 435; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 46, 29 L. R. A. 287; *Cooke v. Baltimore Traction Co.* 80 Md. 551; *Watson v. Minneapolis Street R. Co.*, and *Omaha Street R. Co. v. Duvall, supra*.

A recovery may be had in an action against a railroad company for injuries sustained, notwithstanding the negligence of the person injured exposed him to the danger which resulted in his injury, if the defendant after becoming aware of his danger failed to use ordinary care to avoid injuring him.

Esrey v. Southern Pac. Co. 108 Cal. 541; *Williams v. Southern P. R. Co.* 72 Cal. 120;

Needham v. San Francisco & S. J. R. Co. 37 Cal. 409; *Robinson v. Western P. R. Co.* 48 Cal. 409; *Holmes v. South Pac. Coast R. Co.* 97 Cal. 161; *Sucin v. Fourteenth Street R. Co.* 93 Cal. 179; *O'Callaghan v. Bode*, 84 Cal. 489; *Kansas P. R. Co. v. Cranmer*, 4 Colo. 524; *Citizens' Street R. Co. v. Steen*, 42 Ark. 821; *Gulf, C. & S. F. R. Co. v. Lankford*, 88 Tex. 499; *Lloyd v. St. Louis, I. M. & S. R. Co.* 128 Mo. 595, Affirmed in Banc in 81 S. W. 110; *San Antonio Street R. Co. v. Mechler*, 87 Tex. 628; *Savannah, T. & I. of H. R. Co. v. Bryan*, 94 Ga. 632; *Lake Roland Elec. R. Co. v. McKewen*, 80 Md. 598; *Kansas P. R. Co. v. Whipple*, 89 Kan. 581; *Hanton v. Missouri P. R. Co.* 104 Mo. 381; *Cincinnati Street R. Co. v. Whitcomb*, 66 Fed. Rep. 915; *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270; *Hays v. Gainesville Street R. Co.* 70 Tex. 602; *O'Toole v. Central Park, N. & E. R. R. Co.* 85 N. Y. S. R. 591; *Texas & P. R. Co. v. Nolan*, 62 Fed. Rep. 552; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47; *Houston City Street R. Co. v. Woodcock* (Tex. Civ. App.) 29 S. W. 817; *Omaha Street R. Co. v. Duvall*, 40 Neb. 29; *Montgomery v. Lansing City Electric R. Co. supra*; *Orr v. Cedar Rapids & M. C. R. Co.* (Iowa) 62 N. W. 851; *Dexter & B. P. Rapid Transit Co. v. Dwyer*, 3 Colo. App. 408; *Wallace v. Suburban R. Co.* 26 Or. 174, 25 L. R. A. 663; *Baltimore Traction Co. v. Wallace*, 77 Md. 435; *Gumb v. Twenty-Third Street R. Co.* 26 Jones & S. 1; *Fernandes v. Sacramento City R. Co.* 52 Cal. 45; *Wilson v. Southern P. R. Co.* 63 Cal. 164; *Davies v. Oceanic S. S. Co.* 39 Cal. 280.

Where a motorman in charge of an electric car sees a person riding on a bicycle on the track ahead of him, having crossed over to such track to avoid a car approaching from the opposite direction, and after having sounded an alarm by ringing the bell, the person on the bicycle pays no attention to the alarm given and to all appearance has no knowledge of the approach of the car behind him, and all these facts are obvious to the man in charge of the car, and he still continues to run his car at a rate of speed of 12 miles an hour or thereabouts with a heavily loaded train without any attempt to check the speed of his car or to bring it under control, or to prepare to stop if necessary to avoid a collision until he is so near the person that it is impossible by the use of the appliances at his command to stop his car and avoid an inevitable collision,—such conduct on the part of the motorman is wilful and wanton—it is deliberate.

Errey v. Southern P. Co. 108 Cal. 541; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179; *Montgomery v. Lansing City Electric R. Co.* 108 Mich. 46, 29 L. R. A. 287; *Sears v. Seattle Consol. Street R. Co.* 6 Wash. 227; *Orr v. Cedar Rapids & M. C. R. Co.* (Iowa) 62 N. W. 851; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485.

If the motorman saw the danger and peril which surrounded the deceased, and failed to exercise ordinary care for his safety, deceased's previous contributory negligence in having exposed himself to danger would not defeat a recovery.

Errey v. Southern P. Co. 108 Cal. 541; *Strong v. Sacramento & P. R. Co.* 61 Cal. 826; *Crowley*, 34 L. R. A.

v. City R. Co. 60 Cal. 629; *Meeks v. Southern P. R. Co.* 56 Cal. 518, 38 Am. Rep. 67; *Flynn v. San Francisco & S. J. R. Co.* 40 Cal. 14, 6 Am. Rep. 595; *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282; *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 409; *Robinson v. Western P. R. Co.* 48 Cal. 409.

On petition for rehearing.

The decision of department is rested solely upon the erroneous assumption that it was negligence *per se* for the deceased to travel with his bicycle upon that portion of the public highway occupied by the tracks of the street-railway company, and that the company's duty to avoid running him down and killing him was no greater than that of a steam railroad company to a trespasser upon its tracks. This is not, and in the very nature of things cannot be, true.

Shea v. Potrero & B. V. R. Co. 44 Cal. 414; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179; *Driscoll v. Market Street Cable R. Co.* 97 Cal. 553; *Mahoney v. San Francisco & S. M. R. Co.* 110 Cal. 471; *Bailey v. Market Street Cable R. Co.* 110 Cal. 820; *Cooke v. Baltimore Traction Co.* 80 Md. 551; *Holmgren v. Twin City Rapid Transit Co.* 61 Minn. 85; *Shea v. St. Paul City R. Co.* 50 Minn. 395; *Robbins v. Springfield Street R. Co.* 165 Mass. 30; *Benjamin v. Holyoke Street R. Co.* 160 Mass. 8; *Fleckenstein v. Dry Dock, E. B. & B. R. Co.* 105 N. Y. 655; *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 4 L. R. A. 126; *Heffran v. Brooklyn Heights R. Co.* 8 Misc. 41; *Omaha Street R. Co. v. Duvall*, 40 Neb. 29; *Booth, Street Railways*, § 305; *Beach, Contrib. Neg.* § 288; *Lake Roland Elec. R. Co. v. McKewen*, 80 Md. 598.

It is no part of the plaintiff's case to prove an absence of contributory negligence, but contributory negligence is defensive matter the burden of affirmatively proving which is upon the defendant.

Robinson v. Western P. R. Co. 48 Cal. 409; *MacDougall v. Central R. Co.* 68 Cal. 431; *McQuilken v. Central P. R. Co.* 50 Cal. 7; *Magoo v. North Pacific Const. R. Co.* 78 Cal. 430.

Instead of appellant being relieved from the exercise of proper care by reason of its use of electricity rather than horses for the purpose of moving its cars, the dangerous character of electricity as a motive power imposed upon the servants of the appellants the duty of exercising additional care and foresight to avoid injury to travelers upon the highway.

Cooke v. Baltimore Traction Co., and *Omaha Street R. Co. v. Duvall*, *supra*; *Sears v. Seattle Consol. Street R. Co.* 6 Wash. 227; *Hicks v. Citizens' R. Co.* 124 Mo. 115, 25 L. R. A. 508; *Gulf, C. & S. F. R. Co. v. Walker*, 70 Tex. 126; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623.

The motorman of appellant did not discharge the duty of the company to the deceased by merely ringing the bell and sounding the gong, but when it became apparent to the motorman that the deceased did not hear or pay any attention to the signals given it was his duty to bring his car under control, and even to stop it, if necessary, to avoid a collision; and his failure to do so was actionable negligence on the part of appellant.

Sears v. Seattle Consol. Street R. Co. supra; 2 Shearm. & Redf. Neg. § 488; *Robinson v.*

Western P. R. Co. 48 Cal. 409; *Houston City Street R. Co. v. Woodlock* (Tex. Civ. App.) 29 S. W. 817; *Bunyan v. Citizens' R. Co.* 127 Mo. 12; *Hicks v. Citizens' R. Co. supra*; *McClellan v. Ft. Wayne & B. I. R. Co.* (Mich.) 2 Det. L. N. 59; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47; *Doyle v. West End Street R. Co.* 161 Mass. 538; *Pope v. Kansas City Cable R. Co.* 99 Mo. 400.

The court did not err in denying appellant's motion for a judgment of nonsuit, and the questions of negligence and contributory negligence were properly submitted to the jury.

Fernandes v. Sacramento City R. Co. 53 Cal. 46; *Franklin v. Southern California Motor Road Co.* 35 Cal. 63; *Cross v. California Street Cable R. Co.* 102 Cal. 813; *Raub v. Los Angeles Terminal R. Co.* 103 Cal. 473; *Mullin v. California Horseshoe Co.* 105 Cal. 77; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596; *VanPraag v. Gale*, 107 Cal. 438; *Davis v. Pacific Power Co.* Id. 563; *Thatcher v. Central Traction Co.* 166 Pa. 66; *Holmgren v. Twin City Rapid Transit Co.* 61 Minn. 85; *Bunyan v. Citizens' R. Co. supra*; *Kreis v. Missouri P. R. Co.* 131 Mo. 533; *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37; *Lake Roland Elev. R. Co. v. Mc Kewen*, 80 Md. 593; *Shea v. St. Paul City R. Co.* 50 Minn. 395; *Clark Thread Co. v. Bennett* (N. J. L.) 38 Atl. 404.

Van Fleet, J., filed the following opinion: Verdict and judgment were for plaintiffs, and defendant appeals from the judgment and an order denying its motion for a new trial.

The action was by the widow and minor child of one Charles E. Everett, deceased, to recover damages for the death of the latter, caused by his being run over by an electric car operated by the defendant on its street railroad in the city of Los Angeles, and alleged to have been through defendant's negligence. At the conclusion of plaintiff's evidence in chief, defendant moved the court for a nonsuit, on the grounds, substantially, that the evidence wholly failed to show negligence on the part of the defendant, but did establish affirmatively that deceased came to his death through his own negligence, contributing directly and proximately thereto. The court denied the motion, to which ruling defendant excepted, and this exception constitutes the only material question in the case.

The evidence in behalf of plaintiffs tended to show that the deceased, at the time of the accident resulting in his death, which was on October 17, 1894, was forty years of age, in good health, and in full possession of his faculties, having good eyesight and unimpaired hearing.

He was an experienced rider of the bicycle, had owned one of those vehicles three or four years, and used it every day. On the date in question, about 1 o'clock in the afternoon, or a little thereafter, deceased was on his bicycle, riding along McClintock avenue, in a suburb of Los Angeles, known as "University," on a portion of the street where ran a double line of defendant's railway, one line used for south-bound and the other for northbound cars. He was going south at the time, and traveling at the rate of about 6 miles an hour. Following him, and going in the same direction on the

south-bound track, was a train of defendant's cars, consisting of an electric motor car and a trailer, heavily loaded with passengers going out to the race track. This train was running at its ordinary rate of about 10 miles an hour. When deceased was first observed by those on the train, he was between a block and a half and two blocks ahead of the train, and was riding between the rails of the north-bound track.

He continued on this track for some distance, when he crossed over to the south-bound track, apparently to avoid an approaching car going north, and continued on his course, riding between the rails of the latter track. At this time he was something over half a block in advance of the south-bound train, but the latter was rapidly overtaking him; and when the north-bound car passed him, which was at a point a short distance south of where the south-bound train then was, passengers on the former, evidently noting the rapid approach of the train, called out a warning to deceased to apprise him of danger; and at about the same time, when the train was within from 20 to 40 feet from him (the estimates of the witnesses varying on this point), the motorman on the latter rang his gong, and, together with several of the passengers, cried out to deceased to "get off the track," "look out," and other words of like import. These warnings, although distinctly heard by a witness standing on the street some four or five times as far from the train as deceased then was, were either unheard by him, or totally unheeded, as he was not observed to look back or turn his head, or attempt to turn or increase the speed of his bicycle. Thereupon the motorman, when within about 10 to 20 feet of deceased, reversed the current, and applied the brakes, and endeavored to stop the train, but did not succeed in time to avoid running deceased down; and he was struck by the motor, and killed. At no time from the time he was first seen riding ahead of the train was deceased observed to turn his head or look back, until just as the train was upon him, when he partly turned his head, and turned his wheel a little to the right, but not sufficient to get out of the way. University is a settled suburb of Los Angeles, laid out in blocks, crossed and intersected by public streets, and the point where deceased was killed was at the intersection of McClintock avenue with Thirty-Seventh street. Deceased was not a resident of Los Angeles, but had been there for about a week, more or less, before the accident, stopping at the house of a relative on Thirty-Ninth street, off McClintock avenue, south of Thirty-Seventh street and the point where he was killed. During his sojourn he had been in the habit of riding back and forth to and from the city on his bicycle, and, when on McClintock avenue, would ride on the railroad tracks, as it was smoother for travel between the rails than on the outside, where the space was narrow and rough and a poor road for the bicycle, by reason of the condition of the street. At points on McClintock avenue the soil was sandy, and had receded somewhat from the rails, so as to leave the latter in places standing a little above the surface of the street; but what the condition was in this respect at or in the immediate vicinity of the accident

was not made to appear. At the date in question, races were in progress at the race track, situated south of the scene of the deceased's death; and, owing to the increased travel, extra cars were being run by defendant, and at shorter intervals than at other times, but whether the train which killed deceased was an extra or running on regular time was not shown. The motorman in charge of the train had been in the employment of defendant about two weeks. For the first ten or twelve days he was under instruction from an experienced motorman, and was then put in charge of a motor, and had been so employed some four or five days at the time of the accident. The statements of the witnesses vary considerably as to how far the train was from deceased when the motorman commenced ringing his alarm gong. A number of them show no recollection on the subject, but, taken as a whole, the evidence tends strongly to indicate that the gong was being sounded before the motorman and passengers commenced to call out to deceased to get out of the way. There is a like difference as to just when the brakes were applied, and whether the speed of the train was slackened any before the deceased was struck. The head end of the motor passed the point where deceased was struck between 20 and 80 feet before the train came to a full stop, and the evidence tended to show that it could have been stopped in a shorter distance. There was also some evidence tending to show that the wind was coming from the southeast; at what velocity does not appear, but that it was calculated to deaden to some extent any sound in deceased's rear.

This is substantially the case made by the evidence in behalf of plaintiffs upon the points material for our consideration. It can scarcely be made a question in the case—indeed, we do not understand it to be seriously controverted—but that the conduct of the deceased under the circumstances narrated constituted negligence on his part in the highest degree, and such as, standing alone, would necessarily preclude a recovery for his death. In walking or riding along a line of railway where cars or trains are passing, or likely to pass, at short intervals, one while in a position to be endangered by such vehicles must pay attention to his surroundings, and employ his natural faculties, and exert due diligence to avoid such danger. He must listen and look to ascertain whether danger is threatened by his situation and a failure so to do constitutes negligence *per se*. This principle is settled by a practically unbroken line of decisions in this and other states. One or two of the latest expressions upon the subject by this court, in cases where the rule is fully discussed and authorities cited, may be given as aptly stating and applying the doctrine. In *Kenna v. Central P. R. Co.* 101 Cal. 26, it is said: "It is a fixed rule that it is the duty of any one when attempting to cross a railroad track upon a highway to be vigilant, to look and to listen before attempting to cross, and a failure to do so is regarded as such negligence on his part as to preclude a recovery. *Glascock v. Central P. R. Co.* 78 Cal. 187. With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and

knows that engines will soon follow. 'It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field; and he who deliberately does so will be presumed to assume the risk of the perils he may encounter,'"—citing a large number of cases. In *Holmes v. South Pac. Coast R. Co.* 97 Cal. 161, where the person for whose death it was sought to recover was killed while walking along the railroad track near a station, while waiting for the train which ran him down, and when it appeared that deceased did not look out for the approach of the train, which he could have seen in time to get out of the way, the court says: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated, with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses, in order to avoid the danger incident to such situation, is negligence *per se*. The following are a few of many cases which might be cited to sustain this proposition: *Harlan v. St. Louis, K. C. & N. R. Co.* 64 Mo. 480; *Id.*, on rehearing, 65 Mo. 22; *Baltimore & O. R. Co. v. Depew*, 40 Ohio St. 121; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 188; *Glascock v. Central P. R. Co.* 78 Cal. 187." Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use. In *Haight v. New York C. R. Co.* 7 Laus. 11, speaking of this rule, the court says it is said by counsel for plaintiff that, while this may be the rule in regard to steam railways, it cannot be applied to street railways. In *Carson v. Federal Street & P. V. R. Co.* 147 Pa. 219, 15 L. R. A. 257, it was held that failure to look for approaching cars on the part of one about to drive across the tracks of an electric street railway company is such contributory negligence as will prevent his recovery for injuries received by colliding with a car. The court said: "If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence he may be properly nonsuited." In *Ward v. Rochester Electric R. Co.* 43 N. Y. S. R. 84, it appeared that plaintiff's intestate was fatally injured while attempting to drive across a street-railway track. There was evidence that, at any time before reaching the track, deceased, by a glance, could have informed himself of

the approach of the car, but that he drove onto the track without looking in either direction. It was held that he was guilty of contributory negligence. In *Creamer v. West-End Street R. Co.* 153 Mass. 820, 16 L. R. A. 490, the supreme court of that state held that where a person stepped from a horse car at the junction of two streets, and immediately started to cross the track of an electric road, without looking or listening, and was run over by the electric car running at the rate of 15 miles an hour, there could be no recovery, because the deceased was not exercising due care. We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-car track upon which the motive power is electricity or the cable. See also *Bailey v. Market Street Cable R. Co.* (No. 16,004; decided by this court December 10, 1895) 110 Cal. 820. When the evidence discloses a failure to take such reasonable precautions for one's own safety, it constitutes negligence in law, and is not a question to be submitted to the jury.

This brings us to the only other consideration arising: Does the evidence tend to show such negligence on the part of defendant, contributing to the death of deceased, as would in law authorize a recovery, notwithstanding the negligence of the deceased? We find nothing in the evidence to sustain this view. The case is not like one where the injured party is discovered in time lying or standing upon a railroad track, under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is seen attempting, either on foot or otherwise, to make a crossing, or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible; or under other circumstances of similar character. In such instances it may be conceded that the driver of the engine or motor would not be justified in law in proceeding without effort to stop his vehicle up to the point of collision. Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way. But the evidence has no tendency to make such a case. Here the deceased was in full and open view of the approaching train for several blocks, and had perfect opportunity and ability to apprise himself of its coming. He was upon a swift and noiseless vehicle, which, as a matter of common knowledge, can be made with very little effort, under a rider of ordinary strength and experience, to attain a much higher rate of speed than that with which the cars were progressing, and which, furthermore, is susceptible, by a mere pressure of the hand, to turn aside instantly,—in much less time, indeed, than a pedestrian could step aside,—so as to completely avoid an object no wider than a street car. He was upon level ground, and, assuming that the surface was too rough or the space too narrow outside the railroad tracks for him to safely turn that way, there was nothing, so far as appears, to prevent his return to the other track or to the space be-

tween the tracks. In fact, he had but a few moments before crossed from one track to the other to avoid a like danger, and had been seen to do so by the motorman on the train. Under these circumstances, we think it perfectly clear that the latter was justified, reasoning in the line we have suggested, in keeping on his course, and assuming that the deceased, obeying the most ordinary dictates of prudence, had made himself aware of the approach of the train, and would either increase his speed or turn aside in time to avoid the danger which threatened him. In *Holmes v. South Pac. Coast R. Co. supra*, it is said: "As the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct of self-preservation, move away from the track before being overtaken by the engine. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 279." See also *Cambell v. Kansas City, Ft. S. & M. R. Co.* 55 Kan. 586. The motorman was not required to assume that the deceased would continue his negligent conduct to a point which would endanger his life or limb, and it was not negligence in the driver, under the circumstances, to indulge the presumption that the deceased would get out of the way, up to the last moment. There is nothing in the circumstances to indicate any wantonness or recklessness on the part of the engineer, or that he did not take all the precautions to warn the deceased and to stop his train that would have been suggested to one more experienced, or to any other reasonable mind.

But, were it to be conceded that the evidence disclosed a case tending to show negligence on the part of defendant's servants, the plaintiffs could not recover under the circumstances of this case. The rule which renders a defendant liable for injuries, notwithstanding some negligence on the part of the plaintiff or the person injured, can only apply "in those cases where such negligence was the remote, and not the proximate, cause of the injury, that is, where the negligent acts of the parties are independent of each other, the act of the person injured preceding that of the defendant." *Holmes v. South Pac. Coast R. Co. supra*. In that case, quoting from *O'Brien v. McGlinchey*, 68 Me. 552, it is said: "But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent an injury. . . . But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." See also *Hager v. Southern P. Co.* 98 Cal. 809; *Errey v. Southern P. Co.* 103 Cal.

54. The rule can never apply to a case where, as here, the negligence of the party injured continued up to the very moment of the injury, and was a contributing and efficient cause thereof; for it is apparent that, by the slightest care and effort on the part of the deceased, he could have put himself out of danger up to the last moment before he was struck.

Our conclusion is that the plaintiffs did not make out a case entitling them to recover, and that the refusal of the trial court to grant the motion for nonsuit was error. It may be added that an examination of the evidence on the part of the defendant serves only to strengthen the case as to the negligence of the deceased, and the absence of negligence on the part of the defendant, and makes it clear that the court should have granted defendant's request to instruct the jury to find for the latter. It follows that the judgment and order must be reversed, and it is so ordered.

We concur: **Harrison, J., Garoutte, J.**

Per Curiam:

Upon further consideration of this cause in banc, we adhere to the views expressed in the opinion filed in department 1 (48 Pac. 207), and for the reasons therein given *the judgment and order are reversed.*

Temple, J., dissenting:

I dissent. This action was for damages for the death of Charles E. Everett, which was caused by a car of defendant. The main question presented on this appeal is whether this court can say, as matter of law, that the deceased was guilty of negligence which contributed proximately to his injury, in the face of the verdict of the jury, which is in favor of the plaintiffs, who are heirs at law of the deceased. This is not a question as to what the evidence, taken as a whole, may be considered fairly to establish, or whether the facts which we think plainly established by the evidence show such negligence on the part of the deceased, but whether the conclusion of the jury could be rationally drawn from the evidence. And this must be determined, also, in view of the exclusive province of the jury to pass upon the credibility of the witnesses. The facts may be stated thus: Deceased was an experienced bicycle rider, about forty years old, in the possession of all his faculties, and familiar with the operation of the street railway. At least, he lived in the vicinity, and had often been on this street. Defendant had two tracks on McClintock avenue, there being 7½ feet between them. It was in the suburbs of Los Angeles, and the street was unfinished. Outside of the two tracks the ground was higher, and too rough for travel on foot or on bicycles. The rails were raised some 2 inches above the roadbed. Just before the accident deceased was seen on the north-bound track, going south. He was going at the rate of 6 miles per hour. On the south-bound track a car was following at the rate of 10 miles per hour. At that time a car was approaching on the north-bound track, and, although it was not so near as the car which was approaching from behind, deceased turned, evidently to avoid it, to the south-bound track, and in front of the

nearer car on that track. At about a block and a half away, the motorman of the south-bound car rang his bell "good and hard," to warn deceased of his danger. Upon this subject the motorman testified as follows: "I was the motoneer in charge of car No. 109 at the time Mr. Everett was killed. When I first observed him, I was about two blocks away from him, I should think. I just turned around the curve off from Olin onto McClintock avenue. He was on a wheel, on the north-bound track. I was on the south-bound track. He traveled on the north-bound track, I should think, a block and a half or two blocks; something like that. Then he crossed over onto our track, the south-bound track. When he crossed over, he was about a block and a half or two blocks ahead of me. We were going considerably faster than he was. I did not notice him look back. I saw him all the time after I left the curve. I had been ringing the bell, off and on, ever since I left the curve at Olin street. I rang the bell for the purpose of giving notice to the man on the bicycle. I should think I was then a block away from him, when I was ringing it good and hard. I had been ringing it for about two blocks constantly. When I rang the bell purposely to give him notice, I might not have been as far as a block away from him. He did not do anything when I rang, in regard to looking back, but kept right on. I called out to him when I was within about 50 feet of him, I should think. I do not remember what I said. When I was within about 30 or 50 feet of him, I threw off my currents and applied my brakes, and reversed my car, and did all that I could to stop the car from that time. I attempted to stop the car because I didn't think he heard me. I supposed all the time he did, until that time. Immediately before I put on the brakes, I rang the bell as hard as I could. Other persons called out to him besides myself; everybody in the front end of the car. There was a big crowd there, and a heavy load on the train. They called out as loud as they could hullo. He paid no attention to them. If he was a man of good hearing, he must have heard the noise. There was enough noise made in the front of that car to raise the dead, I should think. He made no attempt to get off the track at all, that I saw. I did not attempt to stop my car sooner because I expected every minute to see him get out of the road. It is the general custom of people riding bicycles to get out of the road. They generally manage to get out of the road. There is no difficulty in a man getting out of the road, if nothing is in the way." On cross-examination this witness said: "When I first began to ring my bell to warn him, I must have been a couple of blocks away, and I kept on ringing it. He paid no attention to the ringing of the bell, and did not seem to know that I was coming behind him. I did not slacken speed at that time." The south bound train was not so near as the north-bound train, but its passengers called to deceased, and made signs to him, trying to warn him of his danger. The north-bound train had not passed when the accident occurred, but stopped on the happening of the accident, something like 100 feet away. The motorman testified that he re-

versed the current 80 or 50 feet before the car struck the deceased, but several other witnesses testified that speed was not slackened at all till it struck the deceased, and some that the current was reversed some 5 feet away. There was testimony to the effect that the car moved from 50 to 60 feet before it was stopped, after the accident. Upon this question of distance there was a conflict. Upon the day of the accident more cars than usual were run on this road, because of races. There was a strong wind from the south, which would tend to prevent the deceased from hearing.

Now, Everett was guilty of gross negligence in going upon the south-bound track without looking to see if a car was dangerously near. But he was not a trespasser there, and, in my opinion, he had just the same right to believe that, if a car did approach from behind, it would not run over him, but would stop or slacken its speed, and see that he did have fair warning and an opportunity to get out of the way, that the motorman would have had to suppose he would leave the track and avoid the danger, if it had been obvious that Everett knew the true state of affairs. The real question is, however, Admitting the negligence of Everett, within the rule applicable to such cases, was it the proximate cause of the injury? or, rather, whether the jury could not reasonably draw any other conclusion from the evidence than that his negligence contributed proximately to the injury. The rule upon this subject is thus stated by Mr. Justice Sander-son in *Needham v. San Francisco & S. J. R. Co.* 87 Cal. 409, as follows: "Therefore, if there be negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury."

The rule is stated with equal clearness by Mr. Justice Garoutte in *Earey v. Southern P. Co.* 108 Cal. 541. He said: "By her own negligence she placed herself in a position of danger, but defendant was aware of her danger and did not exercise ordinary care to protect her from the danger that surrounded her. Under these conditions the law gives the injured person a right of action. This right of action is based upon the principle that a failure to exercise ordinary care by a defendant under such circumstances amounts to a degree of reckless conduct that may well be termed wilful and wanton; and when an act is done wilfully and wantonly, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Some text-writers and courts declare the same principle in another form, by holding that under these circumstances the contributory negligence of the party injured is not the proximate cause of the injury, but that the negligence of the defendant, being the later negligence, is the sole proximate cause. As has been said by one of our law reviews: 'The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible.'"

Upon this question plaintiff contends that the most reasonable conclusion from the evidence is that the motorman knew a sufficient time

before the car struck the deceased that he was unheeding, and did not know of his danger, and that Everett would inevitably be injured unless he slackened his speed. To sustain the verdict, it is only necessary to find that the motorman should have believed, from what he saw, that injury was likely to happen unless the speed was slackened. The defendant must maintain the position that there was no negligence on the part of the motorman, because he believed, and, notwithstanding what he knew, had a right to presume, that the deceased either knew of his danger, or would discover it in time to leave the track before injury resulted.

I have carefully examined the evidence, and I believe the conclusion reached by the jury is fully warranted by a preponderance of the evidence. And, if we apply the rule which has heretofore always obtained in such cases, I am unable to understand how anyone can reach the opposite view. It is, of course, true that there is evidence which will warrant a statement more favorable to the defendant than that which I have stated; but even upon the view most favorable to the defendant which can be drawn from the evidence, in my opinion it is plain that the motorman must have actually known that deceased was unheeding long enough before the injury to have slackened his car sufficiently to have prevented the injury. To do this, it would only have been necessary to have reduced the speed to 6 miles per hour from 10 miles per hour. If, as defendant claims, the motorman had attempted to stop when within 20 feet of deceased, he had then 50 feet within which to stop before the injury could occur, for while the car moved 10 feet Everett moved 6. This supposing that both continued at the same speed, but as soon as the car commenced to slow up the difference of speed would diminish; and, if the car had slowed a little, Everett would have escaped. The motorman testified that he commenced ringing good and hard a block away, and had rung off and on, from the time he was two blocks away. If we assume this distance to be 400 feet, he must have thus pursued Everett for 1,000 feet; and during all that time, according to his own testimony, Everett did not look back, and did not seem to know that he was approaching from behind. Several witnesses testified that, when about 40 feet away, a passenger called to the motorman that, if he did not stop, he would kill the man. After that time, according to the testimony, the car ran 100 feet before it struck the deceased. In fact, I cannot doubt that, had the motorman made an honest effort to stop the car when 5 feet away, Everett would not have been injured. Even from that point the car ran 12½ feet before it struck Everett, and, of course, as soon as the speed diminished the discrepancy of speed would be less. If these cars cannot be so handled, it is criminal to allow their use on the streets. I think it matter of common knowledge that they can be. Now, could this court say that the jury could not reasonably conclude from this evidence that, at some point of time when the injury could have been avoided, the motorman knew, or should have known, that Everett was un-

heedings, and that injury was likely to result unless he checked his speed? Can we say, as matter of law, that such was not the fact?

It has been suggested that the rule invoked does not apply when the person injured is negligent at the very time of the injury, as it is claimed Everett was here. I deny that there is any such qualification of the rule, beyond this: that such negligence on the part of the plaintiff may contribute proximately to the injury. In such case the defendant would not be the last who had a clear opportunity to avoid the injury. If Everett did not know of his peril, he had no such opportunity. If one lies upon a railway track to sleep, and is injured, his negligence continues to the injury. But the rule has been held to apply to such a case. *Williams v. Southern P. R. Co.* 72 Cal. 120. On no question are the authorities more numerous, and I think it will be found that, in a vast majority of them, such was the case as fully as in the case at bar. One who does not know of his danger does not have the last opportunity to avoid the injury. If these views be correct, they furnish a complete answer to the contention of appellant that the motorman was guilty of no negligence, and that the accident was due wholly to the negligence of the deceased; for, conceding gross negligence on the part of Everett, in going upon the track and continuing there without looking back, still, if, as we must concede to the verdict, the motorman knew, as we must also concede, that he was ignorant of his danger, and after such knowledge the motorman could, by the use of ordinary diligence, have prevented the injury, defendant is liable. I am convinced that all these propositions are established in favor of the verdict, by a clear preponderance of the evidence.

It is really not necessary to discuss the rule by which the conduct of Everett should be tried, but I cannot permit the apparent claim that the same rule which has become crystallized into a rule of law in regard to crossings of steam-railway tracks applies here, to pass unchallenged. Negligence is always relative to circumstances, and the circumstances of the two cases vary greatly. It is true, a general statement as to the duty of those using the public highways may be made which will include all cases. All such persons are bound to use ordinary care to avoid injuring others, and to escape injury to themselves, and may expect the like care from others. What conduct this rule would dictate in any given case will depend upon the special facts of that case. One has no right to obstruct unnecessarily a street car, but he has no better right to obstruct any other vehicle. As to all, he is bound

to use the same diligence not to delay. On the other hand, all are bound to use ordinary care not to obstruct or injure him, and he may use the street, relying upon such diligence on the part of others, including those in charge of street cars. If one were to step blindly into the street, closely in front of a push cart, and receive injury, his negligence would deprive him of a right of action. It was his duty to look and avoid danger. The same duty, and no other, rests upon him as to a street car; but as the danger is greater, and the conditions different, a different degree of diligence may be required. The rule in regard to a steam railroad, requiring that a person approaching a crossing must stop, look, and listen, implies that, if a train is imminent, he must stop until it passes. In such case it is not expected that the train will stop for him, and it would be unreasonable to require it. Not so as to street cars. As a hypothetical case, I may state that on Market street, in San Francisco, during a portion of every day, four cars per minute pass on the cable road any given point. There are two other tracks upon the street also operated. The track is thronged with trucks, drays, express wagons, and other vehicles. They have frequent occasion to pass from one side of the street to the other. It is safe to say that at such time such crossing generally stops a car upon each track of the cable road. Yet they have a right to cross, and to drive on the track, although a car is near at hand, and will be required to stop. In other words, the car must beat its way along, like any other vehicle in a crowded street. Neither should move so closely in front of another that a collision is likely to occur. All must use ordinary care not to obstruct others, and all may rely upon the use of that care on the part of others not to injure them. These considerations do not similarly affect a train on a steam railroad, even at the crossings; for the train is not expected to wait for others to pass, and its velocity and momentum would ordinarily prevent it. In conclusion, I wish to say that, in my opinion, if a man of ordinary prudence in the place of the motorman would have seen that perhaps Everett was not aware of his danger, and that injury might occur unless he stopped his car, then it was his duty to stop and make sure. I do not think the jury were misled to the injury of defendant by any instruction given, and in my opinion, the jury were fully instructed upon all points on which instructions were required by defendants. Judgment and order should be affirmed.

We concur: Beatty, Ch. J.; Henshaw, J.

CONNECTICUT SUPREME COURT OF ERRORS.

Emma J. VAN EPPS, *Appt.*,

v.

J. R. REDFIELD, Admr., etc., of John
O. Wasserbach, Deceased, *et al.*

(68 Conn. 89.)

1. A complaint alleging an agreement and promise to convey real estate is not demurrable because it does not expressly allege that the contract was in writing.
2. A relinquishment by the mother of a bastard child of her right to compel the father by legal proceedings to assist in the maintenance of the child, and her support and education of the child at her own separate expense, are a sufficient consideration for his promise to make a conveyance of real estate to her.
3. An agreement to convey real estate appraised at \$3,800 in consideration of the release of the grantor from his liability with respect to a bastard child, when the amount of this burden does not appear, is not based on such an inadequate consideration that a bill for specific performance of the agreement to convey will be bad on demurrer, but the sufficiency of the consideration will be left for determination at the trial.

(June 5, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County sustaining a demurrer to the complaint in an action brought to compel specific performance of a contract to convey real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. William B. Stoddard and Sylvester Barbour for appellant.

Mr. Charles E. Perkins, for appellees:

It is a fundamental principle of the doctrine of specific performance that a plaintiff has no right to call upon the court to exercise its power, but the court will always exercise its discretion whether to decree a performance or not.

Patterson v. Bloomer, 85 Conn. 63, 95 Am. Dec. 218.

A specific performance of a contract will not be enforced unless it is made upon a consideration which is adequate, that is reasonably equal in amount to the value of the property agreed to be conveyed.

Dodd v. Seymour, 21 Conn. 479.

A moral obligation alone is not a sufficient consideration "except where there has theretofore been a legal right which has become devoid of a legal remedy."

Clement's Appeal, 53 Conn. 476; *Cook v. Bradley*, 7 Conn. 63, 18 Am. Dec. 79; *North v. Forest*, 15 Conn. 405.

A past act is not a valid consideration.

8 Am. & Eng. Enc. Law, 838, *Plumb v. Curtis*, 66 Conn. 172.

A promise made in consideration past of illicit intercourse is void.

3 Am. & Eng. Enc. Law, 874; *Binnington v. Wallis*, 4 Barn. & Ald. 650; *Beaumont v. Reece*, 8 Q. B. 488.

NOTE.—As to contracts to transfer parental responsibility or authority, see *Enders v. Enders* (Pa.) 27 L. R. A. 54.

64 L. R. A.

There is no common-law liability of a reputed father to support an illegitimate child; the mother alone is bound to educate and maintain him, and the putative father has no power or control over him.

1 Swift, Dig. 48.

There is a statutory provision by which under certain circumstances the person claimed to be the father may be made to contribute to the support of a child, but no legal liability arises unless the provisions of the statute are followed.

Heath v. White, 5 Conn. 235; *Dickinson's Appeal*, 42 Conn. 503, 19 Am. Rep. 553; *Easley v. Gordon*, 51 Mo. App. 637.

Courts of equity will not enforce any contract founded on any illegal or immoral transaction.

1 Story, Eq. Jur. §§ 296-298; 22 Am. & Eng. Enc. Law, 1014; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 893, 36 L. ed. 748; *Platt v. Stonington Sav. Bank*, 46 Conn. 476.

The general principle has often been applied to cases like the present.

Batty v. Chester, 5 Beav. 103; *Smyth v. Griffin*, 18 Sim. 245, 14 L. J. Ch. N. S. 23; *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Benyon v. Nettelfold*, 3 Macn. & G. 94; *Drennan v. Douglas*, 162 Ill. 341, 40 Am. Rep. 595; *Wallace v. Rappleye*, 108 Ill. 229.

FENN, J., delivered the opinion of the court:—

The original complaint in this action was demurred to, and said demurrer was sustained. Thereupon an amended complaint was substituted. This was also demurred to, and again the demurrer was sustained. Although the appeal assigns error in reference to both of these rulings, we need only to consider the last complaint and the last demurrer, on which all the questions properly presented arise. The cause of action alleged may be thus stated: John C. Wasserbach died September 12, 1895, leaving a considerable estate and a valid will. He also left one child, John C. Wasserbach, Jr. The estate is in settlement. Included in the inventory is a certain lot of land, described in the complaint, with dwelling house and other buildings thereon, situated in Hartford. Said child, John C. Wasserbach, Jr., was born May 20, 1884. The plaintiff is his mother. The deceased gave the child his own name, by which name such child has always been called, and said child was always recognized by said deceased, and adopted as his own child. The plaintiff and the deceased were never married. About the time of the birth of said child, "in consideration of the premises, and in consideration of the legal and moral obligation which the said Wasserbach, deceased, was under to the plaintiff, and in further consideration of the plaintiff's promise to, and agreement with said Wasserbach, deceased, not to enforce by legal proceedings her legal rights and claims against him, said Wasserbach, deceased, to compel him to pay her towards the support and maintenance of said child, John C. Wasserbach, Jr., said Wasserbach, deceased, in part performance of his obligation to the plaintiff, agreed with

and promised her to purchase and convey to her the aforesaid real-estate premises. No. 14, Westland street, which property was formerly owned and occupied by members of the plaintiff's family and relatives of hers." The plaintiff, in fulfillment of her said promise to and agreement with said Wasserbach, deceased, has never commenced any legal proceedings against him to compel him to pay any part of the expense for the support and maintenance of said child, but has always supported, maintained, and educated said child at her own expense. After said promise and agreement said deceased, in pursuance thereof, on or about September 23, 1885, purchased said real estate, but took the title in his own name. Immediately after such purchase he informed the plaintiff that he had purchased said estate for her, according to his aforesaid promise and agreement, and delivered possession of said premises to the plaintiff, and informed her that said real-estate premises were her own property, to be owned by her in fee simple, and be occupied by her as a home for herself and said child; and the plaintiff entered into possession of said premises under a claim of ownership, and has ever since occupied and now occupies the same with said child under said claim of ownership. This she did with the knowledge and consent of said deceased. From time to time since the aforesaid purchase, and up to the time of his death, the deceased renewed his said promise to and agreement with the plaintiff, upon the consideration aforesaid, to convey to her the legal title to said real estate, and had partially made arrangements so to do in the summer of 1895, when he was suddenly killed by an accident, and never in fact did deliver to her a conveyance of said premises. The plaintiff claimed—First, specific performance; second, damages.

In addition to a demurrer to the relief sought the following grounds of demurrer were stated: "(1) Upon the allegations in the complaint, the agreement set up is not one which will be enforced in a court of equity, as not coming within the rules applicable to the specific performance of a verbal agreement relating to real estate. (2) Said complaint does not state any good and sufficient consideration for the said agreement therein asked to be enforced, as the consideration of the premises, and the legal and moral obligations the deceased was under to the plaintiff is not a sufficient statement of a sufficient consideration for said agreement. (3) It is not a sufficient allegation to support the alleged agreement that the plaintiff agreed not to enforce by legal proceedings, her legal rights and claims against the deceased to compel him to pay her towards the support and maintenance of said child, as such agreement, if ever made, would be invalid, under § 1209 of the General Statutes, without the consent or provision referred to in said section, and it is not alleged that such consent or provision was ever obtained. (4) Such agreement not to enforce said claim, if made, would not be a sufficient consideration, and would be contrary to public policy and void; nor would it have been an adequate consideration. (5) Said agreement alleged in said complaint, for the

specific performance of which said suit is brought, was void as against public policy, and is not such a one as a court of equity will enforce." The demurrer to the legal relief, namely, damages claimed upon the complaint, was well taken and properly sustained by the court below for reasons fully stated by this court in *Grant v. Grant*, 68 Conn. 530-545. The demurrer to the claim for equitable relief by way of specific performance, should have been overruled, because that was the appropriate relief to be demanded upon the allegations of the complaint, provided these were sufficient to call for any relief whatever. *Rules of Practice*, 58 Conn. 567, § 11. We come, then, to the special grounds of demurrer which have been stated. It is perhaps to be regretted that we cannot regard the first of these grounds as presenting any question properly before us at this time for decision. We are not at liberty to say that the plaintiff relies upon "a verbal agreement relating to real estate." The record discloses that the defendants moved in the court below that the plaintiff make the original complaint more specific, by stating whether the promise and agreement alleged to have been made to her was in writing or verbal. This motion, the court, however, overruled. It is true that a considerable portion of the complaint consists of allegations apparently introduced to show sufficient part performance of an oral agreement to remove the operation of the statute of frauds. It is also true that a large part of the brief as well as the oral argument before us in behalf of the plaintiff was directed to the claim that the facts stated were sufficient to denote such valid part performance. But notwithstanding this we feel constrained to take the pleadings as they are, and to be limited in our decision to the issues as they are presented upon the record. This limitation prevents also the full application, as a test of the correctness of the decision of the court below, of the doctrines concerning discretionary power in the court, so fully urged upon us by counsel for the defendants. It is very apparent that the trial court, in deciding upon the demurrer, did so, not in the exercise of any actual or assumed discretion, but because, in the view of the law held by said court, a judgment in favor of the plaintiff, upon the allegations of the complaint, could not be vindicated or sustained, not because of discretion to so decide, but because it had, as it deemed, no discretion to do otherwise. If this be true, there was no occasion and no opportunity for the exercise of the power of discretion. If it be not true, the fact that such power did really exist does not justify a decision in no wise based upon it. It is not too much to say that there are cases where complaints may show what may be called (as it is called in *Bispham on Equity*, § 864) a *prima facie* right to come into equity to ask specific performance; but after coming into equity it may, upon a hearing of facts relevant under such complaint, and in support of its allegations, nevertheless appear that the contract is not so equitable, reasonable, certain, or on good, adequate, mutual consideration, consistent with policy, and free from fraud, suspicion, or mistake, that specific performance should be decreed. *Patterson v.*

Bloomer, 35 Conn. 57, 95 Am. Dec. 218. In such a case a demurrer to the complaint will not reach the difficulty in the way of the plaintiff's recovery, which the full trial on the merits will disclose. On such a trial the considerations which the defendants have urged upon us as reasons why the relief prayed for should, in the exercise of discretion, be denied, will doubtless receive, as they will merit, full attention and weight.

The third ground of the defendants' demurrer is not well taken, and was not pressed. Gen. Stat. § 1209, was not passed until 1887, and does not affect the validity of the alleged cause of action in this case.

The remaining grounds of demurrer present, in effect, only a single question: Does the complaint allege a contract founded upon sufficient consideration, consistent with public policy, which a court of equity, in the exercise of its discretion, can enforce? Concerning the allegations of consideration in the complaint, what the legal or moral obligations of a person to a child which such person caused to be called by his own name, and "always recognized and adopted as his own child," may be, it is unnecessary to inquire, since such child is in no sense a party to this suit. Nor is it essential to determine what obligation the said John C. Wasserbach, deceased, was under to the plaintiff, except so far as it enters into the question of the alleged consideration for the asserted agreement and promise to her. Upon the facts stated, he, the said Wasserbach, was at the time stated,—about the time of the birth of the child,—by virtue of the statute (now Gen. Stat. §§ 1206-1208), under a legal obligation to the plaintiff, enforceable by what are called "bastardy proceedings," based upon such statutory enactments. She thereby, and by reason of the premises, had a valid and lawful cause of action against him, to compel him to assist her in the maintenance of their child. The prescribed proceeding is of a civil nature, and the plaintiff mother, in such a suit, has the rights of a party in an ordinary civil action, and her interest in such suit is a pecuniary one. *Hamden v. Merwin*, 54 Conn. 418; *Booth v. Hart*, 43 Conn. 480-486; *Robbins v. Smith*, 47 Conn. 182-186. The complaint states that the plaintiff had the statutory right above referred to, and that in consideration of her promise and agreement not to enforce it by legal proceedings, but to support and educate the child without assistance from said Wasserbach, and at her own separate expense, he agreed and promised to convey to her the property in question. We cannot, in view of these allegations, indorse the claim of the defendants that "there is no suggestion here that there was any other consideration, legal or moral, than the fact of the illicit connection and the birth of the child," which assertion is made the basis of the claim that a past act is not a valid consideration, and that "a promise made in consideration of past illicit intercourse is void" unless, indeed, under seal. We will not discuss or express any opinion here concerning the soundness of these propositions, because it appears to us that the obligation relied upon has its sufficient basis in the legislative authority which created it, though, were it necessary, it would be easy to see that the provisions of such statutes are not opposed

to, but in furtherance of, public policy, and in close accordance with the principles of natural justice.

But the defendants further claim that no liability as imposed by the statute arises unless the statutory provisions are followed. The case of *Heath v. White*, 5 Conn. 228, 235, was referred to, where this court said: "There is no possibility of deciding who is the father of a child begotten of a lewd woman. Her testimony is permitted to rise so high in the scale of probability as to subject him to a contribution towards the child's maintenance, not as the father in fact, but the putative father only." But surely, if the testimony of a lewd woman is permitted to rise so high in the scale of probability as to accomplish the effect stated, what shall be said of the altitude in the scale of such testimony when coupled with the facts alleged, that the asserted father gave the child his own name, by which such child was always called, and always recognized and adopted it as his own child? Truly, it cannot be claimed that this court meant to say in *Heath v. White* that the putative father only of an illegitimate child is liable to contribution, but that the real father is not. But it is said liability attaches only at the end of litigation of bastardy proceedings, which might be brought by the mother or by the town, and then only the amount would be fixed which the defendant should pay, either to her or to the town, for some indefinite time. It is further said that a promise on the part of the mother that she would not commence the suit would not terminate the liability of the deceased. As we have before said, the effect which the provisions of Gen. Stat. §§ 1209, 1210, might have had, if such statute had been in existence in 1884, is not involved, since such enactment was not made until 1887. But the very provisions of those sections appear clearly to recognize the authority of the mother, prior to that time, to effect a settlement, and the object of the statute was to limit and qualify that before-existing right. But it is further to be noticed that the complaint alleges that a part of the promise which the plaintiff made and fulfilled was to relieve the deceased, not alone from his obligation to her, but from the burden of the support, maintenance, and education of the child; thus in this way, at least, doing what would "terminate the liability of the deceased."

But finally, the defendants claim that the real question is whether the court, as a court of equity, will say that the consideration stated is such an adequate and sufficient one that under the circumstances of the case it will enforce the specific performance of the alleged agreement. But regarding this claim, for reasons which we have already somewhat considered in another connection, we do not feel at liberty to base a decision in the defendants' favor upon it, as the case now stands. It is alleged in the complaint that the appraised value of the real estate claimed is \$3,300. What the amount of the burden from which the plaintiff relieved the deceased by her promise and undertaking was, or would have been, does not appear. The trial would probably disclose much material information bearing upon this question of which we are ignorant. We can only refer to general principles applicable to the matter. In

Grant v. Grant, 63 Conn. 540, 541, the cases of *Wallace v. Rappleye*, 103 Ill. 229, and *Woods v. Evans*, 118 Ill. 186, are quoted from and approved. The principle is affirmed that "specific performance of a verbal contract affecting real estate will not be decreed except upon due and conclusive proof of its existence and terms, and that the contract must be certain, equal, and fair, founded upon a valuable as distinguished from a merely good or moral consideration, and that, so proved, it is not a matter of right, but of sound discretion." Such discretion, in such a case so proved, pertains, at least in the first instance, to the trial court, guided also by what is further said by the court in the citation above given,—that such claims as the present "are always dangerous, and when they rest on parol evidence they should be strictly scanned."

There is error in the judgment complained of, and it is reversed.*

The other Judges concur.

*This case went back for a new trial and the trial judge, Wheeler, made a finding of facts in substantial conformity to the allegations of the complaint, and decided in favor of the plaintiff, filing the following memorandum of decision:

The facts set up in the second count are abundantly proved.

Disinterested witnesses of established character, friends of the deceased, testify that at the time he purchased this property in question he said it was to be the plaintiff's. He repeated to different persons the same thing, and only two months before his death he told General Harrison that he had given the plaintiff these premises. The evidence is overwhelming and absolutely convincing that the deceased purchased these premises for the plaintiff and down to his death regarded them as hers. The evidence is entirely satisfactory that the plaintiff has maintained, supported, and educated the boy, and that the deceased loved him greatly and had great pride in him, and the appearance of the boy would entirely justify such a pride. It was equally clear that the deceased had up to his death affection for the plaintiff. He said to General Harrison she had been a good friend to him and done all for him she could.

This was no ordinary case of illicit connection. The only essential fact which rests upon the plaintiff's testimony was that she agreed to support the child at her own expense if he would deed to her these premises. That he agreed to deed the premises there can be no doubt and corroborated as this woman's story is on all sides, and uncontradicted, I must find that she speaks the truth when she says the consideration of these premises was to be her support and maintenance of the child.

The questions of law raised by the defendant were these:

1. There was no consideration to support the claimed agreement.

2. The agreement was a parol one and within the statute of frauds.

3. There was no part performance to take the case out of the statute.

4. The case was one which no court of equity ought to enforce.

5. The case was against public policy.

When this case was before the supreme court upon a decision sustaining a demurrer to the first count of this action the court held that by reason of the statute (Gen. Stat. §§ 1206-1208) Wasserbach was under a legal obligation to the plaintiff enforceable by what are called bastardy proceedings; that such an action was of a civil nature and the plaintiff's interest in such suit was a pecuniary one. Further the plaintiff had a right to effect a settlement with him of his statutory obligation to her. Further, that relieving him from the burden of the support, maintenance, and education of the child would thus terminate his liability.

The evidence disclosed that the plaintiff did agree with him to terminate his liability under the statute by agreeing to support and maintain the child, and that she has kept her agreement by supporting, maintaining, and educating the child. He agreed in consideration of her agreement to thus terminate his liability that he would purchase certain property and deed it to her, that she might have a home for herself and the child.

We think that this agreement on her part is a sufficient consideration to maintain such an agreement on his part. We think that our court has so decided when this case was before it, and the authorities would support such a decision if it were adjudicated in our courts. *Hook v. Pratt*, 78 N. Y. 376, 377, 84 Am. Rep. 539.

The English cases cited in this opinion are decisive of the law of England upon the validity of an agreement by a putative father to pay a sum of money in consideration of the support of the child being furnished by the mother of the child. *Ibid.*; *Todd v. Weber*, 36 N. Y. 159, 47 Am. Rep. 20, and the many cases cited and full discussion therein.

This case cites with approval *Hook v. Pratt*, *supra*. *Ibid.*; note to *Simmons v. Bull*, 66 Am. Dec. 260, and large number of English cases cited; *Hargrove v. Freeman*, 12 Ga. 345; *Schouler*, Dom. Rel. 5th ed. § 279, and note 6, p. 242.

A child at common law is under no liability to support his parents. By statute he may be. A promise to pay for future support furnished will be upheld. *Stone v. Stone*, 22 Conn. 144; *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 310.

An equal, if not stronger, case, is the agreement of the father of a child to pay for support furnished the child by the mother. It was urged that no part performance had been shown sufficient to take the case out of the statute of frauds, but I cannot regard the evidence in this case as leaving this question in doubt.

The case of *Andrew v. Babcock*, 65 Conn. 120-124, is conclusive upon this point.

"The case seems to be sustained by a wholesome public policy and to represent such a state of facts as must appeal to the conscience of a court to carry out the certain wishes of the dead in his desire to do tardy and inadequate justice."

INDIANA SUPREME COURT.

Joshua SANDAGE et al., Appts.,

v.

STUDEBAKER BROTHERS MANUFACTURING CO.

(142 Ind. 148.)

1. A party to a contract is entitled to an injunction restraining the prosecu-

tion of several actions for the recovery of different instalments thereunder, commenced by the assignee of the other party in the court of a foreign state for the purpose of avoiding a statute of the state in which the contract was made and to be performed, and in which both the parties and such assignee reside.

2. The right to an injunction to restrain the prosecution of several actions on a

NOTE.—For injunction against suit in other state, see note to *Thorndike v. Thorndike* (Ill.) 21 L. R. A. 71.

34 L. R. A.

For note as to the validity of notes given for patent rights, see *First Nat. Bank v. Stockell* (Tenn.) 20 L. R. A. 605.

contract for the recovery of different instalments of money, commenced in the court of another state for the purpose of avoiding a statute of the state of the residence of the parties affecting the validity of the contract, is not defeated by the fact that complainant has other legal defenses available in the foreign jurisdiction.

3. The tender back of letters patent by a buyer to the seller places the latter in *statu quo* so as to entitle the former to rescind the contract of sale on the ground that the letters were void for lack of novelty.

4. There can be no recovery as between the parties, on a contract made in violation of a statute, the violation of which is prohibited by a penalty, although the statute does not pronounce the contract void or expressly prohibit the same.

5. Parol evidence is inadmissible to extend the effect of a written contract to abrogate a prior agreement, beyond the terms of such contract, where it is complete and there is no apparent ambiguity therein that requires an explanation.

(September 27, 1894.)

APPEAL by defendants, from a judgment of the Circuit Court for St. Joseph County in an action brought to recover back money paid by plaintiff to defendant Sandage for a patent and to enjoin defendants from prosecuting suits in another state to enforce further payments of moneys due under the contract of sale. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. L. Brick and Charles Pickard for appellants.

Messrs. Andrew Anderson and Lucius Hubbard, for appellee:

Money paid for worthless securities may be recovered back.

2 Whart. Cont. 744.

There is want or failure of consideration, where a patent is incapable of being applied to any practical or beneficial purpose.

Newark, Sales, § 886; *Nash v. Lull*, 102 Mass. 60, 8 Am. Rep. 435; *Harlow v. Putnam*, 124 Mass. 553.

A buyer may recover the price paid to the seller who has warranted the title, when the goods for which the money was paid turned out to have been stolen.

1 Benjamin, Sales, Corbin's ed. p. 540; *Eicholtz v. Bannister*, 17 C. B. N. S. 708.

Even without such warranty, it is said to be the undoubted right of the buyer to recover back money paid on a purchase, where he does not get that for which he paid.

1 Benjamin, Sales, Corbin's ed. p. 540; *Chapman v. Speller*, 14 Q. B. 621; *Burt v. Bowles*, 69 Ind. 1; *Howe Mach. Co. v. Willie*, 85 Ill. 333; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495.

The assignment of this patent by Sandage conveyed nothing.

Morgan v. Muldoon, 82 Ind. 347; *Bever v. North*, 107 Ind. 545.

The promise to work on a salary was separable, and was performed and paid for.

Benjamin, Sales, Corbin's ed. p. 548.

It is, then, immaterial whether the Studebaker Brothers Manufacturing Company made a profitable or unprofitable use of the steel

skein. Nothing passed by the assignment and there was nothing to restore.

Burt v. Bowles, supra; Mooklar v. Lewis, 40 Ind. 1; *Morehead v. Murray*, 31 Ind. 418.

An injunction will lie to restrain a resident of Indiana from prosecuting an action in the courts of another state, to obtain an advantage which he is not entitled to under the laws of this state.

Wilson v. Joseph, 107 Ind. 490; *Dehon v. Foster*, 4 Allen, 545; *Keyser v. Rice*, 47 Md. 208, 28 Am. Rep. 448; 23 Cent. L. J. 268.

The supreme court of Illinois, in *Hollida v. Hunt*, 70 Ill. 109, 23 Am. Rep. 63, held that the state statute which required vendors of patent rights to procure a certificate from the county clerk, and provided that every written obligation the consideration of which was a patent right, should contain the words, "given for a patent right," was unconstitutional and void, as an attempt to regulate, by state legislation, a matter of which Congress has sole jurisdiction.

Ex parte Robinson, 2 Biss. 309.

Our own supreme court now holds that such a statute is valid as an exercise of the police power of the state.

Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695; *New v. Walker*, 108 Ind. 365, 53 Am. Rep. 40; *Hankey v. Downey*, 1 L. R. A. 447, 116 Ind. 118; *Pape v. Wright*, 116 Ind. 502.

There can be no recovery on a contract forbidden by a statute.

Dillon v. Allen, 46 Iowa, 299, 26 Am. Rep. 145; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *New v. Walker, supra*.

It is not enough that there is a remedy at law. It must be plain and adequate, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Thatcher v. Humble, 67 Ind. 444; *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *Heagy v. Black*, 90 Ind. 534; *Hisiop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731.

The rule of the court is to assume jurisdiction in all cases where the interests of justice call for and require its interference.

Spicer v. Hoop, 51 Ind. 365; *Wilson v. Joseph*, 107 Ind. 490.

Jordan, J., delivered the opinion of the court:

The only questions arising and argued by appellants in this appeal are those based upon the alleged error of the court in overruling their separate motions for a new trial. Two principal propositions are presented for our consideration by appellants' learned counsel, namely: (1) That the decision of the court is not sustained by sufficient evidence, and is also contrary to law; (2) that the court erred in excluding certain evidence of the appellant Joshua Sandage. Appellee, by this action, sought to recover a certain sum of money paid by it to appellant Sandage in the purchase of letters patent for an improvement in steel skeins, and to enjoin him, together with his coappellant, the Sandage Steel-Skein Company, from bringing or further prosecuting suits in the courts of Cook county, in the state of Illinois, upon certain contracts in writing, mentioned in the com-

plaint, and for the cancelation of these contracts. The complaint is in two paragraphs and the following is, substantially, a correct summary of the facts, as alleged in this pleading: Appellants, at and long before the commencement of this action were residents, and had their domicils, at the city of South Bend, Indiana. Appellee is a corporation, also having its domicil at said city, long prior to the instituting of this action, and is there engaged in the business of manufacturing wagons and carriages. On July 19, 1882, appellant Sandage was the owner of certain letters patent for an improvement of steel axle skeins, issued to him by the government of the United States. On the date mentioned he sold and transferred these letters patent to the appellee by a contract in writing executed by him and appellee. By this contract the latter agreed to manufacture the patented skein, and to employ Sandage as a foreman in its factory for a period of two years, at a salary of \$1,500 per year, and to pay him \$2,000 in cash, and one third of the net profits arising from the manufacture of the skeins, until he should receive \$20,000. Sandage agreed to also assign to the company any improvements which he might make in the patent, and in the contract he guaranteed the validity of the letters, and agreed to pay all costs and expenses in enforcing and sustaining the same, and to defend the appellee in all suits for infringements, and to pay all costs and expenses occasioned thereby. Upon the execution of this contract, and the transfer of these letters to appellee, it erected buildings and provided machinery, and engaged in the making and selling of the steel skeins; and Sandage was taken into its employ for two years, as per agreement. He was paid his stipulated salary, also \$2,000 in cash, and, in addition, appellee paid him \$7,000 in profits accruing up to 1886, as the consideration for the sale and assignment of the patent. On November 20, 1886, the parties executed what was termed a "supplemental contract," whereby they changed the original agreement by providing that Sandage, as a final and additional compensation for, and in consideration of, his letters patent, and any improvement he might make thereon during the life of the patent, should be paid by the appellee the sum of \$18,000, to be payable as follows, to wit: January 1, 1888, \$4,000; January 1, 1889, \$3,000; January 1, 1890, \$4,000; January 1, 1891, \$2,000. It was further provided in this supplemental contract that in the event that appellee was compelled to defend its right and title to the patent, or if it should find it necessary to prosecute persons for infringements between November 26, 1886, and January 1, 1891,—the date of the last payment,—then and in that event the reasonable expenses of these suits should be paid by Sandage, to an amount not to exceed the final payment of \$2,000; but, in the event the appellee brought a suit and was defeated, appellants were not to be held liable for the costs of such suit. It was also stipulated that: "So much of the agreement made between the Studebaker Bros. Manufacturing Company and Joshua Sandage on the 19th day of July, 1882, as relates to the payment by the said Studebaker Bros. Manufacturing Company to the said Sandage of moneys for and in consideration of his letters

patent herein indicated, or which is in any way inconsistent with this agreement, is hereby repealed and made of no effect. The other particulars of said first agreement to continue and remain in full effect." On January 8, 1888, appellee paid Sandage \$4,000, being the instalment due, under the supplemental agreement, on the 1st of that month. After receiving said sum, appellant, in November, 1889, made an assignment of both the aforesaid contracts to his coappellant, the Sandage Steel-Skein Company. The second instalment, of \$3,000, was not paid at maturity; and the latter company, claiming to be the holder of these contracts, by virtue of an assignment to them by Sandage, brought an action in the circuit court of Cook county, Illinois, upon the contract, in the name of Joshua Sandage, for its use, against appellee, to recover this unpaid instalment. In 1890, after the second instalment of money specified in the second or supplemental contract had become due, and which appellee had refused to pay, the Sandage Steel-Skein Company commenced a second action in the same court against appellee to recover this latter instalment. After the assignment of these contracts to said steel-skein company, and the commencement of these actions, in January, 1890, appellee began a suit in the circuit court of the United States, at Chicago, Illinois, against the Illinois Iron-Bolt Company, for an infringement of said patent, and on January 27, 1890, served both of the appellants with notice to the effect that such an action had been commenced in that court, and that the validity of the patent would be assailed and in issue therein, and requested that said parties assist in said cause, in defending the validity of the letters patent; claiming an estoppel against them by any judgment that might be rendered therein against the validity of the patent. At the March term, 1890, of said United States court, in said action, these letters, by that court, were adjudged and held to be invalid, for want of novelty. *Studebaker Bros. Mfg. Co. v. Illinois Iron & Bolt Co.* 42 Fed. Rep. 52. Thereupon, on May 16, 1890, appellee executed and tendered to appellant Joshua Sandage a reassignment of said letters, and a cancelation of said contracts, and requested him to repay to it the sum of \$20,000, all of which was refused by him. A like demand for cancelation of said contracts was made upon the Sandage Steel-Skein Company, which was also refused. That, in addition to the two suits already commenced by said skein company against appellee, said company was threatening to bring other actions on these contracts in the courts of Illinois, and attach appellee's property situated in that state. Sandage, at the time of the sale of the patent right to the appellee, had wholly failed and neglected to comply with the requirements of §§ 6054, 6055, Rev. Stat. 1881 (Rev. Stat. 1894, §§ 8130, 8131), in relation to the sale of patent rights, and sold his said patent to appellee in violation of this statute. The supreme court of Illinois having held a statute of that state in relation to patents (being one similar to the statute cited above) void on the ground that it violated the Federal Constitution, it is averred that the appellants have resorted to the courts of Illinois in order to escape the laws of Indiana on that subject. It

is also averred that after this action was commenced, and a temporary restraining order was granted against the appellants, that they made a sale of these contracts in suit to a resident of Chicago, Illinois. It is also shown that the tender of a reassignment of this patent was continued by bringing the same into court for appellants' use. These are the conspicuous facts, as presented by the record in this action. A trial upon the issues joined, in the lower court, resulted in a judgment to the effect that appellants be perpetually enjoined from prosecuting or commencing any suit or suits for the purpose of enforcing the contracts in question, and that the same be canceled and delivered up to the appellee, and that appellee recover of Joshua Sandage the sum of \$13,447.42 and costs.

One of the contentions of appellants is that "the facts in this case, as alleged in the pleadings and as shown by the proofs, do not make such a case as entitled the appellee to the equitable relief prayed in the petition, and granted by the decree." Upon the contrary, appellee contends that the evidence fully authorized and justified the court in finding that the appellants commenced their suit in the state of Illinois for the purpose of evading the laws of Indiana, and thereby gaining an advantage over the appellee in the forum of a sister state. We have examined the evidence in the record, and are of the opinion that it establishes the facts alleged in the complaint, and sustains the finding and judgment of the court. It is insisted by counsel for the appellants that the alleged facts in the case at bar are a complete and adequate defense at law to the actions commenced upon the contracts in controversy in the courts of Illinois. Conceding this contention, however, can it be urged, consistent with reason, that this principle of equity can be invoked to require appellee, under the facts, to go into the courts of another state, and there assail these contracts by pleading the facts in bar to the actions therein pending? This contention cannot be sustained upon any reasonable grounds. It is, however, a familiar rule that it is not sufficient that there is a remedy at law but the same must be plain and adequate, and as practical and efficient to the ends of justice, and its prompt administration, as is the remedy in equity. It is manifest, we think, that had appellee been compelled to avail itself of the facts on which it based its cause of action in this case, as a cause of defense to the suits already commenced by the appellee, or to the others that they might institute upon the obligation in question, its remedy would not have been as adequate and efficient as the one invoked in this cause. Two actions had been commenced upon the alleged invalid contract, and another was threatened, in order to recover the instalment of \$2,000 not yet matured. By waiting to contest, by way of defense, the right of appellants to enforce these payments of money under this contract, appellee might have been at least harassed by and subjected to repeated and vexatious litigation, and much expense incident thereto, by appellants, or those to whom they might have assigned the contract in controversy. By appealing to a court of equity, the remedy was at once adequate and complete, and by one

action all the relief to which appellee was entitled under the facts could be awarded.

Counsel further contend that appellee was not entitled to have this contract rescinded until it had placed Sandage *in statu quo*. We recognize the full force of the rule that, where a party desires to rescind a contract, he must do so *in toto*, and return the consideration which he received thereunder, and otherwise do that which will put him and the other party *in statu quo*. But what was necessary to be done, in view of the facts and circumstances in this case, to put Sandage *in statu quo*? All that appellee received from him was an assignment of his right and title to the patent right in question. This right proved to be invalid and worthless, and appellee re-assigned the letters, and tendered back the same to Sandage. This, evidently, in our opinion, was all that appellant could, at the furthest, demand. Sandage had guaranteed the validity of these letters. Their validity was assailed in a court of competent jurisdiction. Of this fact he was notified, and requested to sustain them. They were adjudged by the court to be void for the reason herein stated. By this judgment appellant was bound. That money paid for worthless securities or rights, or where the purchaser does not get that for which the money was paid, may be recovered back, is a well-settled proposition. Whart. Cont. § 744; Benjamin, Sales, p. 540; *Burt v. Bowles*, 69 Ind. 1; *Jarboe v. Sererin*, 85 Ind. 496. It was established on the trial that Sandage had failed to comply with the prerequisites of sections 6054, 6055, Rev. Stat. 1881 (Rev. Stat. 1894, §§ 8120, 8131), by neglecting to file copies of his letters with the clerk of the circuit court of St. Joseph county, wherein the said patent was sold, and by not inserting in the written contract wherein appellee obligated itself to pay the purchase price of the patent the words, "given for a patent right." The penalty for disobeying this statute is a fine, or imprisonment in jail. Rev. Stat. 1881, § 6056 (Rev. Stat. 1894, § 8132). That the noncompliance with this law rendered the contract—at least, so far as appellee therein obligated itself to pay the purchase price of this patent—invalid, as between the parties, is no longer a disputed question. *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695; *Robertson v. Cooper*, 1 Ind. App. 78. That there can be no recovery on a contract made in violation of a statute, as between the parties thereto, the violation of which is prohibited by a penalty, is a principle well recognized by the courts. This is true, although the statute does not in terms pronounce the contract void, nor expressly prohibit the same. This doctrine is well supported by many English and American decisions. *Woods v. Armstrong*, 54 Ala. 150, and the authorities collected in note to this case in 25 Am. Rep. 674; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Winchester Electric Light Co. v. Feal* (at this term) (Ind.) 41 N. E. 334. Counsel for appellant urge that this statute is in conflict with the Federal Constitution, and therefore void. This question has been settled to the contrary in this state, and is no longer an open question. *New v. Walker*, *supra*; *Hankey v. Downey*, 116 Ind. 118, 1 L. R. A. 447;

Pape v. Wright, 116 Ind. 502. It was in evidence that the supreme court of Illinois, in the case of *Hollida v. Hunt*, 70 Ill. 109, 23 Am. Rep. 63, held a similar statute of that state, relating to patent rights, to be repugnant to and inconsistent with the rights exercised by Congress in regard to such rights, and therefore void. In view of this latter fact, in connection with the other evidence in the case, we are of the opinion that it is shown that appellants, by bringing actions upon this contract in Illinois, instead of instituting the same in Indiana, where all the parties resided, did so for the purpose of obtaining an advantage over the appellee which they were not entitled to under the laws of the latter state. As long as a citizen belongs to a state, he owes it obedience; and, as between states, the state in which he is domiciled has jurisdiction over his person, and his personal relations to other citizens of the state. *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 48. That a citizen of a state, under a showing of sufficient facts, can be enjoined from commencing or prosecuting a suit against his fellow citizen in the courts of another state, is an equitable rule, recognized and enforced by this court and many others. See *Wilson v. Joseph*, 107 Ind. 490; *Keyser v. Rice*, *supra*; *Dehon v. Foster*, 4 Allen, 545; 23 Cent. L. J. 268. This rule seems to be sustained by a clear weight of authority in this country. See 10 Am. & Eng. Enc. Law, p. 909. It is declared in the decisions that the court, in the exercise of this authority, does not proceed upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the grounds that the person against whom the restraining order is issued resides within the jurisdiction, and within the power of the restraining court. The court issuing the writ does not pretend to direct or control the one in the foreign state, but, without regard to the subject-matter of the dispute, it considers the equities between the parties, and decrees *in personam* according to these equities, and enforces obedience to its decree. We think that in the case at bar the facts sufficiently show a manifest equity in favor of appellee, so as to entitle it to the decree herein.

Appellants complain of the action of the court in not permitting Joshua Sandage to answer the following question of appellee: "What, if anything, was the consideration of the second or supplemental contract, as to releasing you of your guaranty in the second contract?" The appellants' attorney explained to the court, on the court's request, as follows: "That that statement in the first contract, and the second statement in the supplemental contract, in reference to the having of suits and payments of costs, are ambiguous and not fully explained in the contract; that the contract was entirely abrogated, and

84 L. R. A.

that was a part of the consideration of the second contract; that the first contract was for royalties, and in consideration that Mr. Sandage gave up his right to the royalties, more valuable to him than the second contract gave him,—in consideration that he gave that up,—he should not be held responsible for the patent, and not be liable for any expense on the patent, explained as stated in the contract; and that the defendants wished to show by this witness, in answer to this question, that the second contract was made upon the consideration, and with the full understanding of the plaintiff; that they had investigated the said patent, and told the defendant Joshua Sandage that they were willing to take their chances as to the patent being upheld in the courts; and that the said Joshua Sandage should not be held responsible for such patent if such patent was at any time held to be invalid." By this question appellants' counsel say that they desired and sought to show what the consideration of the supplemental contract was, and to explain what was meant to be repealed by it. It is obvious, we think, that the purpose of the evidence sought to be elicited by this question was to contradict the written obligation. The written contract in question is not incomplete, and there is no apparent ambiguity therein that requires an explanation by parol evidence. Nor was it in any way rendered necessary to show what part of the first agreement had been repealed and rendered of no effect by the second. This was easily disclosed by a comparison of the one with the other. The evident purpose of the question, as it appears from the statements of counsel, was to show that the guaranty of appellant Sandage, made in the first contract, as to the validity of his patent right, had been repealed by a parol agreement contemporaneous with the second written contract, and thereby contradict this latter instrument. The cases of *Kieth v. Kerr*, 17 Ind. 284, to the effect that, when a written contract is incomplete, parol evidence that does not contradict it may be admitted to show the whole contract, and *Martindale v. Parsons*, 98 Ind. 174, where it is held that parol evidence may be received to aid in the construction of ambiguous contracts, lend no support to appellants' claim upon this question, as herein presented. The court did not err in excluding this question.

We have examined all the questions necessarily presented by this appeal, and are of the opinion that there is nothing appearing in the record that would entitle appellants to a reversal.

The judgment is therefore affirmed.

Howard, J., was absent, and took no part in the decision of this cause.

OREGON SUPREME COURT.

BRIDAL VEIL LUMBERING COMPANY,
Replt.,

v.

D. S. JOHNSON, *Appl.*

(.....Or.....)

A railroad chartered to extend from a certain town past a sawmill, through rough, mountainous, timbered, and sparsely-settled country, to the middle of a certain section on lands of the United States, without going near any other town, city, or settlement or other railroad, but which has been built only from the sawmill, about 2 miles from the town, for 5½ miles into the timbered region, and has no freight or passenger depots, passenger coaches, or freight cars, except trucks, and has never charged passengers any fare, is a public way for which eminent domain may be exercised, where it is not shown that it was intended simply as a logging road, and everyone having occasion to use it as a passenger or for the transportation of freight has a right to require the service.

(November 9, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in a proceeding to condemn a right of way for a railroad. *Affirmed.*

Statement by Bean, J.:

This is an action to condemn a right of way for a railroad. The defense is that plaintiff was organized for the operation of a sawmill for the manufacture of lumber, and the proposed railroad is intended for its own private use and benefit in connection therewith, and not for the ordinary purposes of a railroad for the transportation of freight and passengers, and that therefore the use for which the land is required by the plaintiff corporation is not public, so as to justify the exercise in its behalf of the power of eminent domain. The cause was tried without the intervention of a jury, and on July 31, 1892, the court filed its findings of fact and conclusions of law, from which it appears that plaintiff was incorporated in 1889; that by its original and supplementary articles of incorporation one of its purposes is that of constructing and operating a railroad for the transportation of freight and passengers from Bridal Veil, Oregon, by way of the mill of the Bridal Veil Falls Lumbering Company to the center of Sec 1, T. 2 S., of R. 7 E. of the Willamette meridian, near the base of Mt. Hood, in the state of Oregon, both of its terminal points being in Multnomah county; that it was not organized for the sole purpose of operating a sawmill, or for supplying the mill with saw logs, or for constructing and maintaining a logging road thereto; that a portion of the railroad has already been constructed, and so operated and maintained that "the general public have had the use and benefit thereof, for the transportation of freight and passengers, when-

ever freight was offered or passengers desired to ride;" and that, "so far as completed, it provides means of transportation useful and beneficial to the people living in the section of country in which it is built," and "gives to them and persons having business in that vicinity improved facilities for the transportation of freight not possessed before." From these findings the court concluded, as a matter of law, that the plaintiff was entitled to exercise the power of eminent domain. A short time after they were filed the defendant moved for additional findings of fact, and presented a series of proposed findings, some of which the court adopted. From these it appears that the northern terminus of that portion of plaintiff's road, as located and constructed, is at the sawmill referred to, about 2 miles from, and at an elevation of 1,800 feet above, the town of Bridal Veil; that no line or route of the proposed road has ever been surveyed, located, or constructed from Bridal Veil to the sawmill; that, as surveyed and constructed, it extends a distance of 5½ miles, to lands owned by plaintiff; that the southeastern terminus of the route, as described in the articles of incorporation, is near the base of Mt. Hood, upon land owned by the government of the United States, and that there is not, at or near thereto, any town, city, or settlement, or other railroad; that the country along such route is rough, mountainous, covered with timber, and sparsely settled, and, except the town of Bridal Veil, there is at no place on the line or in its vicinity any town, city, or thickly-settled neighborhood; that the plaintiff has connected with its railroad no freight or passenger depots, no passenger coaches, and no freight cars, except that it has a number of trucks, on one of which there is a platform, covered in time of rain; and that plaintiff has never carried over its road any passengers for hire, but has always permitted any person who wished to ride on its trucks to do so without charge. Among the findings proposed by the defendant, but rejected by the court, is one to the effect that the principal purpose for which that portion of the road already constructed was built, and for which it is and has been used, is that of transporting saw logs from the lands of plaintiff to its mill. A judgment having been entered upon the findings in favor of plaintiff, the defendant appeals.

Mr. E. B. Watson for appellant.*Mr. L. L. McArthur* for respondent.

Bean, J., delivered the opinion of the court:

There being no bill of exceptions in the record, the only question for our determination is whether the findings of fact support the judgment. The right of eminent domain is a right of sovereignty, and can be exercised only by legislative authority, and for a public use or benefit.

When, therefore, a particular corporation claims the right to take private property without the consent of the owner, it must show, not only a legislative warrant, but, if its right

NOTE.—See also, as to what railroads are public. *Pittsburg, W. & K. R. Co. v. Benwood Iron Works* (W. Va.) 2 L. R. A. 680, and note; and *Kettle River R. Co. v. Eastern R. Co.* (Minn.) 6 L. R. A. 111. 34 L. R. A.

is challenged on that ground, it must be able to establish the fact that the enterprise in which it is engaged is one by which a public use or benefit is to be subserved or promoted, so that such taking can be said to be for a public, and not a private, use. The necessity or expediency of taking private property for public use, the instrumentalities through which it may be done, and the mode of procedure, are legislative, and not judicial, questions. But, whether the proposed use thereof is in fact public, so as to justify its taking without the consent of the owner, has always been a question for the courts to determine; and in doing so they are not confined to the description of the objects and purposes of the corporation as set forth in its articles of incorporation, but may resort to evidence *abundant* showing the actual business proposed to be conducted by it. *Lewis, Em. Dom. § 158; Re Niagara Falls & W. R. Co. 108 N. Y. 375; Chicago & E. I. R. Co. v. Willes, 116 Ill. 449.*

Now, in this case, from the findings of fact, it clearly appears that plaintiff is a corporation organized for the construction of a railroad for the transportation of freight and passengers, and therefore §§ 8239, 8240, Hill's Ann. Laws, invests it with authority to exercise the power of eminent domain, if the use it intends to make of the property sought to be taken is in fact public. Bearing upon this question, the findings are that it has already constructed five and one half miles of road, and is now and has been operating the same, for the use and benefit of the general public, in carrying freight and passengers; and there is nothing in the record anywhere to indicate that the road has ever been used, or is intended to be used, for any other or different purpose, or that it was built or intended for a logging road, or has ever been used for that purpose, or, in fact, that it is in any way connected with or a part of the mill enterprise, or, indeed, except by inference, that it belongs to the mill company. We are therefore unable to say that the court was in error in holding that the railroad of plaintiff is public, so as to justify the exercise in its behalf of the power of eminent domain. The fact that it has not been fully completed between the termini indicated in its articles of

incorporation, or that there is at present no town, city, or settlement, or other railroad, at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway for the use of the public, in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised. *State, De Camp, v. Hibernia Underground R. Co. 47 N. J. L. 48; Phillips v. Watson, 63 Iowa, 28; Ross v. Davis, 97 Ind. 79.*

If everyone having occasion to use the road as a passenger or for the transportation of freight may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment. In doing so, however, we do not desire to be understood as holding that a railroad constructed by a mill company for the evident purpose of transporting logs to its mill can become a public highway, so as to justify the exercise of the power of eminent domain in its behalf, because of any declaration in its articles of incorporation to that effect, or on account of any right of the public to use it for the transportation of freight and passengers. No such question is presented by this record. The findings of the court by which we are bound, negative such an inference, and this decision is based upon the facts as found by the court below.

The judgment must therefore be affirmed.

MISSOURI SUPREME COURT (In Banc).

STATE of Missouri, *ex rel.* ST. LOUIS UNDERGROUND SERVICE COMPANY,

v.

Michael J. MURPHY.

(.....Mo.....)

1. A city has no power to grant to a corporation the right to lay subways for

electric wires under all the city streets without reserving the power of supervision and control, not only of the work of excavating in the streets, but of all matters incident to its location, construction, maintenance, and use, although the sole purpose of the subway may be that of leasing to public wire-using corporations.

2. The only power of regulation impliedly reserved by a city on giving to a telegraph company or other such corporation its

NOTE.—Grant of franchises to electrical subway companies.

The decision against the validity of a grant to an electrical subway company of the right to make such a subway under streets, made in the above

case of *STATE, ST. LOUIS UNDERGROUND SERVICE CO., v. MURPHY*, is based on the fact that the company, although declared a common carrier by the ordinance, was not bound to perform services for or allow the use of its subway by other electric

consent that electric wires may be laid under the streets is such regulation as the safety and welfare of the public may demand, where the corporation derives its power to place wires underground from the state, subject only to the consent of the municipality.

3. An ordinance granting to a subway company and its assigns the right to occupy space under any streets in the city for the period of fifty years, to the practical exclusion of all other public uses, with power to select its own patrons and dictate its own terms and elect which streets it will use, is void as an attempt to surrender the power to regulate the underground use of streets by wire-using companies.

(*Robinson, J., dissents.*)

(June 2, 1896.)

APPPLICATION for a writ of mandamus to compel defendant to allow relator to construct a subway beneath the public streets of the city of St. Louis. *Denied.*

The facts are stated in the opinions.

Messrs. John G. Chandler, R. L. McLaran, E. A. Noonan, and Boyle, Priest, & Lehman for relator.

Messrs. D. D. Fisher and Edward C. Kehr, for respondent:

A municipal corporation possesses, and can exercise, only such powers as are conferred by

its charter. All acts beyond the scope of the powers granted are void. Under the present charter the city has no power to lay conduits and pipes for the transmission of electricity, and therefore no power to grant to others a franchise to use the streets for that purpose.

1 Dill. Mun. Corp. 4th ed. § 89; Charter of St. Louis, art. 8, § 26, Rev. Stat. 1889, pp. 2065-2100; *Spaulding v. Peabody*, 153 Mass. 129, 10 L. R. A. 397.

If the power is claimed to exist, it can only be derived from the power of the city to regulate the use of its streets. But a street can be devoted only to public use, and an ordinance which diverts it to private use, or curtails the right of the city to control it at all times for public use, is *ultra vires* and void.

Dill. Mun. Corp. §§ 97, 656, also §§ 383, 716; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121, 101 Mo. 192, 8 L. R. A. 801; *Glaesener v. Anheuser-Busch Brewing Assn.* 100 Mo. 508; *Schopp v. St. Louis*, 117 Mo. 181, 20 L. R. A. 788; *Glasgow v. St. Louis*, 87 Mo. 678; *Cummings v. St. Louis*, 90 Mo. 259; *Mattheus v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Illinois, St. L. & Canal Co. v. St. Louis*, 2 Dill. 70; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Milbau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 814; *Gozler v.*

companies, and was not obliged in any way to use them or cause them to be used, while it was given the right to occupy every street in the city for fifty years. It would seem from the opinion of the court that the decision would have been different if the ordinance had required the subway company to serve the public, either by its own wires or by the wires of other companies using its subway. In the absence of any obligation on the part of the company it is held that the grant was not for public use, and therefore was invalid.

In New York subway statutes which have been held constitutional have provided for the construction of conduits of electric wires under streets and for the appointment of subway commissioners with power to compel all companies operating electric lines to use the subways.

A statute confirming a contract between subway commissioners and a subway company for laying subways is sustained in *Western U. Teleg. Co. v. New York* (C. C. S. D. N. Y.) 8 L. R. A. 449, and *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883. The court in the former case said: "The statute is none the less an exercise of the police power and within the competency of the legislature because of the special privileges given to the subway company."

As to police regulation of electric companies generally, see *note to State, Laclede Gaslight Co., v. Murphy* (Mo.) 81 L. R. A. 798.

The contract sustained in the above cases authorized the subway company to charge a rental for the use of the subways, and contained provisions reserving such control in the commissioners over them as were calculated to secure to all companies desiring to use them reasonable facilities and protection. It contained a provision by which all companies occupying space in the subways were to own their own conductors and have the full management and control thereof, subject to the rights of all other occupants and such reasonable rules and regulations as should be made by the commissioners. It also contained a stipulation that the commissioners would use all lawful means to compel all companies to place their conductors in the subways and pay a fair rental for the same, but it provided in express terms that it should not be 84 L. R. A.

construed as granting to the subway company any exclusive privileges or franchise. *Western U. Teleg. Co. v. New York*, *supra*.

A subway company which obtained permission to construct conduits and lay wires in certain streets of New York under certain conditions, among which was the requirement that the work should be performed under the control and supervision of the commissioner of public works claimed to have a contract right under this permission, to use such streets, and contested the validity of New York Laws 1885, chap. 499, providing that the approval of a board of commissioners of electric subways must be obtained before constructing such a conduit. But the New York court of appeals decided that it did not have such a contract, and that even if it did it was subject to the police power. *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593. This decision was affirmed by the Supreme Court of the United States (145 U. S. 175, 36 L. ed. 686), in which it was also decided that the provision of the New York statute requiring electric companies to pay the salaries of the subway commissioners did not violate the 14th Amendment of the Federal Constitution by depriving them of property without due process of law.

That telegraph companies may be compelled to place their wires underground although they have accepted the benefits of the United States Revised Statutes, §§ 5253, 5263, giving them the right to operate their lines over post roads, was decided in *American Rapid Teleg. Co. v. Hess* (N. Y.) 18 L. R. A. 454; *Western U. Teleg. Co. v. New York* (C. C. S. D. N. Y.) 8 L. R. A. 449; *H. Clausen & Sons Brewing Co. v. Baltimore & O. Teleg. Co.* (N. Y. Sup. Ct.) 2 Am. Elec. Cas. 210.

The discretion given to the board of electrical control in respect to the construction, use, and control of subways under the New York act of 1887, chap. 716, § 1, is held to be beyond judicial review in the absence of fraud or improper motives. *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883.

In case of unjust discrimination by the board of electrical control between electric companies the New York act of 1887, § 7, provides a remedy by man-

Georgetown, 19 U. S. 6 Wheat. 593, 5 L. ed. 339; *Friend v. Porter*, 50 Mo. App. 89; *Lake Roland Elec. R. Co. v. Baltimore*, 77 Md. 352, 20 L. R. A. 126; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

The franchises granted by the ordinances in question are not for a public use, but for the private use, gain, and emolument of the subway company, its successors or assigns, and such franchises so granted are utterly void.

Lovell v. Boston, 111 Mass. 454, 15 Am. Rep. 59; *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121; *Savannah v. Hancock*, 91 Mo. 54; *Kansas v. Baird*, 98 Mo. 215; *St. Louis County Ct. v. Grinnold*, 58 Mo. 175.

Such grant is void because, if valid, it will deprive the city of the control and regulation of its streets, and prevent it from discharging its public duties.

Dill. Mun. Corp. § 716; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278.

The sole purpose for which the conduits are constructed and used by the subway company is to rent or lease them to others for its private gain and emolument, and upon its own terms. The city is not authorized to rent or lease any

portion of its streets for private use, and hence cannot confer any such right on the subway company.

Glasgow v. St. Louis, 87 Mo. 678; *Schorp v. St. Louis*, 117 Mo. 181, 20 L. R. A. 788; *Glaesner v. Anheuser-Busch Brewing Assn.* 100 Mo. 508.

Where the act undertaken is *ultra vires* of the corporation, there can be no estoppel. Power cannot be created by estoppel.

Bigelow, Estoppel, 5th ed. pp. 466, 467, also p. 849; *Cababé, Estoppel*, 125, 126; *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Winters v. Armstrong*, 87 Fed. Rep. 508.

The ordinance being executory as to the portion of the term yet to come, it is not only the right but the duty of the city to disaffirm and abandon it.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 80 L. ed. 83; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Mallory v. Hanau Oil Works*, 86 Tenn. 598; *St. Louis v. Davidson*, 102 Mo. 149; *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665.

The relator has not acquired title to the franchise in question, nor has it legal capacity to assume or perform public duties under it.

damus to compel the board to furnish just and equal facilities, and an injunction is not the proper remedy in such case. *Ibid.*

An electric-light company which had applied for and been granted the right to place its wires in the subway, and had placed them therein with knowledge of the rental price fixed therefor, on refusal to pay the rental, claiming that it was exorbitant, met a threat of the removal of its wires by application for an injunction. But an injunction was denied on the ground that its remedy, if it had any, was by mandamus under the New York act of 1887, § 7. But it was also decided that it must pay or offer to pay reasonable rental in order to obtain any remedy under the statute. *Brush Electric Illum. Co. v. Consolidated Teleg. & E. S. Co.* 60 Hun. 448, affirming 15 N. Y. Supp. 81. The court likened the interest of the owner of an electric wire in such a subway to that of a passenger's right to a place in a railroad car, subject to termination in case of failure to pay the rates required.

The validity of the New York subway acts was also recognized in *United States Illum. Co. v. Grant*, 55 Hun. 223, although the questions actually decided were as to the right of the public authorities to remove dangerous wires from the streets where the board of electrical control was alleged to have refused permission to make the proper repairs to the electric plants.

The making and execution of a contract for the construction of electric subways in the city of New York was enjoined at the suit of a taxpayer authorized by New York Laws 1887, chap. 673, where the proposed contract was uncertain in many of its provisions and omitted to include as a part thereof a resolution of the board of electrical control in regard to the streets in which and the time when the subways were to be constructed, or to bind the contract to such construction, and provides that the decision of the board as to the use of the subways shall be final, and gives the option to the city to purchase the subways subject to encumbrances placed thereon by the company. *Armstrong v. Grant*, 55 Hun. 226. The court says the contract would leave it to the volition of the contractor to construct subways or not, and this was deemed the most serious defect.

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An electric-light company has no such rights in the subway in which its wires have been placed as to entitle it to interfere with the action of the board of electrical control for the construction of other subways. *Manhattan Electric Light Co. v. Grant*, 31 N. Y. S. R. 254.

The constitutionality of the New York subway acts was also sustained in *United Lines Teleg. Co. v. Grant*, 137 N. Y. 7, by upholding an assessment upon a telegraph company for its share of the expense of building a subway and placing the electric wires therein.

An exclusive right to maintain subways and conduits for electrical conductors was claimed by a subway company, but denied by the court, in *Empire City Subway Co. v. Broadway & S. A. R. Co.* 87 Hun. 279. The court said it found no statutory provision showing that the legislature intended to confer an exclusive right upon any corporation or authorizing the grant of such a franchise by municipal or state authorities, while it further found that the contract with the subway company expressly provided that it did not give any exclusive privileges. The right of a street surface railroad company to have its own subway for its cable was therefore sustained as against a subway company.

In New Jersey a statute was enacted creating a board of commissioners of electrical subways, and providing for the placing of electrical conductors underground in cities. This act was in question in *Presbyterian Church v. Electrical Subways Comrs.* 55 N. J. L. 436, but the only question raised under it was as to its power to grant a franchise for erecting poles and wires in the streets for the transmission of electricity for a street railway. It was decided that the board did not have power to grant a franchise. But this statute has since been repealed by N. J. Laws 1894, chap. 7.

The great danger and inconvenience caused by the numerous electric wires which have been hung in the streets of large cities within recent years and which have caused the legislation referred to in the above cases will undoubtedly cause still further legislation in other states. The cases cited in this note probably represent only the beginning of the law on this subject.

B. A. B.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55; 1 Rev. Stat. 1889, §§ 4915, 4918; *McPheters v. Merimac Bridge Co.* 28 Mo. 465; *Stewart v. Jones*, 40 Mo. 140.

The relator never acquired title to the franchises attempted to be granted by these ordinances. The alleged assignment and transfer by sheriff's sale are void, and did not pass any right or title whatever. The power to make such transfers is not given by statute and does not exist at common law.

Stat. 1889, vol. 2, § 4915, p. 1109; *Stewart v. Jones*, *supra*; *Freeman, Executions*, § 126, p. 307; *Wood v. Truckee Turnp. Co.* 24 Cal. 474; *Herman, Executions*, p. 551; *East Alabama R. Co. v. Doe, Visscher*, 114 U. S. 353, 29 L. ed. 140; *Gue v. Tide Water Canal Co.* 65 U. S. 24 How. 257, 16 L. ed. 685; *Thompson v. Adams*, 98 Pa. 55.

After a hearing on demurrer, *Macfarlane, J.*, on June 25, 1895, delivered the following opinion:

On the 15th day of February, 1889, an ordinance of the city of St. Louis, No. 14,798, entitled "An ordinance to provide for laying electric wires underground," was passed and approved. By § 1 permission and authority were granted the National Subway Company of Missouri, its successors and assigns, to construct, maintain, and operate conduits, pipes, mains, conductors, manholes, and service and supply pipes in any of the streets, alleys, squares, avenues, and public highways of the city of St. Louis, for the term of thirty-five consecutive years. The objects are declared to be that of "distributing and maintaining a line or lines of electric and other wires, together with all necessary feeders, outlets, service wires or other electrical conductors to be used for the transmission of electricity for any and all purposes." It was further provided that before said company, its successors or assigns, should lay any conduits or pipes in any of the streets, it should submit to the board of public improvements its plans, and the same should be approved. Section 2 prescribed the manner and depth in which conduits and pipes should be laid in the streets. Section 3 required the work to be done with the least possible injury or delay to the public, and that the streets be left in proper condition. Section 4 required the deposit of \$1,000, to secure the proper repair of streets, and impose a penalty for neglect to repair. Section 5: The corporation is declared to be a common carrier, and is required to permit any person or persons, company or companies, to use said system of underground conduits upon terms agreed upon by the respective parties, and, in case of a failure to agree, arbitration was provided for. Section 6 requires the corporation to furnish, in addition to other taxes assessed by law, and maintain at its own expense, all the wires of the fire and police alarm and telephone service of the city of St. Louis, free of charge to the city. Section 7 makes the corporation subject to ordinances of the city now in force, or that may hereafter be passed, in relation to making excavations in streets. Section 8 nullified the ordinance unless a bond for \$25,000 with approved security, should be filed in ninety days, conditioned for the faithful observance of the

ordinance. The ordinance was also made null, unless work was commenced in sixty days. Section 8 declares a forfeiture for violation of the conditions and provisions of the ordinance. Section 10 gives the city the right to purchase the property at the end of the term granted.

On February 6, 1891, Ordinance No. 15,953 was passed, entitled "An ordinance amending Ordinance No. 14,798 of the city of St. Louis entitled 'An ordinance to provide for the laying of electric wires underground.'" This ordinance strikes out §§ 6 and 10 of Ordinance 14,798, and substitutes for §§ 1, 4, and 5 three other sections. The only material change made by § 1 is to extend the duration of the franchises to fifty years, and to grant the right to distribute and maintain "electric, telegraph, telephone, and other wires." No material change was made in § 4. Section 5, as amended, besides declaring said company, its successors and assigns, a common carrier, requires a payment to the city for the rights and franchises granted semiannually in advance of the sum of \$500. No provision is left for the use of wires by the city, or the right of any other company or person to use them.

Said National Subway Company was incorporated January 28, 1889, under the act providing for the incorporation of telegraph and telephone companies, now art. 5, chap. 42, Rev. Stat. 1889, with a capital stock of \$250,000, divided into 25,000 shares of \$10 each. The purposes of the incorporation, as declared in the articles of association, are to construct, own, operate, and maintain a line of underground magnetic telegraph in the city of St. Louis. On the 5th of February, 1889, the board of directors sold and assigned all the rights and franchises granted by said ordinance to Charles Sutter for the consideration of \$100. On the 25th of February, 1889, the St. Louis Subway Company was incorporated under art. 8, chap. 21, Rev. Stat. 1879, as a private business corporation, with a capital stock of \$500,000, divided into 50,000 shares of \$10 each, which was alleged to have been actually paid up in lawful money of the United States. Of this stock the said Charles Sutter subscribed for 49,800 shares. The purposes of this corporation, as declared in the articles, were: "To lay out and maintain, construct, and operate, lines of subway in this state for the purpose of carrying wires for the transmission of electricity and electric currents, and in and about said business to acquire and hold such property, both real and personal, as may be requisite and necessary in the premises: to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company." On February 28, 1889, this corporation was organized, and purchased from Charles Sutter the rights and franchises granted under said ordinances, for which it agreed to pay \$498,000. Mr. Sutter accepted 49,800 shares of fully paid-up stock in satisfaction of the purchase price. The other shareholders, except one who subscribed for 25 shares, paid for their stock by services rendered. From June, 1889, to the end of that year, the St. Louis Subway Company obtained permits upon plans approved by the board of public improvements, and caused a line of subways to be constructed, about 1½

miles in length, as follows: On Broadway, from Elm street to St. Charles; on Market street, from Broadway to Tenth; on Tenth street, from Market to Chestnut; and on Chestnut street, from Tenth to Fourteenth streets. The subways occupy a space in the streets about 6 feet deep and 3 feet wide, with man-holes about 5 to 6 feet in diameter at each street crossing, and at other points where obstructions are to be passed. From 1889 to 1894 nothing was done in the way of building conduits.

On the 10th day of May, 1890, John B. O'Mera obtained judgment against the St. Louis Subway Company in the St. Louis circuit court for \$8,869.28, for work done on the subways above mentioned, and on the 10th day of June, 1890, Emile A. Meysenburg obtained a judgment against it in the same court for \$42,911.22, on account of work, material, and money applied to the construction of said subways. Upon these judgments executions were issued, and the sheriff seized all the right, title, and interest of the St. Louis Subway Company in and to the franchise acquired by it under Ordinance 14,798, and all its title in and to the subways above mentioned, and all pipes, mains, iron, etc., belonging to said company, and on July 21, 1890, sold the same to Emile A. Meysenburg for the sum of \$1,000, to whom the sheriff executed a deed as for the sale of real estate. Alias executions were issued on said judgments, and the same property seized and sold under them, as personal property, on January 7, 1891, at which sale Emile A. Meysenburg was again the purchaser at the sum of \$500, and for which he received a bill of sale from the sheriff.

The relator, the St. Louis Underground Service Company, was incorporated February 26, 1891, as a private business corporation, under art. 8, chap. 42, Rev. Stat. 1889, with a named capital stock of \$1,000,000, divided into 10,000 shares of \$100 each, which is alleged to have been fully paid in lawful money. The stock was subscribed as follows: Emile A. Meysenburg, 9,000 shares; Robert McLaren, 250; Benjamin Von Puhl, 250; Andrew J. Cooper, 250; and Charles Sutter, 250 shares. The purposes for which this company was organized "are to lay out and maintain, construct and operate, lines of subway in this state for the purpose of carrying wires, for the transmission of electricity and electric currents; also to lay out, construct, and maintain and operate, lines of pipes, mains, and conductors in this state for the purpose of distributing substances, either for fuel or illuminating purposes, or for both, and for said purposes to acquire and hold such property, both real and personal, as may be requisite and necessary in the premises, to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company." Emile A. Meysenburg, on March 10, 1891, for the expressed consideration of \$900,000, by bill of sale transferred to the St. Louis Underground Service Company all the property and rights he acquired by purchase at the sheriff's sales above mentioned. By this transfer he paid his subscription for the 9,000 shares of stock subscribed by him. From this time, March 10, 1891, until the summer of

1894, the St. Louis Underground Service Company did nothing in the way of building conduits. In May, 1894, relator made application for and received a permit to lay, and laid, a subway 180 feet in length, on Olive street, from Broadway east to an alley at the middle of the block, and south on said alley to a point opposite the operating room of the Postal Telegraph Company, in the Laclede building; and on August 20 it obtained a permit and constructed a subway on Fourteenth street, from Chestnut to the alley in the middle of the block, and about 16 feet into the alley, to a telegraph pole, about 165 feet in length.

In November, 1894, relator made application in due form to respondent, as street commissioner, for permit to construct conduits on Chestnut street. The plans had previously been submitted to and approved by the board of public improvement. Respondent refused to grant the permit. This proceeding is by mandamus to require the respondent, as street commissioner, to grant the permit. A writ was issued and respondent has made return thereto, to which relator demurred. From the pleadings and the evidence taken the foregoing facts are deduced.

While the legal questions involved are raised by demurrer to the return, the entire case was presented by oral argument and brief of counsel, and we will consider the merits of the case without regard to the form in which it has been presented.

1. A number of questions were discussed by counsel, both in argument and brief, but the most important, and, as we think, the controlling one, is whether the city of St. Louis had the power to grant to the National Subway Company the franchises now claimed by relator. If it had no such power, and is not estopped by what it has done in affirmance of its grant, the controversy necessarily ends, and consideration of other questions will be unnecessary. Municipal as well as other corporations derive their power from the legislature, and can exercise none not confided to them. To the charter of the city of St. Louis, then, we must look for authority to make the contract in question. *State v. Clarke*, 54 Mo. 35, 14 Am. Rep. 471. The charter undoubtedly vests in the city large power and control over the streets and other public property within its limits. It has power to establish, open, and vacate all streets, public grounds, and squares, and regulate the use thereof; to lease portions of the unimproved wharf; to license, tax, and regulate telegraph companies and street-railroad cars; to have sole power and authority to grant to persons or corporations the right to construct railways in the city; and, finally, to pass all such ordinances, not inconsistent with the provisions of the charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures. Charter, Rev. Stat. 1889, pp. 2085, 2100.

The power to regulate the use of streets is very comprehensive. "The word 'regulate' is one of broad import. It is a word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions

of this court will perceive how broad and comprehensive it has been held to be." Mr. Justice Brewer, in *St. Louis v. Western U. Tel. Co.* 149 U. S. 469, 37 L. ed. 813. Under the power thus delegated, it cannot now be questioned that the municipal authorities can permit the use of the surface of the streets for the erection of telegraph and telephone poles, and the laying of railroad tracks; the space above the surface for stringing electric wires for the transmission of messages and the creation of light; and may also permit the laying of water and gas pipes and sewers beneath the surface. *Julius Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *St. Louis v. Bell Teleph. Co.* 96 Mo. 629, 3 L. R. A. 278; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Schopp v. St. Louis*, 117 Mo. 136, 20 L. R. A. 783. These uses are all of a public nature, and are not inconsistent with the public uses to which the streets were dedicated. Under its general power to regulate the use of streets, the city has authority to authorize corporations and persons, for the purpose of serving the public, to string telegraph, telephone, or electric-light wires, upon poles above the surface, or through conduits beneath the surface of the streets, provided such structures and mechanical appliances do not materially interfere with the ordinary uses of the streets and public travel thereon. But the city has no power, under this or any other provision of its charter, to authorize such a use of the street, though for a public purpose, as will destroy its usefulness as a public thoroughfare. *Lockwood v. Wabash R. Co.* 123 Mo. 86, 24 L. R. A. 516; *Knapp, S. & Co. Company v. St. Louis Transfer R. Co.* 126 Mo. 26, and cases cited. So it is well settled that the city of St. Louis has no power to authorize the appropriation of any parts of any of its streets for private purposes. The power to regulate the use of streets refers to legitimate public uses not inconsistent with the ordinary and paramount use for travel thereon, or with the private rights of abutting property owners. An ordinance having the effect of diverting the streets from a public to a private use, or of unreasonably appropriating them to a public use other than that of ordinary travel by pedestrians and vehicles is *ultra vires* and void. *Knapp, S. & Co. Company v. St. Louis Transfer R. Co. supra*; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 486; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 124; *Schopp v. St. Louis, supra*; *Glaesmer v. Anheuser-Busch Brewing Assn.* 100 Mo. 514.

It is true that these decisions and the principle declared were applied to grants authorizing the use of the surface of the streets. But the public use of streets, as has been said, is not confined to the surface, nor is the power of the city confined to that of regulating the use of streets and public grounds. To it are also delegated general police powers, and under them it is authorized to pass "all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures." In the exercise of the powers thus delegated, it has the undoubted right to regulate the public use of the streets, both above and beneath

the surface. This it constantly does by allowing public sewers, water mains, and gas pipes to be laid beneath the surface, and regulating the manner in which the work shall be done. It is said in a recent case: "This power to regulate the use of streets is not confined to the regulation of travel thereon, but under it the city may allow gas, water, and sewer pipes to be laid therein, and may cause wells therein to be filled . . . and may permit the erection and maintenance of telegraph poles thereon. . . . All these uses are consistent with the uses for which the streets are acquired or dedicated." *Schopp v. St. Louis*, 117 Mo. 136, 20 L. R. A. 783. The dedication of the streets, then, to public uses includes as well the soil beneath them as the surface itself. The city authorities had the same power to regulate the use of the streets beneath as upon the surface thereof, and the power is in like manner limited to public uses. It has also been held that the general power to regulate the use of streets is not confined to public uses common and known at the time of the dedication, but extends to new uses as they spring into existence. *St. Louis v. Bell Teleph. Co. supra*. Under these well-settled principles, there can be no doubt that the municipal authorities of the city of St. Louis, vested as they are with such enlarged control over property devoted to public uses, have the power to authorize, and, if public safety and general welfare demand it, to require all electric wires, used for the benefit of the public, to be laid underground. This would be a proper and legitimate regulation of the public use of the streets. But the streets of a city are dedicated to public uses only, and are held by the municipality in trust for such uses. The trust is sacred, and the city has no authority, even under such enlarged powers as St. Louis possesses, to permanently divert any portion of it from these uses to such as are purely private. The question, then, is whether, under the ordinance granting to the National Subway Company of Missouri, its successors or assigns, the right to construct, maintain, and operate conduits, pipes, mains, conductors, manholes, and service and supply pipes in any of the streets, alleys, etc., of the city of St. Louis, during the term of fifty years, was for a public or private use. If for the latter, it must be held *ultra vires* and void.

While under the pleadings the issues were made by demurrer to the return, evidence was taken by the parties and filed, and the case was argued as well upon the evidence as upon the allegations of the pleadings, we consider the question as presented under the pleadings and the evidence. "If it is doubtful or questionable whether the use is public or not, testimony is admissible to determine the fact."

The purpose of the grant, as declared in the ordinance, is that of "distributing and maintaining a line or lines of electric, telegraph, telephone, and other wires . . . to be used for the transmission of electricity for any and all purposes." By § 5, as amended, it is declared that such corporation, its successors or assigns, shall be a common carrier, and shall have and enjoy such rights, privileges, and immunities as are usually had and enjoyed by such companies. These are the only purposes

expressed in the ordinance. A clause of § 5 in the original ordinance, which was omitted from the amendment, provided that said corporation shall permit "any persons, company, or companies, to use said system of underground conduits," upon terms to be fixed as therein provided. There is nothing in the terms of the ordinance from which an inference can be drawn that the proposed conduit and wires should be used for the benefit of the public. The corporation was not at the time engaged in the business of transmitting messages by use of electric wires, or transmitting electricity for the purpose of producing light, and no inference can be drawn that the proposed transmission of electricity was for use of the public. After the amendment of § 5 of the original ordinance, no obligation was left on said corporation to serve the public in any capacity.

The corporation to which the franchises were granted was chartered, under the general laws of the state, for the purpose of constructing, owning, operating, and maintaining a line of underground magnetic telegraph in the city of St. Louis, but immediately on obtaining the franchises conferred by the ordinance it sold and assigned them to relator, into whose hands they are claimed to have passed by assignment. Relator was not even organized as a telegraph company. It was organized as a business corporation. Its purposes, as declared in its articles of association, are "to lay out and maintain, construct, and operate, lines of subway in this state for the purpose of carrying wires for the transmission of electricity and electric currents; also to lay out, construct, and maintain and operate, lines of pipes, mains, and conductors in this state for the purpose of distributing substances, either for fuel or illuminating purposes, or for both." So it appears that relator does not, under its charter, undertake to discharge a public duty by itself using the wires for telegraph or telephone purposes. Its purpose, so far as appears from the ordinance or charter, is to occupy the streets by subways and electric wires. It is placed under no obligations to use them, or cause them to be used, for the benefit of the public. Still, it claims the right to so occupy every street in the city for fifty years. No duty whatever is imposed upon it, no control over its works or business is retained by the city, except in the mere approval of the plans it may adopt for making the subways, and the manner of executing the work. The evidence shows that the object to be accomplished in granting these important franchises was to vest in one company the right to build suitable conduits, and to require all telegraph, telephone, and electric-light companies to lease and use the wires of the favored company, its successors or assigns.

We do not think it necessary to inquire whether a contract of this character, had the objects been expressed, could be upheld. Such purposes were not expressed; on the contrary, the provision in § 5 of the original ordinance, which did give "any person or persons, company or companies," the right to use the system of underground conduits, was studiously omitted from the amended ordinance. As the ordinance now stands, relator is under no obligation to permit any telegraph, telephone, or

electric light company to use its wires, and it is thus given the power to control the use of the streets for its own private benefit. We think the extraordinary rights, powers, and franchises granted under the ordinance can only be construed to have been intended for the private use of said corporation, and that the city therefore had no power to grant them.

Much stress is laid upon the fact that the National Subway Company is declared, under the ordinance, to be a common carrier. But calling it a common carrier does not make it one. It has none of the characteristics of a common carrier. To ascertain how its franchises are to be used, we must look to the rights conferred and the duties imposed under its charter and the ordinance. Does it appear from these that relator invites employment from the public generally? Does it obligate itself to serve the public generally. Is it subject to regulation and control in respect to its dealings with the public? None of these essentials to a public business such as that of a carrier appear. On the contrary, it is clear, as has been shown, that a private business only is contemplated.

2. But it is insisted that inasmuch as relator and his assignors have gone to large expense, with the knowledge of the city, in constructing subways in some of the streets, and have paid to the city semiannually, in advance, the sum of \$500 for the rights and franchises granted it, as required by § 5 of the amended ordinance, the city should now be estopped to deny the validity of the ordinance. There is no doubt that the doctrine of estoppel is, as a general rule, alike applicable to corporations and individuals. It cannot, however, be applied to validate a contract which the corporation had no power to make. The doctrine is thus declared: "When a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals." *Union Depot Co. v. St. Louis*, 76 Mo. 393. The rule is thus given by Bigelow: "If the act undertaken was in and of itself *ultra vires* of the corporation no act of the body can have the effect to estop it to allege its want of power to do what was undertaken." Bigelow *Estoppel*, 5th ed. 466, 467. See also *Scott v. Thayer*, 105 U. S. 143, 26 L. ed. 963; *Thomas v. West Jersey R. Co.* 101 U. S. 86, 25 L. ed. 953; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 817, 30 L. ed. 94. In the case last cited it is said: "We know of no well-considered case where a corporation, which is party to a continuing contract which it had no power to make, seeks to retract, and refuses to proceed further, can be compelled to do so." As the city had no power to authorize the use of its streets for private purposes by ordinance, it certainly cannot do so by estoppel.

Peremptory writ denied.

Brace, Ch. J., and **Robinson**, J., concur. **Barclay**, J., concurs in the result.

An answer having been filed and further hearing having been had, **Macfarlane**, J., on February 18, 1896, delivered the following opinion:

This is an original proceeding by mandamus.

the purpose of which is to require respondent, Murphy, as street commissioner of the city of St. Louis, to grant relator a permit to construct conduits beneath the surface of Chestnut street, in pursuance of contract claimed to have been made with the city under ordinances. The case was heard on a demurrer to respondent's return, and the demurrer was overruled. Relator, under leave of court, has answered the return. Evidence was taken, and the questions in issue have been argued, and the case is now to be determined upon its merits. A full statement of the pleadings will be found to accompany the former opinion. Most of the evidence was also then on file, and was treated in the argument on the demurrer and in the opinion as forming a part of the record. The answer of relator is, in substance, a denial of the allegation of the return. The answer, by way of new matter, averred that its articles of association had been amended, whereby its purposes are more distinctly set out, as follows: "This company is organized for the purposes of laying out, constructing, maintaining, and operating conduits or subways, pipes, mains, conductors, manholes, and service pipes in the streets, alleys, or other public places in the cities of this state and elsewhere, to be used in distributing and maintaining a line or lines of electrical and other wires owned by this company or others, together with all necessary feeders and service wires and other electrical conductors, and, when used for the wires of others, upon reasonable and just compensation; and to acquire and hold all necessary or useful grants, to occupy and use the streets, avenues, alleys, and other public places for the purposes aforesaid; to acquire and hold such property, real and personal and incorporeal, as may be requisite and necessary in the premises; to make all necessary leases, contracts, and other agreements as may be required to carry out the purposes of the company, to make proper by-laws, and to do and perform all such matters and things as may be necessary and usual for the effectual consummation of the purposes for which the company is formed." The answer also, for the purpose of showing the intention of the parties in making the contracts and granting the franchises evidenced by the ordinances, stated at length the situation in the city of St. Louis in respect to the manner in which electricity was then carried, the inconvenience and danger of such methods, and the necessity of providing for placing electric wires under ground. It charges that electric wires, for all the uses to which they are applied, are for the benefit of the public, as well as for the private gain of the owners; and that its subways "are intended and designed for the use of all persons, upon reasonable rates and like conditions, who may desire to use the same by placing wires therein, or connecting with wires to be laid therein; and its property and employment are thereby affected with public use, and being so affected, whether its charter or the ordinances granting the right to construct and operate its works retains the reserved right to control and regulate the said conduits and the operation thereof or not. Such power, authority, and control exist to the extent of protecting the public against danger, unjust discrimination, extor-

tionate charges, and injustice and oppression." The new evidence introduced bore upon the character of the uses to which electric wires are applied, for the purpose of showing that all such uses are public in their nature, the inconvenience and danger of overhead wires, and the necessity, convenience, and economy of placing them underground, and in one subway.

1. We are unable to perceive that the answer of relator, the amendment of its charter, and the supplementary evidence now before us have so changed the situation as to require a different conclusion from that reached upon the former hearing. On that hearing it was held that the city, under its charter rights, has the power to control and regulate the public use of its streets and public grounds, not only upon, but, if public safety requires it, above and beneath, its surface; and in the exercise of its general police powers it may require all electric wires whose use is of a public character to be placed under ground. But it was held further that the unconditional and uncontrolled grant contained in these ordinances was essentially for the private use of the grantee and its assigns, to which the city had no power to devote its streets. No claim was made on the first hearing, nor indeed can it be justly made now, that relator proposes to deal directly with the public. At most it only proposes for its own private gain to furnish others the instrumentalities by means of which they may subserve the public interest. Over the use, sale, assignment, or lease of these instrumentalities the city has expressly reserved no control or management. The business thus proposed can no more be denominated public than could that of manufacturing electric wires for the use of a telegraph company, or rails for use in the track of a railroad, or pipes for conducting water or gas through the streets. A single instrument, though a necessary part of a public work, is not a public instrumentality, for the manufacture of which the power of eminent domain could be exercised even by the state. The use to which it may be applied is not the test of its public character. The use to which the entire work, and not parts of it, are to be applied, is the proper test. The city of St. Louis made an unconditional lease of a portion of its public wharf to an elevator company to be used for erecting and maintaining a warehouse for the storing and handling of grain and other merchandise in connection with the use of its elevator. The power of the city to make the lease was questioned. This court held that, while the city had power to lease its unused wharf for the purposes specified in the lease, it had no right to authorize the erection of such buildings thereon without reserving a control over the buildings and the uses to which they should be applied. *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 126. The court, in its opinion, says: "The owner of the building may open or close it at his pleasure, and discriminate between shippers and receivers of produce, and make his a strictly private business, as if a retail dry goods merchant were permitted to erect a building on the wharf to conduct his business in. There is no reservation by the city in the lease to defendant of any control whatever of the building or business." The court says further: "The city has

no right, and can acquire none from the legislature, to make such a disposition of the property condemned for wharf purposes as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect." The same may be said in respect to the property held in trust by the city for public streets. The city has no power to divert their uses from those to which they were dedicated. It had no right to grant their use to relator for subways, though its sole purpose may be that of leasing them to public wire-using corporations, without reserving the power of supervision and control, not only of the work of excavating in the streets, but of all matters incident to its location, construction, maintenance, and use. No such powers have been reserved under these ordinances.

2. It is now insisted that, inasmuch as all the uses to which electric wires are ordinarily applied are of a public character, and as the subways are to be used by corporations exercising public functions, they are for public, and not for private, use, and the power of regulation and control is reserved in the municipal authorities. In other words, that the uses to which the subways are to be applied, and not the ownership, determine their character; and, if the use is public, the streets may be devoted to their maintenance, and the power to regulate is reserved. It may be conceded that the use of electric wires for the transmission of messages by telegraph and telephone, and for the distribution of light throughout the city for the use of its inhabitants, is essentially public in its character, and to which the public streets may be properly devoted. Indeed, the correctness of this proposition has been frequently declared by this court, and is recognized by the legislation of this state. *State, Laclede Gaslight Co. v. Murphy*, 180 Mo. 10, 31 L. R. A. 798, and cases cited; Rev. Stat. 1889, §§ 2721, 2792. It may also be conceded that, where the franchises granted by the government are for the purpose of subserving the public interests, power is reserved in the public to control the use for the common good, unless restricted in the grant. As has been said: "The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law." *Perrine v. Chesapeake & D. Canal Co.* 50 U. S. 9 How. 172, 13 L. ed. 92. But it must be kept in mind that the city of St. Louis does not exercise original governmental functions, but only such measure thereof as the state has seen fit to delegate to it. Telegraph, telephone, and electric-light companies also receive their powers directly from the state. The reserved power to regulate them, unless within the delegated power of the city, rests in the state. These corporations are vested with power, under certain restrictions, to use the public streets of cities, and to place their wires and other fixtures under ground, on obtaining the consent of the municipal authorities thereof. Rev. Stat. 1889, §§ 2721, 2793. It is evident that the city has no such reserved power over these wire-using corporations as is possessed by the state. It can only exercise such powers as are "granted in express words; those necessarily or fairly implied in or incident to those

expressly granted; those essential to the declared objects and purposes of the corporation." 1 Dill. Mun. Corp. § 89; *St. Louis v. Bell Teleph. Co.* 96 Mo. 625, 2 L. R. A. 278. The express powers bearing upon the rights here claimed are confined to general police powers and the power to regulate legitimate public uses of the streets. But the public corporation to which the relator proposes to lease the use of the streets, and through which it proposes to serve the public, has express power from the state to place its wires and other fixtures under ground in the streets of cities provided it obtain the consent of the municipal authorities thereof. It is clear, therefore, that when a telegraph or other such corporation secures the right to lay its wires under ground in the streets of the city, no power of regulation is reserved by the city except such as is incident to the regulation of the use of the streets, and such as the safety and welfare of the public may demand. Any further rights must be secured by contract, as conditions of the lease. *St. Louis v. Bell Teleph. Co. supra*; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 469, 37 L. ed. 812.

3. But, conceding that the subways relator proposes to construct are, without other requirements or conditions, than those expressed in the ordinances, of such a public character and for such a public use as will authorize their construction in the public streets, and that the city has the power to confine their use to public purposes, we are still of the opinion that the ordinances are void, for the reason that the city thereby undertakes to delegate powers which it alone can exercise under its charter. The attempt is made under the ordinance to grant to the National Subway Company and its assigns the right to occupy space for its subway beneath the surface of every street in the city for the period of fifty years to the practical exclusion of all other public uses. It is given power to select its own patrons and dictate its own terms. It can elect upon which streets its works can be constructed. It can practically control the charges of all electric-wire using corporations. It has the practical control of the use of all public wires which may hereafter be required to go under ground. By the ordinances the city virtually surrenders to relator its power to regulate the underground use of its streets by wire-using companies and permits their use for such public purposes only as may appear most profitable to relator. The contract can only be characterized as an attempt on the part of the city to surrender and bargain away to relator its charter powers. This it could not do. "Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot . . . be delegated, so they cannot without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." 1 Dill. Mun. Corp. § 97; *Belcher Sugar Ref. Co. v.*

St. Louis Grain Elevator Co. supra; Matthews v. Alexandria, 68 Mo. 119, 30 Am. Rep. 776; 15 Am. & Eng. Enc. L. p. 1045 and cases cited; *Gosler v. Georgetown*, 6 Wheat. 593, 5 L. ed. 339; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81.

In the case last cited the city of Alexandria undertook to lease to Matthews its wharf, which the city had power to regulate and control. In passing upon the validity of the contract, the court says: "No authority was given by the charter of the city to lease the wharf, or farm out its revenues, or to empower anyone else to fix the rates of wharfage. All these things were attempted to be done by the contract under consideration, and, being wholly unauthorized, the contract was illegal and void. The legislative authority of the city could not be delegated, nor could the city abdicate its control over the public property held in trust by it for the benefit of the public."

The evidence here shows, and common

knowledge advises us, that economy of space, convenience to the public, security, and proper adjustment of conflicting interests of the various competing companies make it desirable, if not necessary, that all electric wires should be laid in one subway; but the city cannot cede to another the power of supervision over them. That power only can be exercised by the city.

Writ denied.

Brace, Ch. J., and Barclay, J., concur.

The case having been transferred to the court in banc, on June 2, 1896, the following opinion was handed down:

Per Curiam:

The foregoing opinion of Macfarlane, J., handed down in division No. 1, is adopted as the opinion of the court in banc. **Brace, Ch. J., and Barclay, Gantt, Sherwood, and Burgess, JJ., concurring therein with Macfarlane, J. Robinson, J., dissents.**

The writ of mandamus is therefore denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Eunice F. CLARK, *Appt.*,

v.

Daniel C. STANWOOD *et al.*

(166 Mass. 379.)

1. **Partnership creditors may vote in the choice of assignees** and on the matter of the discharge of a single insolvent partner, although the firm is not insolvent.
2. **Firm debts can be proved against a single insolvent partner** although the partnership is not insolvent or any proceedings taken against it.
3. **One creditor of an insolvent is not aggrieved** by the refusal of the insolvency court to permit other creditors to withdraw their assent to the discharge of the insolvent.
4. **A release of an insolvent is not "a thing of value"** within the meaning of Pub. Stat. chap. 157, § 43, for obtaining which on credit and without intent to pay therefor he may be refused a discharge, and it does not constitute an asset in the debtor's estate.

(Knowlton, J., dissents.)

(June 16, 1896.)

A PPEAL by petitioner from a decree of the Supreme Judicial Court for Suffolk County sustaining demurrers to a bill to set aside a discharge in insolvency. *Affirmed.*

Daniel C. Stanwood, having become insolvent and not having sufficient cash to petition for his discharge, borrowed the sum of \$40 for that purpose from a person who knew his in-

solvent condition and that the money was for the purpose of procuring an insolvency discharge. The proceeding was instituted and creditors of the firm of which the insolvent was a member were permitted to vote on the matter of discharge and the discharge was granted.

Further facts appear in the opinions.

Messrs. George Fred Williams and G. W. Anderson, for appellant:

If a legal bar (Pub. Stat. chap. 157, § 81) to plaintiff's right to sue the insolvent has been interposed by illegal proceedings in the insolvency court, she must be a "party aggrieved," entitled in this forum to have that bar removed.

Binney v. Globe Nat. Bank, 150 Mass. 575, 6 L. R. A. 379; *Lancaster v. Choate*, 5 Allen, 530; *Harlow v. Tufts*, 4 Cush. 448; *Hill v. Hersey*, 1 Gray, 584.

From the statutes and cases these general principles are a clear deduction:

1. Individual property must be applied to individual debts until they are paid in full; joint creditors have no rights against the separate estate until such payment.

2. Partnership property must be applied to partnership debts until they are paid in full; separate creditors have no rights until such payment.

3. Any surplus from either joint or separate estate, after the satisfaction of joint or separate debts, is to be applied to separate or joint debts.

Catskill Bank v. Hooper, 5 Gray, 574; *Barclay v. Phelps*, 4 Met. 397; *Harmon v. Clark*, 18 Gray, 114; *Robb v. Mudge*, 14 Gray, 534; *Hove v. Lawrence*, 9 Cush. 553, 67 Am. Dec. 68; *Wild v. Dean*, 8 Allen, 579; *Phillips v. Ames*, 5 Allen, 185; *Conant v. Perkins*, 107 Mass. 79.

In *Baker's Case*, 8 Cush. 109, where the petitioner was a member of a partnership in in-

NOTE.—For another important case as to proof of partnership debts against estate of insolvent partner, see *Thayer v. Humphrey* (Wis.) 30 L. R. A. 649. See also *Darby v. Gilligan* (W. Va.) 6 L. R. A. 740.

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solvency, and his private estate paid 55 per cent of his private debts, while neither the partnership estate nor the other partner's estate paid 50 per cent, the court ordered his discharge from his private debts, leaving him still liable as a partner.

Purple v. Cooke, 4 Gray, 120; *Somersett Potters, Works v. Minot*, 10 Cush. 592.

Even in England firm creditors cannot prove against the separate estate unless there is no joint estate at all.

Robson, Bankr. 780.

And this exception to the general rule is not admitted by our court.

Hove v. Lawrence, 9 Cush. 559, 57 Am. Dec. 68.

The partnership creditors could have no rights against the separate estate, even as against Stanwood, until they have brought the partnership properly into court and showed it insufficient to satisfy their claims.

Nor would joint claims be barred by the debtor's discharge under these proceedings.

Corey v. Perry, 67 Me. 140, 24 Am. Rep. 15; *Re Noonan*, 3 Biss. 491; *Crompton v. Conkling*, 15 Nat. Bankr. Reg. 417; *Re Jewett*, 16 Nat. Bankr. Reg. 78; *Parsons*, Partn. § 876, note 2; *Glenn v. Arnold*, 56 Cal. 631; *Perkins v. Fisher*, 80 Ky. 11. *Poillon v. Lawrence*, 77 N. Y. 207; *Amsinck v. Bean*, 89 U. S. 22 Wall. 395, 23 L. ed. 801; 11 Nat. Bankr. Reg. 495; *Bean v. Amsinck*, 8 Nat. Bankr. Reg. 228, 10 Blatchf. 861; *Hudgins v. Lane*, 11 Nat. Bankr. Reg. 463; *Parker v. Phillips*, 2 Cush. 175.

Plaintiff is aggrieved by the court's refusal to allow withdrawals because such refusal resulted in the defendant's discharge and set up a bar to the plaintiff's claim.

This question cannot be determined on demurrer, unless the court should rule as a matter of law that the creditors had a right to withdraw their assents.

Merriam v. Richards, 8 Gray, 252; *Beverly Bank v. Wilkinson*, 2 Gray, 519.

Decisions sustaining the right to withdraw are:

Morse v. Lowell, 7 Met. 152; *Safford v. Slade*, 11 Cush. 29; *Bemis v. Smith*, 10 Met. 194.

The assent of the Everett Press Company, by its attorney, H. T. Richardson, was filed on May 10, 1894. No power of attorney to Richardson was then on file, or was placed on file until after September 23, the end of the six months. The right of the defendant to his discharge must be determined on the record at the end of the six months, and the record did not at that time show him entitled to a discharge. The Everett Press Company claim should not have been counted for his discharge.

Gifford v. Barker, 9 Gray, 364.

The claim of Arthur G. Stanwood, if a debt at all, was obtained for the purpose of influencing the proceedings in this cause, contrary to the provision in § 29 of the insolvency law.

Arthur Stanwood knew the insolvent was about to go into insolvency; that he had no assets to distribute, and was simply seeking a discharge from his debts. He passed him the \$40 without any promise that the same should be repaid. There was therefore no express contract, and if there had been, it would have been a fraud on the insolvency law, and therefore void.

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Phelps v. Thomas, 6 Gray, 327; *Blaisdel v. Fowle*, 120 Mass. 447, 21 Am. Rep. 538; *Tirrell v. Freeman*, 139 Mass. 297.

Mr. Anson M. Lyman, for appellees:

Under § 95, chap. 157, Pub. Stat. a creditor whose debt was proved or provable against an insolvency estate may, at any time within two years after the date thereof, apply to the court which granted it to annul the same, on the ground that it was fraudulently obtained.

By § 36 of this chapter, the assignee could have appealed to the superior court from the allowance of any of the claims objected to. These provisions of the statute give this plaintiff all the relief to which she is entitled.

Kempton v. Saunders, 132 Mass. 466; *Freeland v. Mechanics' Bank*, 16 Gray, 187.

A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree.

Wiggin v. Sweet, 6 Met. 197, 39 Am. Dec. 716; *Merriam v. Sevall*, 8 Gray, 316; *Deering v. Adams*, 34 Me. 44; *King v. Middlesex Justices*, 3 Barn. & Ad. 988.

The partnership creditors have no concern with the expunging of the claim of A. G. Stanwood, and the latter is not interested in the expunging of said partnership claims, nor in the question whether certain creditors shall be allowed to withdraw their assent to the debtor's discharge.

Gifford v. Barker, 9 Gray, 364; *Gates v. Campbell*, 8 Cush. 104.

The claims of the creditors of the copartnership of Bates, Stanwood, & Andrews were provable against the separate estate of Stanwood.

Agawam Bank v. Morris, 4 Cush. 103; *Barclay v. Phelps*, 4 Met. 387; *Wilkins v. Davis*, 9 Low. Dec. 511; *Davis v. Werden*, 13 Gray, 305; *Lothrop v. Tilden*, 8 Cush. 375.

The petitions to withdraw the assent of the Notman Photograph Company, and of Messenger & Jones, were apparently drafted upon the theory, which is not law, that a creditor has an absolute right to withdraw his assent without assigning good reasons therefor.

Gifford v. Barker, 9 Gray, 364; *Merriam v. Richards*, 8 Gray, 252; *Beverly Bank v. Wilkinson*, 2 Gray, 519; *Fenton v. Graham*, 161 Mass. 556.

The plaintiff is entitled to no equitable relief in regard to the claim of Arthur G. Stanwood. Arthur G. Stanwood was certainly a creditor to the amount of \$40 and as such was entitled to prove the claim. He could make all the allegations set forth in the statutory form of the proof of claim, and this furnishes a test of his right to prove.

Spurr v. Dean, 139 Mass. 84.

Morton, J., delivered the opinion of the court:

This is an application to the supervisory jurisdiction of this court, under Pub. Stat. chap. 157, § 15. There were demurrers by the two Stanwoods, which were sustained, and the bill dismissed, as to them with costs, and a decree *pro confesso* against the other defendants. It appears that the defendant Daniel C. Stanwood was adjudged insolvent on his own petition, and a warrant was duly issued

against his estate. He was a member of the firm of Bates, Stanwood, & Andrews, which was never declared insolvent; and neither of the other partners was insolvent, or was declared to be so. No reference was made in the petition or warrant to the partnership. The schedule of creditors filed with the petition contained a list of firm and individual creditors. Firm creditors, as well as individual creditors, were allowed to and did prove, their claims, and vote for assignees and on the discharge. No assets came to the hands of the assignees. The plaintiff does not claim to be aggrieved by any action of the insolvency court respecting her own demand, but contends that she is a party aggrieved, because the partnership creditors were allowed, against her objection, to prove their claims, and to vote for assignees and on the discharge, and because of certain other rulings by the insolvency court in the course of the proceedings. For the purposes of this case, we assume without deciding, that the petitioner has a *locus standi*.

The principal question is whether the partnership creditors were rightly allowed to prove, and to vote in the choice of assignees, and on the matter of discharge. The plaintiff insists that they were not, and her contention is, in effect, that firm debts cannot be proved against a single insolvent partner, and he cannot be discharged from them by the insolvency court, unless the partnership is declared insolvent, and proceedings had accordingly. There are some cases which seem to favor the petitioner's view. *Corey v. Perry*, 67 Me. 140, 24 Am. Rep. 15; *Poillon v. Lawrence*, 77 N. Y. 207; *Perkins v. Fisher*, 80 Ky. 11; *Re Noonan*, 3 Biss. 491; *Crompton v. Conkling*, 15 Nat. Bankr. Reg. 417; *Hudgins v. Lane*, 11 Nat. Bankr. Reg. 463; *Re Winkens*, 2 Nat. Bankr. Reg. 349; *Re Little*, 1 Nat. Bankr. Reg. 841. But we think that, on principle and authority, the better rule is the other way, and that it has been so held in this state, and is implied, by statute. It is elementary that each partner is liable *in solido* for the partnership debts. *Davis v. Werden*, 13 Gray, 805. His separate estate can be taken in satisfaction of them. *Allen v. Wells*, 22 Pick. 450, 33 Am. Dec. 757; *Davis v. Werden*, *supra*. He may be adjudicated bankrupt individually, because of his liability as partner; and his interest in the partnership, as well as his separate estate, passes to his assignee. *Harrison v. Sterry*, 9 U. S. 5 Cranch, 302, 3 L. ed. 104, 107; *Robson*, Bankr. 7th ed. 681; 2 Lindley, Partn. 2d Am. ed. *637. His estate continues liable in equity for partnership debts after his death, though the grounds of the liability do not seem to be very clearly settled. *Kendall v. Hamilton*, L.R. 4 App. Cas. 504; 1 Story, Eq. Jur. 10th ed. § 676. His bankruptcy, like his death, dissolves the partnership. (*Eustis v. Bolles*, 146 Mass. 414) and the bankruptcy law is based largely on equitable principles. In view of these considerations, it seems to us that there is nothing in the nature of a partnership debt, *per se*, which should exclude it from proof against a single insolvent partner. Whether a partnership creditor is entitled to share in the distribution is another question. But the right to

prove against an insolvent estate has never been made contingent, in this state, on the presence or absence of assets. If partnership debts are provable against a single insolvent partner, without regard to the insolvency of the firm or of the other partners, then it follows that a discharge will release the insolvent partner from the partnership debts, since it is expressly provided that a discharge shall release the debtor from all debts proved or provable against his estate. Pub. Stat. chap. 157, §§ 81, 83. Further, in the consideration of debts or demands which may be proved against the estate of an insolvent debtor, there is nothing which excludes joint or partnership claims or demands, or limits the proof to debts due to the creditor solely. Id. § 28. And it is plainly implied by Id. § 85, that an insolvent partner may be discharged from partnership debts on a warrant issued against him alone, and without the firm being adjudged insolvent as it is provided in §§ 120 *et seq.* that it may be. And we think that the cases are to the same effect. *Barclay v. Phelps*, 4 Met. 397, and *Agawam Bank v. Morris*, 4 Cush. 99, expressly hold that partnership debts may be proved against a single insolvent partner, but must be postponed in dividends to the claims of separate creditors. *Lothrop v. Tilden*, 8 Cush. 375, holds that a discharge granted to a single insolvent partner will bar partnership debts. In *Buck v. Burlingame*, 13 Gray, 307, a partnership creditor proved against an insolvent partner, and was allowed, as a preferred claim, the costs incurred in bringing suit against the firm, and attaching the separate estate of the insolvent partner. In *Sigourney v. Williams*, 1 Gray, 623, partnership creditors proved, and it was taken for granted that they had the right to do so; and the discharge was held to apply to their claims, as well as to the separate debts, though it is to be observed that the petition was by the debtor individually and as a member of the firm. In the present case the petition contained no reference to the partnership, but the schedule of debts filed with it included partnership debts as well as private ones; thus manifesting a desire on the part of the debtor if that is material, to be discharged from those. In *Gates v. Mack*, 5 Cush. 613, the right to prove a partnership debt against the estate of a single insolvent partner was expressly affirmed. The plaintiff further sought in that case to share with the several creditors in the distribution of the estate; and the assignees objected that the debt was a partnership debt; but the court held that by the discharge of the other partner the debt had become the sole and separate debt of the insolvent debtor, and that the proving creditor was entitled to share in the distribution. *Barclay v. Phelps*, *supra*, which may be regarded as the leading case, never has been denied, or it would seem, doubted, but has been cited several times with apparent approval. *Burnside v. Merrick*, 4 Met. 537, 545; *Parker v. Phillips*, 2 Cush. 175, 178; *McDaniel v. King*, 5 Cush. 469, 476; *Gates v. Mack*, Id. 613, 614; *Catskill Bank v. Hooper*, 5 Gray, 574, 583. See also *Ex parte Yale*, 3 P. Wms. 24, note A; *Ex parte Taill*, 16 Ves. Jr. 193, 195, note; *Ex parte Hammond*, L. R. 16 Eq. 614; *Wilkins v.*

Davis, 2 Low. Dec. 511; *Re Freer*, 1 Nat. Bankr. Reg. 660; *Re Abbe*, 2 Nat. Bankr. Reg. 75; *Re Stevens*, 5 Nat. Bankr. Reg. 112; 1 Deven. Bankr. 3d ed. 657; Lindley, Partn. 2d Am. ed. *752; Robson, Bankr. 7th ed. 657.

The plaintiff relies upon *Robb v. Mudge*, 14 Gray, 534; *Wild v. Dean*, 8 Allen, 579, and *Baker's Case*, 8 Cush. 109, as, in effect, qualifying, if not overruling, *Barclay v. Phelps*, and *Agawam Bank v. Morris*, *supra*. We do not so regard them. The question in the first two of those cases was whether a certain debt was a partnership debt, or the private debt of one of the partners, and as such entitled to share in the separate estate,—not whether, if it was a partnership debt, it was entitled to proof. *Baker's Case* was a case of an insolvent partnership. The plaintiff also relies upon *Parker v. Phillips*, 2 Cush. 175; *Thompson v. Thompson*, 4 Cush. 127, and *Pelletier v. Couture*, 148 Mass. 269, 1 L. R. A. 863. But those cases only decide that after dissolution, as before, a partnership may be adjudged insolvent on the petition of one of the partners, and the joint and separate estates distributed accordingly. In this case no question arises as to the distribution of firm assets or the course to be pursued in the winding up of an insolvent partnership; though in the latter event it is to be noted that there is no such thing as a partnership discharge, but each partner is to be granted or refused a discharge as if the proceedings had been against him alone, and Pub. Stat. chap. 157, § 124, implies that proceedings may be instituted against, or promoted by, a single partner.

If, then, partnership debts are provable against a single partner, in insolvency, and are released by his discharge, there would seem to be no good reason why partnership creditors should not vote on the matter of discharge, or in the choice of assignees. In the case of *Re Purvis*, 1 Nat. Bankr. Reg. 163, it seems to have been held that, though partnership creditors were allowed to prove, they could not vote in the choice of assignees. The practice seems to have been otherwise in this state. As far back as 1859 the late Chief Justice Bigelow (then Justice Bigelow) sustained a ruling by Judge Richardson, of the insolvency court, allowing partnership creditors to prove against a single insolvent partner, and to vote in the choice of assignee. *Seavey's Case*, S. J. C. Middlesex; Cutler, *Insolv. Laws*, pp. 74, 214. And such a practice would seem to conform to our statute, which provides that the assignee shall be chosen by the creditors who have proved their debts. Pub. Stat. chap. 157, § 40.

Perhaps the conclusions thus expressed may appear to lead to an inconsistency in dealing with partnership claims in the case of a single insolvent partner, and in the case of an insolvent firm. But the inconsistency is seeming only, and not real. In the latter case no more than in the former are partnership creditors permitted to compete with separate creditors in the distribution of the separate estates. In the case of a single insolvent partner there is no method in which the rights of partnership creditors to an ultimate share in the estate can be protected, unless they are entitled to prove. In the case of an insolvent firm, their rights in

that regard, and in the choice of assignees and the matter of discharge, are fully protected and established by proof against the firm. And it certainly would be a hardship if a solvent firm, with solvent partners, had to be adjudicated insolvent, or had to liquidate, in order that an insolvent member might be discharged of the firm debts, though, if the statute required it, there would be no alternative but to do it. We think, therefore, that on the main question the ruling of the insolvency court was correct.

The remaining objections may be briefly disposed of. The release was not a "thing of value," within the meaning of Pub. Stat. chap. 157, § 93. It did not constitute an asset in the debtor's estate. If it was obtained by fraud, as the plaintiff contends, it had no force or validity, and still less was a thing of value. Besides, the settlement and payment by notes operated as a release without anything more, and the plaintiff has retained and proved the notes. There is nothing in the statute which requires written evidence of authority to act on the part of an attorney who assents, in the name of his principal, to a discharge. The \$40 was a debt due to the person advancing it, and, as a creditor, he had a right to prove his claim, and to vote on the question of discharge. We do not think that the plaintiff was a party aggrieved by the refusal of the judge of the insolvency court to permit certain creditors to withdraw their assent to the discharge. *Freelund v. Mechanics' Bank*, 16 Gray, 137; *Kemp-ton v. Saunders*, 132 Mass. 466. The result is that in the opinion of a majority of the court the decree should be affirmed, and it is so ordered.

Knowlton, J., dissenting:

The injustice that will be accomplished under the decision in this case is so flagrant, and the result reached so at variance with what I have long supposed to be the law of Massachusetts, and with the weight of authority in other jurisdictions, that I feel constrained to state my views. The record shows that one Stanwood owed to six different parties separate debts amounting in the aggregate to \$2,090. He had no separate property. He was a member of a perfectly solvent firm, which owed some debts, but was not brought into the court of insolvency. He induced creditors of the firm, who had not the slightest interest in the insolvency proceedings, to prove their claims against him as an individual, and to sign their assent to his discharge, and thereby relieve him from all of his separate debts, against the will of his separate creditors, without his paying anything. Doubtless these partnership creditors then went to the other members of the firm, and received their pay in full from the partnership assets. There is some confusion in the earlier cases touching this subject. In *Barclay v. Phelps*, 4 Met. 397, it was held that the language of the statute, "two or more persons who are partners" (Stat. 1838, chap. 163, § 21; Pub. Stat. chap. 157, § 120), did not apply literally to members of a partnership which had been dissolved before the commencement of proceedings in insolvency, and that such a partnership could not be brought into the insolvency court, and that therefore the creditors of it could

prove against an individual partner. In *Parker v. Phillips*, 2 Cush. 175, it was intimated, and in *Thompson v. Thompson*, 4 Cush. 127, it was expressly decided, that this narrow construction of the statute was erroneous; and it has ever since been held that previously dissolved insolvent partnerships are to be brought into the court of insolvency, and settled there, as well as those existing at the commencement of insolvency proceedings. *Pelletier v. Couture* 148 Mass. 269, 1 L. R. A. 863. Although for nearly fifty years it has been settled that the reason given for the decision in *Barclay v. Phelps* has no foundation in law, the case was not expressly overruled; and in the early practice under the statute the decision was sometimes followed by magistrates, and their action passed without disapproval by this court. Under this practice, if an individual who was a member of a firm was in insolvency without bringing in the partnership, all of the partnership creditors were allowed to bring their claims into court, and, in a sense, to prove them against the separate estate, simply for the purpose of sharing in the surplus if there was anything left after paying the separate creditors. It never was adjudged that they could do anything to affect the rights of the separate creditors, and they never were allowed to receive anything from the separate estate unless the separate creditors were first paid in full. *Agawam Bank v. Morris*, 4 Cush. 99. See also *Somerset Potters' Works v. Minot*, 10 Cush. 592, 598-601; *Catskill Bank v. Hooper*, 5 Gray, 574-588. In *Gates v. Mack*, 5 Cush. 618, one who was formerly a partnership creditor was allowed to prove against one of the partners only, because there had been a severance by former proceedings in insolvency, in which the other partners had been discharged; leaving the debt from that time an individual debt, for which the insolvent only was liable. In *Baker's Case*, 8 Cush. 109, the statute received exposition in reference to discharges where there are both individual and partnership creditors, to the effect that the rule stated in Pub. Stat. chap. 157, § 121, requiring the separate estates of the individual debtors to be administered by themselves, and the partnership estate to be administered by itself, and giving to creditors of either class no rights in the estate applicable to debts of the other class until all the creditors of that class are first paid in full, and then only a right to have the surplus assets transferred to the estate, and administered for creditors of their class, is applicable to discharges,—so that partnership creditors alone can sign their assent to a discharge from partnership debts, and separate creditors of each partner alone can sign their assent to a discharge from his individual debts, and a discharge may be granted from one's individual debts and not from his partnership debts, or from his partnership debts and not from his individual debts; the granting or refusal of the discharge from each class of debts depending upon their giving or withholding their assent to a discharge. Since that decision was announced, it has been the practice in the insolvency courts of most of the counties of the state, as I know,—and I believe it has in all of them,—to grant a discharge from individual debts, and to refuse it from partnership debts,

or *vice versa*, if the amount of the dividend, or the assent of creditors, called for different results in the different estates, and to hold that a discharge from one class of debts has no effect upon debts of the other class. No later case has questioned this doctrine, and I must assume it to be the law of the state to-day. In *Lothrop v. Tilden*, 8 Cush. 875, the warrant issued upon a representation that the petitioner was indebted both personally and as a member of a firm. The only debts proved were partnership debts, and the certificate, in terms, purported to cover these debts. The next important adjudication bearing upon the question now before us was in *Robb v. Mudge*, 14 Gray, 584, which in my judgment fully covers the present case. It was a suit involving large amounts, and was argued by several of the ablest lawyers in the state. In that case, as in this, the insolvent debtor did not represent the partnership estate as insolvent, and the proceedings in the insolvency court had reference to his individual estate alone. A firm of which he was a member was dissolved a few months before the commencement of the insolvency proceedings, owing debts upon which he was liable as a partner at the time of their commencement. The claims were presented by the holders of them for proof in the insolvency court against his estate. It was held in an elaborate opinion by Mr. Justice Bigelow that they could not be received, and they were disallowed. There was no intimation that the claims could be given any kind of standing in that proceeding. Both the language of the opinion and the judgment were directly contrary to the decision in *Barclay v. Phelps*, and it seems to me that the result reached necessarily followed from the decision in *Baker's Case*, *ubi supra*, and from a careful consideration of our statutes.

It is to be noticed that our courts of insolvency have no jurisdiction except that which is expressly conferred upon them by the statute, and until the enactment of Stat. 1894, chap. 164, had no jurisdiction whatever in equity. The jurisdiction in regard to partnership estates is conferred by Pub. Stat. chap. 157, §§ 120 *et seq.*, and it exists only "when two or more persons who are partners become insolvent." If the partnership is insolvent, its estate, as well as that of each of the individual partners, is brought into court; and it may be brought in upon the representation of either of the partners, or of the creditors of the firm. If the partnership estate is brought into court to be settled, the estates of the firm and of the individual members, although dealt with at the same time and in one proceeding, are settled separately, as if separate warrants had been issued against each. *Baker's Case*, *ubi supra*; Pub. Stat. chap. 157, §§ 121, 123, 124. Creditors can only prove against the estate which is indebted to them. The only way in which they can derive any benefit from an estate of another class is by having any surplus that remains after paying creditors of that class in full added to the assets of the estate against which they have proved. There is no provision in the statute for any kind of proof except a real proof that entitles one to his dividend with the others. If a debt is presented for proof, it is either proved and allowed, or it is disallowed. If it

is proved it entitles the holder to all the rights of a creditor, among which are the rights to receive a dividend, and to assent or withhold assent to a discharge. I do not know where any warrant is found in the statute for giving a creditor an anomalous position, which is not that of a holder of a proved claim, but that of a holder of a claim which is recognized by the court for the purpose of sharing in a surplus, if there is any, after the estate is settled by paying in full all creditors whose claims are regularly proved, and who are entitled to dividends. The general provisions in regard to the proof of claims and the rights and liabilities of creditors seem to me inapplicable to claims presented for such a purpose only, and no special provision is made for such claims. I have searched the books in vain for a case under our statute in which the court, after administering an estate that paid individual debts in full, has attempted to administer the surplus by a distribution among partnership creditors, unless the partnership estate was first brought into court, under Pub. Stat. chap. 157, § 120, by the insolvency of the several partners. If such an attempt is hereafter made, there being no jurisdiction of the partnership assets, or of the assets of the solvent members of the firm, it will be interesting to consider what scheme can be devised for the purpose.

If a partnership is insolvent, it must be brought into court, and its affairs are properly settled there. If the partnership is not insolvent, some of the partners being in a condition to pay all partnership debts as they are presented, there is no occasion for the partnership creditors to come into court, and the individual insolvent debtor has no occasion to obtain a discharge from the partnership debts. There is but a bare possibility that he will ever be called upon to pay any of them after getting his discharge from his individual debts, and, if he should be, he would have his remedy over against the solvent members of the firm. His copartners are fully protected, for his liability to contribute his share of any deficiency is an individual liability, which they may prove against his estate. Upon the doctrine laid down in *Baker's Case* and in *Robb v. Mudge*, *ubi supra*, the proceedings are simple, and the rights of everybody are fully protected. The rule laid down in *Robb v. Mudge* was reaffirmed with emphasis in *Wild v. Dean*, 3 Allen, 579, in which firm creditors attempted to prove their claims against the estate of an individual partner; the principal difference between this case and *Robb v. Mudge* being that in this the partnership, as well as the individual, was in insolvency. Since the decision in *Robb v. Mudge* there is nothing in our books, that I can find, which indicates that a partnership creditor can prove a claim

against the individual estate of one of the partners, whether the partnership is adjudged insolvent or not. Nobody contends that he can prove for the purpose of sharing with the individual creditors, or of receiving anything unless they are first paid in full. But if an anomalous kind of proof is to be allowed, which is wholly subordinate to other rights in the separate estate, how can it be consistent with the nature and purpose of the proof to allow the firm creditors, by their assent, to discharge the insolvent from his individual debts? And how can such anomalous kind of proof, which does not entitle firm creditors to a dividend, bring them within the terms of the discharge, which includes only debts proved or provable against the estate? Clearly, it is not the kind of proof meant by the statute. Under the doctrine of the opinion, an injustice may be done to a debtor as great as that done to the separate creditors in the present case. A debtor who complies with all of the provisions of the statutes is entitled to a discharge if his estate pays a dividend of 50 per cent or more to the creditors among whom it is distributed. Suppose that a debtor's estate pays a dividend of 90 per cent to separate creditors, and suppose that one of these creditors desires to prevent the granting of the discharge, and induces partnership creditors of a solvent firm, of which the debtor was a member, to present claims, which are proved in this special way, to an amount greater than the whole amount of the separate debts. If these claims are reckoned with the claims of the separate creditors in determining whether a discharge shall be granted, the dividend of 90 per cent will not be enough to make a dividend of 50 per cent upon the aggregate of the debts of the two classes. If this method is adopted a debtor may be unable to obtain a discharge from his separate debts unless he pays them in full, even though there is partnership property in the possession of the solvent partners to an amount sufficient to pay all of the partnership debts. An important object of the law may thus be entirely defeated. All of the decisions in other states which have come to my attention tend to support my view, and nearly all of those in the Federal courts. *Corey v. Perry*, 67 Me. 140, 24 Am. Rep. 15; *Poillon v. Lawrence*, 77 N. Y. 207; *Perkins v. Fisher*, 80 Ky. 11; *Re Little*, 1 Nat. Bankr. Reg. 341; *Re Winkens*, 2 Nat. Bankr. Reg. 349; *Hudgins v. Lane*, 11 Nat. Bankr. Reg. 462; *Crompton v. Conklin*, 15 Nat. Bankr. Reg. 417. See also as bearing upon the question, *Rice's Case*, 7 Allen, 112; *Nutting v. Ashcroft*, 101 Mass. 300; Stat. 1865, chap. 113 (Pub. Stat. chap. 157, § 125); *Bucklin v. Bucklin*, 97 Mass. 256.

I think the petition to expunge the proof of the partnership debts should be granted.

MINNESOTA SUPREME COURT.

Re ESTATE OF Nehemiah HULETT, Deceased.

John R. CAREY, Admr., etc., of Nehemiah Hulett, Deceased, et al., Appls.,

v.

Lucy A. HULETT, Resp't.

(.....Minn.....)

"1. The issue being whether the deceased executed an alleged written contract of marriage with the petitioner, conveyances executed by the deceased, subsequent to the marriage contract, in which he was described as a single man, were inadmissible in evidence against the petitioner.

3. A letter written by petitioner to her sister subsequent to the execution of the marriage contract, in which she referred to the deceased as "her husband" and "your brother," was handed by her to the deceased to read. He read it, enclosed it in an envelope addressed to the sister, and put it in his pocket with other letters, apparently for the purpose of posting it. Held, that this so connected the deceased with the letter that it was competent evidence in favor of the petitioner as his admissions.

3. It is mutual, present consent lawfully expressed, which makes marriage. All that is necessary to render competent parties husband and wife is that they agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. It is not necessary that such a contract be followed by holding themselves out to the public as husband and wife, or that it be acted on by their professedly living together in that relation. The distinction noted between the fact of marriage and the proof of it.

4. The fact that under our statutes a wife may inherit from her husband has not changed the common-law rule that the will of a man is not revoked by his subsequent marriage alone, without the birth of issue.

(November 27, 1894.)

APPEAL by proponents from orders of the District Court for St. Louis County denying probate to a paper alleged to be the last will and testament of Nehemiah Hulett, deceased, and granting homestead rights to one claiming to be his widow. *Reversed as to the first order; affirmed as to the second.*

The facts are stated in the opinion.

Mr. J. L. Washburn, with **Mr. James Spencer**, for appellants:

The controlling fact in this case, and the one which should have been submitted to the jury, was the inquiry as to whether these parties were husband and wife.

Re Terry's Estate, 58 Minn. 268.

The verdict should be held null for its failure to determine the material and substantial question of fact involved.

McArthur v. Craigie, 22 Minn. 858; *Ohlweiler v. Lohmann*, 88 Wis. 78; *McLimans v. Lancaster*, 68 Wis. 603.

*Headnotes by MITCHELL, J.

The deeds made by Hulett were receivable in evidence, and the recitals therein contained admissible under the rules of pedigree evidence. They were made by one who knew. They were made before the controversy had arisen. They were made by one deceased prior to the time of the trial and his death had fully appeared. Pedigree embraces birth, marriage, death and the date thereof.

Dawson v. Mayall, 45 Minn. 408; 1 Greenl. Ev. § 108; 2 Best, Ev. §§ 501, 502; *Jackson, Ross, v. Cooley*, 8 Johns. 128; *Taylor*, Ev. §§ 642, 628-630; *Eisenlord v. Clum*, 126 N. Y. 568, 12 L. R. A. 836; *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 828.

The evidence was admissible as a written statement, entry, or declaration made by the deceased in the usual course of business, where there was no *lis mota* apparent.

Doe, Pattenhall, v. Turford, 3 Barn. & Ad. 890; *Short v. Lee*, 2 Jac. & W. 464; *Sussex Prerogative Case*, 11 Clark & F. 112; *Stapylton v. Clough*, 2 El. & Bl. 937. *Champerney v. Peck*, 1 Stark. 404; *Price v. Torrington*, 2 Ld. Raym. 878; *Haven v. Wendell*, 11 N. H. 112.

In a controversy of this kind as characterizing the relations between a man and woman claimed to have been married they were admissible as a part of the *res gesta*.

When we have shown that this evidence is admissible under the doctrine that it is a part of the *res gesta* we have removed it from the field of secondary or hearsay evidence, and it becomes primary evidence of the facts.

Allen v. Hall, 2 Nott & M'C. 114, 10 Am. Dec. 578; *King v. Bramley*, 6 T. R. 880; *Stevens v. Moss*, Cowp. 593; *Kenyon v. Ashbridge*, 85 Pa. 157; *Tarpley v. Poage*, 2 Tex. 139; *Floyd v. Calvert*, 58 Miss. 87; 1 Bishop, Mar. & Div. §§ 937, 938, 439; *Davis v. Brown*, 1 Redf. 260; 1 Greenl. Ev. § 108; 1 Smith, Lead. Cas. 506, 508, 515; *Philbrick v. Spangler*, 15 La. Ann. 46; *Kansas P. R. Co. v. Miller*, 2 Colo. 445; *Richard v. Brehm*, 73 Pa. 140, 13 Am. Rep. 733; *Budington v. Munson*, 38 Conn. 484; *Trimble v. Trimble*, 2 Ind. 78; *Donnelly v. Donnelly*, 8 B. Mon. 118; *Henderson v. Cargill*, 31 Miss. 267; *Spears v. Burton*, 81 Miss. 547; *Jones v. Reddick*, 79 N. C. 290; *Redgrave v. Redgrave*, 38 Md. 98; *Womack v. Tankersley*, 78 Va. 242; *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263; *Van Tuyl v. Van Tuyl*, 57 Barb. 235; *Gall v. Gall*, 114 N. Y. 109; *Re Taylor*, 9 Paige, 611; *Cargile v. Wood*, 63 Mo. 501; *Caujolle v. Ferrie*, 23 N. Y. 104; *O'Gara v. Eisenlohr*, 33 N. Y. 296; *Jewell v. Jewell*, 42 U. S. 1 How. 219, 11 L. ed. 108; *Arnold v. Chesebrough*, 58 Fed. Rep. 838, 20 U. S. App. 87; *Eisenlord v. Clum*, 126 N. Y. 552, 12 L. R. A. 836; *Taylor v. Swett*, 3 La. 33, 22 Am. Dec. 157.

It shall not be competent for any party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with or admission of the deceased or insane party or person relative to any matter at issue between the parties.

Comp. 1894, § 5660.

NOTE. As to revocation of will by marriage, see also some cases in note to *Riggs v. Palmer* (N. Y.) 4 L. R. A. 346, other cases in note to *Davis v. Fogle* 34 L. R. A.

(Ind.) 7 L. R. A. 485, and the case of *Roane v. Hollingshead* (Md.) 17 L. R. A. 522.

This statute cannot be circumvented by parties in interest writing out their declarations and giving evidence to show that the deceased person so acted as to consent thereto.

Eisenlord v. Clum, *supra*.

The instrument does not constitute marriage.

State v. Worthingham, 23 Minn. 533; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Re Terry's Estate*, 58 Minn. 263; *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826; *Jewell v. Jewell*, 42 U. S. 1 How. 219, 11 L. ed. 108; *State v. Bittick*, 103 Mo. 183, 11 L. R. A. 587; *Grimm's Appeal*, 181 Pa. 199, 6 L. R. A. 717; *People v. Loomis* (Mich.) 2 Det. L. N. 291; *Pret v. Pret*, 52 Mich. 464; *Hiler v. People*, 156 Ill. 511; *Sharon v. Sharon*, 79 Cal. 669; *Yardley's Estate*, 75 Pa. 207.

Presumption of marriage can arise, not only where parties live together as man and wife, but hold themselves out as such.

Durand v. Durand, 2 Sweeney, 322; *Hinckley v. Ayres*, 105 Cal. 357.

There must be a contract in *presentis* followed by habit and reputation of marriage in order to constitute a good common law marriage.

Hantz v. Sealy, 6 Binn. 405; *Odd Fellows Ben. Assn. v. Carpenter*, 17 R. I. 720; *Com. v. Stump*, 53 Pa. 132, 91 Am. Dec. 198; *Arnold v. Chesebrough*, 63 Fed. Rep. 833, 20 U. S. App. 87; *Martland v. Baldwin*, 112 U. S. 490, 28 L. ed. 822; *Sharon v. Sharon*, 79 Cal. 633.

Marriage alone without birth of issue will not revoke the will of a man made prior thereto.

Redf. Wills, 298, 294, 296, 299; 1 Jarman, Wills, 270; 3 Washb. Real. Prop. 4th ed. 539; *Swan v. Hammond*, 133 Mass. 45, 52 Am. Rep. 255; *Warner v. Beach*, 4 Gray, 162; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 580; *Webb v. Jones*, 86 N. J. Eq. 168; *Roane v. Hollingshead*, 76 Md. 869, 17 L. R. A. 592; *Noyes v. Southworth*, 55 Mich. 175, 54 Am. Rep. 359; *Re Burton's Will*, 4 Misc. 512; *Swan v. Sayles*, 165 Mass. 177; *Brush v. Wilkins*, 4 Johns. Ch. 518; *Re Ward's Will*, 70 Wis. 251; *Morgan v. Ireland*, 1 Idaho, 786; *Brown v. Scherrer*, 5 Colo. App. 255; *Graves v. Sheldon*, 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653; *Goodell's Appeal*, 55 Conn. 179.

Mr. A. L. Agatin also for appellants.

Messrs. Henry S. Mahon, Pence & Carpenter, and Davis, Kellogg, & Severance for respondent.

Mitchell, J., delivered the opinion of the court:

Nehemiah Hulett, for many years a resident of St. Louis county, and generally supposed and reputed to be a bachelor, died July 25, 1892. Proceedings were duly had in the probate court of that county, whereby a will which he had executed in May, 1862, was proved, and admitted to probate on October 10, 1892, and John R. Carey appointed administrator with the will annexed. On February 18, 1893, the respondent, under the name of Lucy A. Hulett, presented her petition to the probate court, alleging that she was the widow of Hulett, that she was married to him on January 6, 1892, and praying that the homestead of the deceased be set apart to her, and that she be allowed to select certain personal prop-

erty, pursuant to the statutes in such case made and provided. On September 18, 1893, she presented another petition to the probate court reiterating her marriage to the deceased, and praying that the probate of the will be vacated and set aside and declared not to be the last will and testament of the deceased. In this petition she alleged that she and the deceased were married by mutual consent, but without any formal solemnization, and that in evidence of such marriage a certain instrument in writing was executed by both parties at the time of the contract of marriage. Both petitions alleged, and it is an admitted fact, that Hulett died without issue, and that no issue was ever born of the alleged marriage between him and the petitioner. The only ground here material, on which it was asked that the probate of the will be vacated, was that it was revoked by the marriage of Hulett to the petitioner subsequent to its execution. The administrator, the devisees and legatees under the will, and the heirs at law of the deceased all opposed the granting of the petitions; their main contention being that the petitioner had never been married to the deceased. It appeared on the hearings before the probate court that the foundation of the petitioner's claim to be the widow of the deceased was the following instrument, alleged to have been executed by her and the deceased on January 7, but by mistake dated January 6, 1892:

Contract of Marriage between N. Hulett and Mrs. L. A. Pomeroy.

Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written.

[Signed]

N. Hulett.
L. A. Pomeroy

The probate court decided adversely to the petitioner, and denied both her petitions, whereupon she appealed to the district court in both cases. Inasmuch as the main, if not the only, issue in both appeals was whether there had been a valid common-law marriage between the petitioner and the deceased, both were tried together. When the appeals came on for trial, the district court ordered that the following question be submitted to a jury, *viz.*: "Was the paper purporting to have been made on January 6, 1892 [the marriage contract above set forth], in fact executed by the late Nehemiah Hulett?" All other issues of law and fact, if any, were reserved to be tried and determined by the court. Exception is taken by the appellants to the action of the court in submitting this question to a jury. But upon the record no such objection is open to the appellants, because it appears that this is one of the very questions, but better expressed, which they themselves asked to be thus submitted. The court, however, had a right to do this on its own motion. Gen. Stat. 1894, § 5361. This practice is as old as courts of chancery themselves, and this is just the kind of a question which those courts were in the habit of sending out to a court of law to obtain the verdict of a jury. So far from trying the issues piecemeal, as counsel claim, this question was really decisive of the only issue

of fact in the case, as we will hereafter show. The case proceeded to the trial before a jury of the question thus submitted to them. Of course, the contest was over the genuineness of Hulett's signature to the marriage contract. While evidence was introduced as to various collateral facts tending more or less directly to throw light on this question, the bulk of the evidence consisted of the testimony of experts, properly so called, and of persons acquainted with Hulett's handwriting, as to whether his purported signature to the marriage contract was genuine or a forgery. As is usual in such cases, the testimony of these witnesses was very conflicting; but the jury answered the question submitted to them in the affirmative, and it is not claimed, and could not be successfully, that the evidence did not justify the verdict. Hence, unless errors of law, duly excepted to, occurred during the trial of this issue, it must stand as a settled fact, with all its legal consequences, that Hulett and the respondent did execute the marriage contract on the 7th of January, 1892. This disposes of the first assignment of error.

2. Of the various assignments of error relating to the rulings of the court admitting or excluding evidence on the jury trial only three—the ninth, tenth, and fourteenth—are worthy of special notice. The appellants offered in evidence a mortgage on real estate executed by Hulett alone on the 31st of May, 1892, in the certificate of acknowledgment of which the notary described Hulett as a single man. This was excluded by the court. Counsel then offered to prove by other documents that Hulett, subsequent to the date of the alleged marriage contract, "continued to make conveyances of property and execute legal instruments in which he was designated as a single and an unmarried man in the same manner as prior to said date." This offer was likewise excluded. Counsel then offered in evidence a bill of sale executed by Hulett on May 31, 1892, in the certificate of acknowledgment of which the notary described Hulett as a single man. This offer was accompanied by a statement of counsel that this bill of sale was "simply an additional document on the same line." This offer was also excluded. In view of the specific offers which thus preceded and followed the general offer, we think the latter must be construed as meaning, not that Hulett described himself as a single man in the body of the instrument, but merely that he was so described in the certificate of the officers who took his acknowledgments. But, however that may be, and without considering the competency of such evidence had it been sought to prove a contract of marriage by "habit and repute," we are clearly of opinion that it was inadmissible upon the sole issue then being tried before the jury, to wit, whether Hulett executed the express written contract of marriage referred to. Any statements he might have made in these conveyances were certainly no part of the *res gesta*, to wit, the execution of the written contract of marriage. As respects that subject, it seems to us that such evidence would be merely the subsequent self-serving statements of one of the parties. The fourteenth assignment is that the court erred in admitting in evidence Exhibit 133,

being a letter written July 24, 1892, by the respondent to her sister, in Ohio, containing references to her relations to Hulett; as, for example, where she speaks of him as "my husband" and "your brother Hulett." If Hulett had been in no way connected with this letter, so that it would have been the mere statement of the respondent herself, it would have been inadmissible. But the testimony of the respondent was that she wrote it in the presence of Hulett, and then handed it to him to read; that he read it, put it in an envelope, sealed it, and put it in his pocket. She further testified that she subsequently received it back from her sister, to whom it was written. This letter, according to respondent's testimony, was written the day before Hulett's death. The next morning he left home to take the cars to go to Duluth, but died suddenly at the station, while waiting for the train. After his death, a number of letters, addressed, and apparently intended to be mailed, were found in his pocket by the undertaker, who gave them to a nephew of the deceased, who put stamps on them, and posted them. As this letter reached the person to whom it was written, the fair inferences from the evidence are that this was one of the letters found in Hulett's pocket after his death, that the envelope in which it was inclosed was addressed, and that these letters were put in his pocket by Hulett for the purpose of posting them when he reached the city. These facts, if true, amounted to such a recognition of and assent to the statements contained in the letter as to make them, in effect, the joint declarations and statements of both Hulett and the respondent, and therefore competent as his admissions. It is urged very strenuously by counsel for the appellants that the testimony of the respondent, by which she was thus enabled to connect Hulett with the contents of her letter, impinges upon the statute that it shall not be competent for any party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with or admission of a deceased person relative to any matter at issue between the parties. Gen. Stat. 1894, § 5660. It was held in *Chadwick v. Cornish*, 26 Minn. 28, followed in subsequent decisions, that the language of the act refers only to spoken words. If it was a question of first impressions, it might admit of discussion whether the statute ought not to be construed in accordance with the views of the late Chief Justice Gilfillan, so as to include any admission of the party, whether by word or act. The peculiar facts of the present case illustrate the fact that admissions by act may often be as much within the mischief aimed at as admissions by spoken words. But, as the narrower construction placed upon the statute has been adhered to and followed for nearly eighteen years, during which the legislature has not seen fit to amend the law, it is now too late for us to reconsider the question.

None of the exceptions to the charge are well taken or of sufficient substance to require discussion. In fact, the charge was, in most respects a model one. Instead of merely stating general abstract principles of law (as is often the case), which the average lay juror is usually incapable of correctly applying to the facts of the particular case, the learned

judge gave the jury the benefit of a very full, clear, and impartial analysis of the evidence, taking up each important branch of it, and explaining to them its bearing upon the issue which they were to decide. This disposes of all the assignments of error relating to the trial of the issue before the jury.

3. When the other issues came on for trial, by stipulation of the parties all the evidence introduced upon the trial before the jury was deemed as introduced, subject to the same objections and exceptions, in the trial by the court. A small amount of additional evidence having been introduced, both appeals were submitted to the court for its decision. The court thereupon made separate findings of fact and conclusions of law in each appeal. The second finding of fact in each case was to the effect that the deceased and the petitioner were husband and wife, the only difference being that in the one appeal the finding was that they were such on the 7th of January, 1892 (the date of the execution of the marriage contract), and on the 25th of July, 1892 (the date of Hulett's death), while in the other appeal the finding was that they became husband and wife on the 7th of January, 1892; the difference in the two findings being, in our opinion, immaterial. The court held, as conclusions of law, in the one appeal, that the petitioner was entitled, as widow, to an order setting apart to her the homestead of the deceased, etc.; and, in the other, that the will of Hulett, executed in 1862, was revoked by his subsequent marriage to the petitioner. It is to this second finding of fact and to this last conclusion of law that the appellants take exception, and this presents the two principal questions raised by these appeals. The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to house-keeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and house-keeper remained unchanged. Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although *per verba de presenti*, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil

contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Com. p. 87; 2 Greenl. Ev. § 460; 1 Bishop, Mar. & Div. §§ 218, 227-229. The maxim of the civil law was *Consensus, non concubitus, facit matrimonium*. The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bishop, Mar. Div. & Sep. §§ 239, 313, 315, 317. See also the leading case of *Dalrymple v. Dalrymple*, 3 Hagg. Constat. Rep. 54, which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. *Dalrymple v. Dalrymple*, *supra*. The only two cases which we have found in which anything to the contrary was actually decided are *Reg. v. Mills*, 10 Clark & F. 584, and *Jewell v. Jewell*, 42 U. S. 1 How. 219, 11 L. ed. 108, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country. Counsel for appellants contend, however, that the law is otherwise in this state, citing *State v. Worthingham*, 28 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, *per verba de presenti*, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents;" citing *Hutchins v. Kimmell*, 81 Mich. 126, 18 Am. Rep. 164. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed *per verba de presenti* to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the court was merely stating a proved or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely

meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage. In *State v. Worthingham, supra*, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it. The case of *Hutchins v. Kimmell, supra*, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation;" but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife. *Sharon v. Sharon*, 75 Cal. 1, and *Id.* 79 Cal. 638, is not in point, for the reason that § 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations." In view of the increasing number of common-law widows laying claim (in many instances, doubtless fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do.

4. This brings us to the last and most important question in the case, *viz.*, Was the will of Hulett revoked by his marriage to the respondent? At common law the marriage of a woman absolutely revoked her will. The reason usually given was that, a married woman having no testamentary capacity, her will was no longer ambulatory. But the marriage of a man did not revoke his previous will in regard to either real or personal estate. This was not considered such a change of condition as would work a revocation by implication or inference of law. The reason usually given was that the law made for the wife a provision independently of the act of the husband by means of dower. But the marriage and the birth of issue conjointly revoked a man's will, whether of real or personal estate; these circumstances producing such a total change in the testator's condition as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged. The issue, the birth of which would revoke a will, must have been such as could have inherited the property which was the subject of the will, so that the effect of throwing open the property to the disposition of the law would have been to let in the after-born child or children, for whose benefit alone the implied revo-

cation obtained. The chief reason why marriage and the birth of issue was deemed such a change of condition on part of the testator as would work a revocation of his will was that otherwise his issue, which was the natural object of his bounty, would be wholly unprovided for, differing in that respect from the widow, for whom the law had made provision by means of dower. Hence it seems to have been the rule that marriage and the birth of issue would not produce the revocation of a will where provision was made by the will itself for the children of the future marriage. At common law a married woman could not inherit from her husband. In case of her husband dying intestate, she was not entitled to anything out of his estate except her dower. While by our statutes dower *eo nomine* has been abolished, yet the law makes provision for the widow, independently of the act of the husband, much more liberal than the common law did. She is entitled—First, to a life estate in the homestead of her deceased husband, free from any testamentary devise or other disposition to which she shall not have assented in writing, and free from all debts or claims against his estate; second, to an undivided third in fee simple, or such inferior tenure as the deceased husband was at any time during coverture seised or possessed thereof, of one undivided third of all other lands of which the deceased was at any time during coverture seised or possessed, free from any testamentary or other disposition thereof to which she shall not have assented in writing, but subject in its just proportion with other real estate to the payment of such debts of the deceased as are not paid from the personal estate. Of the personal estate of which her husband dies possessed the widow is entitled to all his wearing apparel, his household furniture, not exceeding in value \$500; other personal property to be selected by her, not exceeding in value \$500; a reasonable allowance for her maintenance during administration, which, in case the estate is insolvent, is not to be for more than one year. Gen. Stat. 1894, §§ 4470, 4471, 4477. Such is the provision which the law makes for the widow. The statute then provides that, where the husband dies intestate, the residue of his estate, real and personal, shall descend and be distributed as follows: First, to his children, and to the lawful issue of any deceased child by right of representation; second, if there be no child, and no lawful issue of any deceased child, then to the surviving wife. It is mainly on this last provision by which the wife may inherit from her husband that counsel for the respondent base their contention that in this state marriage alone will revoke by implication of law the prior will of the husband. Their argument may all be summed up in the proposition that, inasmuch as a widow may now inherit from her husband (which she could not do at common law), therefore marriage alone effects the same change in the condition or circumstances of the husband as was effected under the common law by his marriage, and the birth of issue who could inherit. The courts of two or three western states have taken substantially this position. See *Tyler v. Tyler*, 19 Ill. 151; *Morgan v. Ireland*, 1 Idaho, 786;

Brown v. Scherrer, 5 Colo. App. 255, approved and affirmed in 21 Colo. 481. In *Tyler v. Tyler*, *supra*, the question was not discussed at any great length, and the weight of that case as authority is somewhat impaired by the fact that in a subsequent case the court placed its refusal to reconsider the question mainly on the ground that the legislature had subsequently enacted that marriage alone, without the birth of issue, revoked a will, and hence that any decision which the court might make would be merely retroactive. The most able and forcible presentation of the arguments on that side of the question is to be found in the opinion of the Colorado court of appeals in *Brown v. Scherrer*, *supra*. But, after carefully considering all that has been said on that side, we are compelled to the conclusion that due weight has not been given to the fact that the main reason why, at common law, marriage and the birth of issue was deemed such a change in the condition or circumstances of the husband as would work an implied revocation of his prior will was that otherwise his issue would be wholly unprovided for,—a thing which was not to be supposed to have been in the contemplation of the testator; whereas, under our statutes, and, we assume, without special examination, under the statutes of those states in which the decisions cited were rendered, even if the will stands, very liberal provision has been made for the widow independently of any act of the husband. There is a prevailing sentiment, often expressed by both courts and text-writers, that marriage alone should be deemed such a change in condition and circumstances as will revoke a prior will. A statute to that effect was passed in England in 1837 (1 Vict. chap. 26), followed by the enactment of statutes to the same effect in many of the states of the Union. How far this sentiment may have unconsciously influenced the decisions referred to it is impossible to say, but no court has ever assumed to hold on this ground alone, and in the absence of legislation affecting the question, that the common-law rule was abrogated, or so far modified, that marriage alone would revoke a will. It is also suggested that the common-law rule had its origin in part in the ancient desire to build upon families and family estates a consideration which has no place in this country. It is undoubtedly true that many of the doctrines of the common law had their origin in social or political conditions which have in whole or in

part ceased to exist. But this fact alone will not usually justify courts in holding that these doctrines, when once thoroughly established, have been abrogated, any more than it would justify them in holding that a statute had been abrogated because the reason for its enactment had ceased. Any such rule would leave the body of the common law very much emasculated; as, for example, that pertaining to real estate. While, undoubtedly, the common law consists of a body of principles applicable to new instances as they arise, and not of inflexible cast-iron rules, yet where the rules of the common law have become unsuited to changed conditions, political, social, or economic, it is the province of the legislature, and not of the courts, to modify them. While we do not wish to be understood as intimating that no condition of legislation upon the subject of the rights of married women in the estates of their husbands would effect by implication a change of the common-law rule, yet our conclusion is that, in view of the main reason upon which the common-law rule was based that marriage alone would not, but that marriage and the birth of issue conjointly would, revoke the prior will of a man, and in view of the very liberal provision made by statute for the widow independently of the act of her husband the mere fact that she may now, under the statute, in certain contingencies, inherit more from her husband, is not sufficient to warrant us in holding that the common-law rule has been so changed that marriage alone is such a change of condition or circumstances as will work an implied revocation of the prior will of the husband. We should have stated that our statute relating to the revocation of wills is substantially, if not literally, the same as that of 29 Car. II., which has been so generally adopted by the American states. Gen. Stat. 1894, § 4430.

The conclusion at which we have arrived on this question renders it unnecessary to consider other questions discussed by counsel; as, for example, as to the power of the probate court to set aside the probate of a will. *In the appeal from the judgment setting aside the petitioner the homestead of the deceased, and giving her an allowance out of his estate for her maintenance during administration, the judgment is affirmed.*

In the other appeal the judgment setting aside the probate of the will and adjudging such will to be of no force or effect is reversed.

NORTH CAROLINA SUPREME COURT.

C. E. KRAMER *et al.*

v.

J. Y. OLD *et al.*, *Appts.*

(119 N. C. 1.)

1. A contract restricting persons from

engaging in the milling business in the vicinity of a certain city after the completion of the agreement for the sale of their business, although it extends for their lives, is not illegal as in restraint of trade.

2. To take stock or help to organize or manage a corporation formed to carry on

NOTE.—As to the validity of contracts of sale in restraint of trade when there is no limitation of place fixed, see *note* to *Gamewell Fire Alarm Teleg. Co. v. Crane* (Mass.) 22 L. R. A. 673.

For local restraint of trade, see *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 453, and *note*; *Carroll v. Giles* (S. 34 L. R. A.

C.) 4 L. R. A. 154, and *note*; *Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 489, and *note*; *National Benefit Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437, and *note*; also *Oakdale Mfg. Co. v. Garst* (R. I.) 23 L. R. A. 639.

a business after one has agreed, on the sale of such a business, not to continue it in that locality, is a breach of his contract.

(October 20, 1896.)

APPEAL by defendants from an order of the Superior Court for Pasquotank County restraining them from violating their contract not to engage in the milling business in Elizabeth City. *Modified and affirmed.*

The facts sufficiently appear in the opinion.

Mr. W. J. Griffin, for appellants:

Contracts in restraint of trade are void unless partial, that is, restricted either in time or territory; and when so restricted they are void unless made upon an actual valuable consideration.

Holmes v. Martin, 10 Ga. 508; *Chappel v. Brockway*, 21 Wend. 157; Clark, Cont. 83.

All contracts in restraint of trade are presumed to be void, and the burden of showing their validity is upon the party setting them up.

Ross v. Sadgeer, 21 Wend. 166.

The fact that such contract is under seal does not import a consideration.

Clark, Cont. 83.

The sale of the goodwill of a business is not an undertaking to abstain from entering into that business.

2 Addison, Cont. 742, *1154.

Contracts in restraint of trade may be divided into two classes: those in which the parties to the contract are alone interested, those in which the public are interested directly as well. If the contract partakes of the latter nature it is absolutely void.

West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600, 46 Am. Rep. 527.

If the contract is binding the Olds may lawfully be employed by the defendant company.

Baker v. Cordon, 86 N. C. 116, 41 Am. Rep. 448; 10 Am. & Eng. Enc. Law, p. 947, note.

Contracts in restraint of trade partaking largely of bartering away a person's liberty should be strictly construed. The defendants only contracted to refrain from participating in the lumber business as individuals. Does it prohibit their taking stock in a milling company.

Mr. E. F. Aydlett, for appellees:

When the injunction relief is not merely auxiliary to the principal relief demanded in the action, but is the relief, the court will not dissolve the injunction upon a preliminary hearing.

Love v. Davidson County Comrs. 70 N. C. 532; *Marshall v. Stanly County Comrs.* 89 N. C. 106.

This contract is not in restraint of trade. Public policy requires that when a man has by skill or other means obtained something that he wants to sell he should be at liberty to sell it in the most advantageous way in the market, and in order to do this it is necessary that he should be able to preclude himself from entering into competition with the purchasers.

Hughes v. Hodges, 109 N. C. 239; *Cowan v. Fairbrother*, 118 N. C. 406, 32 L. R. A. 829; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 78, 4 Am. Rep. 513; *Diamond Match Co. v. Roebor*, 106 N. Y. 473, 60 Am. Rep. 464; High, Inj. § 1174, Clark, Cont. 451.

34 L. R. A.

Being unlimited as to time is not objectionable. It is for seller's and buyer's life.

Diamond Match Co. v. Roebor, 106 N. Y. 484, 60 Am. Rep. 464; *Whittaker v. Howe*, 3 Beav. 383; *McClurg's Appeal*, 58 Pa. 51; *Binninger v. Clark*, 60 Barb. 113; *Chappel v. Brockway*, 21 Wend. 157; *Lewis v. Langdon*, 7 Sim. 422; Addison, Cont. 1154; Clark, Cont. 447, 449, 454.

Avery, J., delivered the opinion of the court:

The courts in later years have disregarded the old rules by which it was sometimes attempted arbitrarily to fix by measurement the geographical area over which a contract in partial restraint of trade might be made to extend, and to prescribe a limit of time beyond which it could not be made to operate. The modern doctrine is founded upon the basic principles that one who by his skill and industry builds up a business acquires a property at least in the goodwill of his patrons, which is the product of his own efforts (*Cowan v. Fairbrother*, 118 N. C. 406, 32 L. R. A. 829), and has the fundamental right to dispose of the fruits of his own labor, subject only to such restrictions as are imposed for the protection of society, either by express enactments of law or by public policy (*Hughes v. Hodges*, 109 N. C. 239, *Bruce v. Strickland*, 81 N. C. 247). But the property which one thus creates by skill or talent and industry is not marketable unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit, and for a reasonable length of time. *Cowan v. Fairbrother*, supra; 2 High, Inj. § 1174; *Leather Cloth Co. v. Lonsant*, 39 L. J. Ch. N. S. 86; *Roussillon v. Roussillon*, L. R. 14 Ch. Div. 351; Clark, Cont. p. 451. To the extent that the assignor of this species of property is left at liberty to come into competition with the assignee, the market value of what is sold must fall below that of the untrammelled right to freedom from competition in the whole field from which the former derived the support of his business. The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is greater than it is necessary to make it in order to protect the purchaser from competition in his efforts to hold and get the full benefit of the business or right of competition bought by him. The three defendants who sold to the plaintiff retained the undisputed right to continue in the same business and operate at any point beyond Elizabeth City and the vicinity, and exercised it by operating their mills. But in our case it was not contended that the area of territory covered by the restrictive agreement was so unreasonably great as to vitiate the contract, but that the time for which the defendants covenanted to refrain from entering into the same business imposed an unnecessary restriction upon the rights of the three defendants, and was, therefore, contrary to public policy, and void. It must be conceded that, in so far as it is consistent with the power to sell the property which is the creation of one's own labor, physical or mental, society has the right to claim an open field for every man's labor, skill, and competition with

others, both for the benefit of his family and the more direct benefits accruing to society from removing restrictions and encouraging competition in every kind of trade. The reason of the law leads to the adoption of any rule that is calculated to reconcile all conflicts between the proper exercise of the *jus disponendi* of the individual and the interests of society at large. The services of no one person are so valuable to the public, in any field to which his business may extend, as to demand that he shall receive a smaller price for his right of competition, because an arbitrary rule forbids him to extend the restriction in point of time to the term of his own life or that of the purchaser, or for their joint lives. The enlargement of the restrictive area by later adjudications is founded, therefore, upon a principle which it was reasonable to apply in determining what is the lawful limit of time. Where the contract is between individuals, or between private corporations, which do not belong to the quasi public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of should apply. *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464; *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607; *Morse Twist Drill & Mach. Co. v. Morse*, 108 Mass. 73, 4 Am. Rep. 518.

The stipulation on the part of James Y. Old, W. P. Old, and W. N. Old, to quote the exact language of the contract, is "that they will not continue business of milling in the vicinity of Elizabeth City after the 1st day of September, 1891, and the full completion of this agreement." The contract having been in other respects performed, the agreement is now complete in the sense contemplated by the parties. The three defendants were, at most, restricted from engaging in the business for the lives of each and every one of them. Such a sale has been upheld, upon reason and authority, in other courts. The plaintiff bought their right to compete in their own persons in the business to which he succeeded as purchaser. It was not unreasonable that he should insist upon the stipulation that none of the three should interfere, while they lived, by competition at the particular place mentioned, either with him as purchaser, or his assignee in law or in fact. In the case of *Morgan v. Perhamus*, *supra*, the facts were that a milliner sold her stock and goodwill, and engaged "not to carry on the business at any time in future at the town of F. or at any place within such distance of said town as would interfere with such business, whether carried on by the purchasers, or their successors." The agreement was held to be binding by the supreme court, and the seller was enjoined from resuming business. There, as in our case, the time was not described, except as an inhibition on a particular person, with the implication that it should extend to her life. The law would have construed the contract as conferring the right to sell or transmit to a personal representative, as a part of the assets of his estate, the property bought, whenever the time was found to be co-extensive with the lives of the three defendants. *Cowan v. Fair-*

brother, supra; Clark, Cont. pp. 454, 455, and note page 456; 2 High, Inj. § 1845; *Lewis v. Langdon*, 7 Sim. 422; *Binsinger v. Clark*, 60 Barb. 118. In *McClurg's Appeal*, 58 Pa. 51, the agreement, which was held not to be unreasonable, was that a physician, who had sold his business and goodwill to another physician, should "never thereafter establish himself as a physician within 12 miles [of his original place of business] without the consent of the purchaser." The contract there, like that under consideration, could be fairly construed in no other way than as operating for the term of the seller's life. These cases and others are cited with approval by text-writers, and seem as a rule, to have established the reasonable doctrine contended for by the plaintiff in the states as well as in England. 2 High, Inj. § 1180; 1 Beach, Inj. §§ 462-470; *Whittaker v. Howe*, 3 Beav. 383.

It is elementary learning that the single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do or refrain from doing certain things, and it is unnecessary to repeat, in every paragraph of the contract, that such stipulations are entered into for the consideration once expressed. It is sufficient to set forth that A has paid or agreed to pay a certain sum, and that B has agreed to do or abstain from doing certain things, which may be stated *seriatim* in separate paragraphs. A case almost exactly in point, because it relates to a somewhat similar agreement, is that of *Morse Twist Drill & Mach. Co. v. Morse, supra*.

Though the contract is valid and binding, as between the parties, it in no way impairs the right of the defendants who were not parties to engage in any kind of business in Elizabeth City; but as a court of chancery we must declare that, where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit as well as the letter of the agreement. Under a fair and just interpretation of its terms, the stipulation meant that the three defendants would not engage in business, so as to bring their skill, names, and influence to the aid of any competitor carrying on the same trade within the prohibited limits. It was, therefore, a violation of the contract on the part of the three mentioned, or either of them, to take stock in, help to organize or manage a corporation formed to compete with the plaintiff in his business. *Jones v. Heavens*, L. R. 4 Ch. Div. 636. While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague*, 114 N. C. 647), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital or a portion of either in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their

own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals.

The judgment must be modified so as to restrain only the three defendants who were parties to the original contract from engaging in or from taking stock in or assisting in the organization of a corporation formed with the purpose of carrying on the business of milling in or in the vicinity of Elizabeth City. The order must be vacated as to the other defendants.

Modified and affirmed.

STATE of North Carolina

v.

R. Z. YANDLE, *App't.*

(.....N. C.)

1. An order of county commissioners for the employment of a convict upon the public roads, made under Code, § 3448, and without any provision therefor in the sentence or any order of court, is not void on the ground that it is in the nature of an additional judgment against the convict.
2. The employment of a convict upon the public roads under supervision and control of a public agent by order of the county commissioners is not a "hiring out" of the convict which, by Code, § 3448, requires an order of court embodied in the sentence.

(October 27, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for Union County remanding him to custody after hearing a petition for habeas corpus seeking to obtain his release from serving a sentence for assault and battery. *Affirmed.*

Defendant was sentenced to imprisonment in the county jail for ninety days for assault and battery. The county commissioners placed him in the custody of James Howie, who required him to work on the public roads. Defendant applied for a habeas corpus on the ground that such action was illegal.

Further facts are stated in the opinion.

Mr. D. A. Covington, for appellant:

The court had no authority, even during the same term, to change the sentence of the defendant from three months in the county jail to three months at hard labor on the public roads of the county, he having served a part of his term under the first sentence, before the imposition of the second sentence.

State v. Warren, 92 N. C. 825; *State v. Orok*, 115 N. C. 760, 29 L. R. A. 260.

N. C. Code, § 3448, does not authorize working the defendant upon the roads, because his case does not fall within the provisions of this statute, he not having been adjudged to pay any costs, and the court before whom he was tried not having so authorized.

Acts 1887, chap. 355, § 1, of the legislature of North Carolina does not cover defendant's case because the court did not sentence him to the roads in accordance with its provisions.

Acts 1889, chap. 419, amending Acts 1887, § 1, *supra*, does not avail, for this amendment applies only to persons sentenced to jail by a magistrate or those put in by the order of a court for the nonpayment of costs.

Upon a proper construction of these several statutes none of them authorize the county commissioners of the county of Union to put the defendant, sentenced to jail by the trial judge, for a trivial offense (assault and battery in striped clothes and chains (badges of dishonor), and work him upon the public roads by the side of common felons.

State v. Melton, Busbee, L. 49; N. C. Const. art. 11, § 1.

The words "farm out" as used in the latter clause of § 3448 of the Code, *supra*, does not apply to work upon the public roads.

State v. Sneed, 94 N. C. 806; *State v. Williams*, 97 N. C. 414.

No order was made by the county commissioners in session assembled, and the action of two of their number taken upon the street was *functus officio* and void.

Duke v. Markham, 105 N. C. 181.

Messrs. Shepherd & Busbee also for appellant.

Messrs. Frank I. Osborne, Attorney General, and **Jerome & Williams** for the State.

Avery, J., delivered the opinion of the court:

The boards of commissioners of the several counties have power to provide for employing on the public streets, public highways, or public works persons committed to jail by any magistrate or judge of a superior or criminal court having jurisdiction to try the accused, upon conviction of any crime or misdemeanor, or upon their failure to enter into bond to keep the peace or for good behavior, or to pay, or properly secure the payment of, costs or fines. That the authority to make the order complained of was granted by § 3448 of the Code, and was not withdrawn by any subsequent act, is settled in the well-considered opinion of Justice MacRae in *Myers v. Stayford*, 114 N. C. 284, 287. There is no force in the contention of the defendant that the order of the commissioners was in the nature of a sentence subsequently imposed, and was void because they had no judicial authority, and because, if they had been competent to try and sentence originally, a sentence had been already pronounced, and no additional sentence could be imposed after the term when it was entered. The principle upon which the defendant relies is a familiar and fundamental doctrine, which was not disputed by the prosecution. The working of the defendant on the public highway was not in pursuance of a judgment pronounced by the commissioners. It was an incident to the sentence proper imposed by the court, which the law had declared, before conviction and before the offense was committed, should follow. The order of the commissioners was therefore no more an additional judgment than is an order of the superintendent of the state prison that a pri-

NOTE.—On the general question of the right to compel prisoners to labor, see *note* to *Topeka v. Boutwell* (Kan.) 27 L. R. A. 568.

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oner confined in a cell at the penitentiary shall be taken to one of the farms now cultivated under his direction. The commissioners were for this purpose only the ministerial agents provided by law for the purpose of managing economically the business of the counties, and protecting the people, as far as possible, against unnecessary cost in the punishment of criminals. A person who commits an assault and battery knows, or is presumed by law to know, the probable legal as well as the natural consequences of his own act. Knowing the law (as we must assume), he knows that the court has the power to imprison upon conviction, and that, as an incident, the commissioners of the county may, for the protection of the county, order him to be taken out and worked upon the public roads. The principle governing this case is in no sense analogous to that upon which the decision hinged in *Ex parte Lange*, 85 U. S. 18 Wall. 168, 175, 21 L. ed. 872, 878. The order to work the defendant

upon the public roads was in no proper sense a second sentence, imposed after a part of the punishment provided for by an original judgment had been inflicted, but was an incident to the punishment, in contemplation of which he committed the offense. It has been expressly held, also, that the provision of § 3448 of the Code, which forbids the hiring out of convicts, except under order of the court embodied in the sentence, applied only to farming out convicts to individuals or corporations, and did "not extend to labor employed upon public works, and under the supervision and control of public agents." *State v. Sneed*, 94 N. C. 806.

The answer of the respondent was sufficient to show that the prisoner was detained by lawful authority, and we are of opinion, therefore, that there was no error in the order remanding him to the custody of James Howie.

No error.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Pff. in Err.*,

Rudolph IHLENBERG.

(75 Fed. Rep. 872.)

1. A self-executing mandate is made by Const. § 193, providing that "knowledge, by any employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby," with an exception as to conductors or engineers.
2. Whether or not a constitutional provision is self-executing is a question always of intention, to be determined by the language used and the surrounding circumstances.
3. A legislative adoption of the exact language of a constitutional provision, omitting only a clause as to the right of the legislature to make an extension of the provision, does not make a legislative construction of the article to the effect that it is not self-executing.
4. A Federal court in Tennessee will enforce the Mississippi Constitution precluding the defense to an action for an employee's injury that he knew of the defective or unsafe character of the machinery or appliances by which he was injured, when the injury was received in Mississippi, since this provision is simply a variation from and not repugnant to the law of Tennessee.

(July 2, 1896.)

ERROR to the Circuit Court of the United States for the Western District of Tennessee.

see to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Taft, Circuit Judge:

Rudolph Ihlenberg, the plaintiff below and the defendant in error, was a locomotive fireman employed by the Illinois Central Railroad Company, the defendant below and the plaintiff in error here, in July, 1891. He had been employed as fireman for eighteen days before he was hurt, though actually engaged in work but ten days. He had never worked as a fireman before. While on duty, and while the engine was running from 15 to 20 miles an hour, he stepped upon the tender to get a drink of water from a keg placed upon the tool box. A sudden roll or jerk in the engine caused him to lose his balance, and he put his foot in the open space between the engine and the tender. This threw him off the engine onto the ground, and resulted in severe injuries to him. His claim in the action was that the engine was defective in not having an apron covering the space between the tender and the engine, so that his foot would not have caught in it. He had ridden on this particular engine but two days. The defenses set up by the defendant were—First, that it was not a defective engine, because many engines were without aprons, and the presence of the apron when used was not for safety, but merely to keep the dust from coming up in the engine cab; and, secondly, that the plaintiff had assumed the risk of danger from the defect, if it

NOTE.—As to self-executing constitutional provisions, see note to *Willis v. Mahon* (Minn.) 16 L. R. A. 281; also *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402; *Hickman v. Kansas* (Mo.) 23 L. R. A. 652; *St. 34 L. R. A.*

Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia (Ark.) 23 L. R. A. 83; *Washingtonian Home v. Chicago* (Ill.) 29 L. R. A. 798, and *Anderson v. Whatcom County* (Wash.) 23 L. R. A. 137.

was a defect, by reason of the absence of the apron. The accident occurred between Canton, Mississippi, and Way's Bluff, Mississippi, on the line of the defendant's railway, on the 18th of July, 1891.

Section 198 of the Constitution of Mississippi, adopted November 1, 1890, is as follows: "Sec. 198. Every employee of any railroad corporation shall have the same right and remedies for any injuries suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons, not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedy as are allowed by law to such representatives or other persons. Any contract or agreement, express or implied, made by an employee to waive the benefit of this section, shall be null and void; and this section shall not be construed to deprive any employee of the corporation or his legal or personal representative of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employees."

In November, 1892, after the accident occurred, the legislature of Mississippi enacted the following statute: "Sec. 3559. Fellow Servant Rule. Every employee of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. Where death ensues from an injury to an employee, the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employee to waive the benefit of this section

shall be null and void; and this section shall not deprive an employee of a corporation or his legal or personal representative of any right or remedy that he now has by law."

A bill of exceptions embodying all the evidence was taken, and included in it was this statement of the charge of the court: "(1) The court, among other things not excepted to, charged the jury that under the law of Tennessee, or under the common law, the plaintiff, under the facts in this case, could not recover, but that the law of Mississippi, where the injury occurred, controlled in this case; and that § 198 of the Constitution of 1890 of Mississippi (which section reads as follows: 'Every employee of any railroad corporation shall have the same right and remedies for any injuries suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons, not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of unsafe cars, or engines voluntarily operated by them') was the law of that state at the time of the accident to plaintiff, and applied in this case. (2) And in this connection the court submitted the question to the jury, under instructions not excepted to, whether the engine and tender were equipped with the apron or lap described in the proof, and whether or not the injury was the result of any defect in that regard as a proximate cause thereof, and instructed them if they found such defect to exist, and that it was the cause of the injury, the plaintiff would be entitled to recover, by reason of the constitutional provision found in the laws of Mississippi above quoted in the charge."

Before Taft and Lurton, Circuit Judges, and Severens, District Judge.

Messrs. Estes & Fentress, for plaintiff in error:

The apron and keg were no necessary or proper parts of the machinery. The neglect to fence or cover the ordinary machinery of a servant's employment does not make the master liable. The aperture and the keg were open and patent to ordinary observation.

Bailey, *Master's Liability*, pp. 152, 153; *Sullivan v. India Mfg. Co.* 113 Mass. 896; *Sandborn v. Atchison, T. & S. P. R. Co.* 85 Kan. 292; *Stone v. Oregon City Mfg. Co.* 4 Or. 52.

There was no statute requiring the aperture to be covered or the keg to be maintained in the engine.

These were solely for the comfort and convenience of the employees. They were no necessary parts of the equipment.

Buswell, *Personal Injuries*, § 196.

Ihlenberg was a mature man of large experi-

ence in machinery, and assumed the risks of his employment.

Coombs v. New Bedford Cordage Co. 102 Mass. 573, 8 Am. Rep. 506; *Townsend v. Langles*, 41 Fed. Rep. 919; *Schroeder v. Michigan Car Co.* 56 Mich. 133, Buswell, Personal Injuries, § 204.

An experienced machinist takes his risk of being injured by dangerous machinery used in his employment, although it might have been made less dangerous by covering it.

Ladd v. New Bedford R. Co. 119 Mass. 412, 20 Am. Rep. 331; *Goodnow v. Walpole Emery Mills*, 146 Mass. 201; *Koley v. Pettie Mach. Works*, 149 Mass. 294, 4 L. R. A. 51; 14 Am. & Eng. Enc. Law, p. 851; *Leary v. Boston & A. R. Co.* 139 Mass. 580, 53 Am. Rep. 788; *Murphy v. Greeley*, 146 Mass. 196.

All machinery is dangerous, and men must take observation of the ordinary laws of nature. They must know that fire will burn; that water will drown; that to step in to an open, unprotected, or uncovered place between engine and tender, would be dangerous.

Buswell, Personal Injuries, § 204.

The lack of the apron did not constitute a "defective or unsafe character or condition of machinery or appliances," even under the Mississippi statute.

Hence the *lex fori* or the common law should obtain.

The master's duty is to furnish only such appliances as are suitable and reasonably safe. This duty is one of ordinary care only.

Bailey, Master's Liability, pp. 8, 14, 16, 19, 24, 44.

Dangerous contrivances are not necessarily defective; nor is the master liable for the inappropriate use of dangerous machinery.

Bailey, Master's Liability, pp. 22, 42; *Cantrell v. Kansas City, M. & B. R. Co.* 69 Miss. 435; *Hatter v. Illinois C. R. Co.* Id. 642; *Townsend v. Langles*, 41 Fed. Rep. 919.

Nor is it the master's duty to see that the servant knows of this danger. He may assume that he does know.

Bailey, Master's Liability, pp. 166, 171, 172; *Anderson v. Minnesota & N. R. Co.* 89 Minn. 523.

The servant who voluntarily continues in the employment without objection cannot complain.

Buswell, Personal Injuries, 196; Bailey, Master's Liability, pp. 170-180; *Camp Point Mfg. Co. v. Bailou*, 71 Ill. 417; *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138, *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425.

Defects in tools or instruments which the servant is frequently using, or which are obvious, or which he may discover by reasonable diligence, he will be charged with knowledge of. Bailey, Master's Liability, p. 170; *Anderson v. Minnesota & N. R. Co.* *supra*.

Knowledge on part of the employee will be presumed if the defect is obvious.

Bailey, Master's Liability, p. 175; *Wedgwood v. Chicago & N. W. R. Co.* 41 Wis. 478.

Employees are not absolved from the duty binding upon all to use ordinary care to avoid injury, and such knowledge, though of itself no longer a defense, yet is material in determining whether with such knowledge the employee used due care.

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Buckner v. Richmond & D. R. Co. 73 Miss. 878.

The Mississippi law is radically different from the common law, and from the law of Tennessee.

Federal courts sitting in Tennessee on cases brought in the Tennessee state courts and removed to the Federal courts will not enforce this stringent and penal section of the Constitution of Mississippi.

Ray, Negligence of Imposed Duties, 644, 649, 650; *Texas & P. R. Co. v. Richards*, 68 Tex. 375.

The Federal courts will not apply the state statutes in such cases.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 369, 37 L. ed. 773; *Texas & P. R. Co. v. Richards*, *supra*.

Messrs. Rankin & Rhodes also for plaintiff in error.

Messrs. Neil & Deason and Haynes & Hays, for defendant in error:

Under the constitutional provision of § 198 of Mississippi, the question of the knowledge of the defect on the part of the employee is an immaterial investigation.

Welsh v. Alabama & V. R. Co. 70 Miss. 20; *Sproule v. Fredericks*, 69 Miss. 898; *Illinois C. R. Co. v. Hunter*, 70 Miss. 471, *White v. Louisville, N. O. & T. R. Co.* 73 Miss. 12; *Rick v. Calhoun* (Miss.) 12 So. 707.

The supreme court of Mississippi has treated the Constitution of 1890 as self-executing.

Illinois C. R. Co. v. Oathley, 70 Miss. 833. See *Willis v. Madon*, 48 Minn. 140, 16 L. R. A. 281, *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Washingtonian Home v. Chicago*, 187 Ill. 414, 29 L. R. A. 798; *People v. Hoge*, 55 Cal. 612, *State, Lincoln, v. Babcock*, 19 Neb. 230; *Pierce v. Com.* 104 Pa. 150; *Ex parte Snyder*, 64 Mo. 58; *People v. Bradley*, 60 Ill. 398.

16 L. R. A. p. 288, note, says of *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800, and *Rowan v. Runnels*, 46 U. S. 5 How. 184, 12 L. ed. 85: "The temptation to comment on these decisions is almost irresistible, but might seem out of place in this connection. Considering that they stand alone among decisions on constitutional prohibitions, and that they were made in opposition to the decisions of the supreme court of Mississippi in interpreting its own Constitution (and we may add, by a divided court), they are at least remarkable."

The cases in Mississippi hold the constitutional clause was self-executing.

Green v. Robinson, 5 How. (Miss.) 80; *Glidewell v. Hite*, Id. 110; *Brien v. Williamson*, 7 How. (Miss.) 14.

The supreme court of Tennessee followed these Mississippi decisions.

Yerger v. Rains, 4 Humph. 259. See *Thompson v. Reno Sav. Bank* (Nev.) 3 Am. St. Rep. 837, note.

The question as to whether the courts of Tennessee will enforce the laws of a foreign state does not depend upon the sameness or similarity of the laws of the foreign state to the law of Tennessee touching the same subject, but it depends upon whether the law of the foreign state is repugnant to the policy and spirit of the law of Tennessee.

Bank of Columbia v. Walker, 14 Lea, 306.

Woods v. Wicks, 7 Lea, 47; *Robinson v. Queen*, 87 Tenn. 445, 8 L. R. A. 214.

A Federal court sitting in one state will enforce rights which have accrued under the laws of another state in transitory actions, where the law creating the right is not repugnant to the laws of the former, or contravenes some well-established policy.

Northern P. R. Co. v. Mass, 68 Fed. Rep. 115; *Theroux v. Northern P. R. Co.* 64 Fed. Rep. 84; *Northern P. R. Co. v. Babcock*, 154 U. S. 198, 38 L. ed. 960; *Dennick v. Central R. Co.* 108 U. S. 11, 36 L. ed. 439; *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 771; *Shedd v. Moran*, 10 Ill. App. 618; *The E. B. Ward*, 16 Fed. Rep. 260; *Texas & P. R. Co. v. Cox*, 145 U. S. 598, 36 L. ed. 829.

Taft, Circuit Judge, delivered the opinion of the court:

The assignments of error seek to raise some questions of evidence, but the record is not in such a condition as to permit it. The court allowed the plaintiff, when on the stand, to answer certain questions put to him by his counsel in respect to the pain he suffered, and the knowledge which he had of locomotives before engaging in the service of the defendant. The questions were objected to; the objections were overruled; and no exception was taken to the rulings. The absence of exceptions prevents us from considering the correctness of the court's action on the objections.

The main point which this writ of error is intended to present is that the clause of the Constitution of Mississippi providing that knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, is not self-executing. It is very evident that this is the only question which the bill of exceptions was prepared to make. It is now, however, attempted to raise a different question upon the charge of the court. The charge is not given in full, and only enough appears to present clearly the point already alluded to. In the first of the two paragraphs, giving a summary of the charge, the court is represented as telling the jury that the clause of the Constitution of 1890 applied to this case, and introduced a different rule from that which would have been applied under the law of Tennessee or the common law; and, by the second paragraph, it appears that "in this connection"—that is, in connection with the operation of the clause of the Constitution of Mississippi upon the case—the court submitted the question to the jury, under instructions not excepted to, whether the engine and tender were equipped with the apron or lap described in the proof, and whether or not the injury was the result of any defect in that regard as a proximate cause thereof, and instructed them, if they found such defect to exist, and that it was the cause of the injury, the plaintiff would be entitled to recover by reason of the constitutional provision found in the laws of Mississippi above quoted in the charge. To this part of the charge of the court the defendant excepted. It is now contended that the effect of this charge was to take away the question

from the jury, which was much mooted on the trial, whether the absence of the apron or lap in a locomotive was a defect in machinery. We are not able to say whether the court left this question to the jury or not, from the very summary way in which the charge of the court in this respect is described; but, if the court below did not leave the question to the jury, it is clear from the statement in the bill of exceptions that no exception was taken to that part of the charge, because it is expressly stated that the manner in which the court submitted to the jury the questions whether the engine and tender were equipped with the apron or lap, and whether or not the injury was the result of any defect in that regard as a proximate cause thereof, was not excepted to, and that the only part of the charge to which exception was directed was the operation of the constitutional provision of Mississippi upon the rights of the parties. It follows, therefore, that the only question we have before us in this case on the record is whether § 193 of the Constitution of Mississippi was self-executing, at least so far as the clause which provides that "knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them," and whether, if self-executing, it should be enforced in a Federal court sitting in Tennessee in an action for an injury happening in Mississippi after the constitutional provision went into effect.

In *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800, the question was whether the language of the Constitution of Mississippi providing that the "introduction of slaves into that state, as merchandise, or for sale, should be prohibited, from and after the 1st day of May, 1838," was self-executing, or was directed to the legislature, and required legislative action before it should become operative upon contracts and persons. The question arose in the Supreme Court of the United States with reference to its effect upon contracts made in the state, and it was there determined by a divided court that the clause was not self-executing. Subsequently, the court of errors of Mississippi, in *Green v. Robinson*, 5 How. (Miss.) 80, in *Glidewell v. Hite*, Id. 110, and in *Brien v. Williamson*, 7 How. (Miss.) 14, refused to follow the decision of the Supreme Court of the United States, and held that the clause was self-executing. Thereafter another case involving the effect of the clause upon contracts made before the decision of the supreme court in Mississippi was considered in *Rowan v. Runnels*, 46 U. S. 5 How. 184, 12 L. ed. 85, and the Supreme Court of the United States refused to change its ruling with respect to these contracts entered into before the decisions of the supreme court of Mississippi. An examination of the case of *Groves v. Slaughter* and the reasoning of the court leaves no doubt that the question for consideration is one of the intention of the persons framing and adopting the Constitution. There is nothing in *Groves v. Slaughter* to justify the claim that a Constitution may not contain self-executing

provisions. It may be conceded that it is usually a declaration of fundamental law, and that many of its provisions are only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, and that many are mere restrictions upon the power of the legislature to pass laws; but that it is entirely within the power of those who confirm and adopt the Constitution to make any of its provisions self-executing is too clear for argument. Hence it is a question always of intention to be determined by the language used and the surrounding circumstances. Considering the constitutional clause in question in this light, we have no doubt that it was self-executing. In the first place, the language of the particular clause in question is prohibitory, and is in the exact form which the legislature, were it enacting such a provision into the law, would use in a command to the courts. Then the whole section is of that detailed character which characterizes legislation intended to operate on the courts. It is one of those general provisions directed to the legislature, which usually cover an entire subject-matter in a few words, and fix only limits of action and vest a wide discretion as to the manner in which the mandate of the Constitution shall be carried out. More than this, there is language in the section which is inconsistent with the view that it is not self-executing. Thus, near the end of the section occurs this clause: "That this section shall not deprive an employee of a corporation or his legal or personal representative of any right or remedy that he now has by the law of the land." If the latter clause were not self-executing, then this particular provision in it should read: "And legislation in accordance with this section shall not be construed to deprive any employee in a corporation or his legal or personal representatives of any right or remedy that he now has by the law of the land;" for, if the entire article were not self-executing, then it would not operate directly on any right or remedy previously existing, and the protection of the proviso would naturally be directed to the legislation executing the mandate, rather than to the mandate itself. Again, the final clause of the article excludes any other construction than that we have given. It is: "The legislature may extend the remedies herein provided for to any other class of employees." This certainly implies that so much of the article as precedes the clause actually provides remedies for those mentioned in it, and leaves to the legislature power to enlarge the benefits of the article by applying it to others than those named in the article. But it is said that the fact that the legislature of Mississippi in 1892 treated this as a mandate to the legislature to pass legislation giving the remedies therein described is a legislative construction of the article to the effect that it was not self-executing. We do not so regard it. On the contrary, when the legislature of Mississippi came to embody this in the statute, it adopted the exact language of the article of the Constitution, omitting only that clause of it which provided that the legislature might extend the remedy to other classes of employees. This shows that, in the opinion of the Mississippi legislature, the clause was sufficiently specific to operate upon the rights, 34 I. R. A.

remedies, and persons therein referred to, without further provision or detail.

The conclusion which we have reached is in accordance with the decision of the supreme court of Mississippi, and this settles the question for us. In *Welsh v. Alabama & V. R. Co.* 70 Miss. 80, it appeared that Welsh was a switchman in the employ of the Alabama & Vicksburg Railway Company, his duty being to ride upon the switch engine, and to open and close switches and couple cars. His usual station was on the footboard of the engine. He was injured by falling from the footboard, while engaged in the performance of his duties, and brought his action to recover damages, on the ground that the fastening of the footboard was insecure by reason of the negligence of the company. The court gave a peremptory instruction for the defendant, on the ground of contributory negligence of the plaintiff. The supreme court held that the view of the court below would have been correct before the enactment of § 198 of the present Constitution, but continued. "Section 193 of the present Constitution practically destroys the defense in cases where no wilful or reckless negligence can be predicated of the conduct of the injured and complaining employee. The change is radical, sweeping, unambiguous, and we must enforce it as written." This decision was rendered in October, 1892, before the legislature of Mississippi had embodied the constitutional clause in the statute. Therefore, the accident which was the subject of consideration there happened after the adoption of the Constitution, and before the passage of the act by the legislature. The clause of the Constitution we are considering was also enforced as self-executing in the case of *Illinois C. R. Co. v. Hunter*, 70 Miss. 471, in respect to a personal injury happening in March, 1892. It is true that the question was not mooted in either of these cases, and they are not, therefore, so strong authority as they otherwise would be; but the reason why the question was not raised and decided is manifest from the course of decisions in that state with respect to the constitutional clause which was held not to be self-executing, in *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800, by the Supreme Court of the United States, but was subsequently held to be so by the supreme court of Mississippi, in *Green v. Robinson*, 5 How. (Miss.) 80, *Glidenell v. Hite*, Id. 110, and *Brien v. Williamson*, 7 How. (Miss.) 14. In *Illinois C. R. Co. v. Brookhaven Mach. Co.* 71 Miss. 663, it was held that § 171 of the Constitution of 1890, with reference to the jurisdiction of justices of the peace, was self-executing, and did not need legislation to carry it into effect. Our construction of the clause of the Constitution as self-executing is quite in accordance with the weight of the authorities. *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Washingtonian Home v. Chicago*, 157 Ill. 414, 29 L. R. A. 798; *People v. Hoge*, 55 Cal. 612; *State, Lincoln, v. Babcock*, 19 Neb. 230; *Pierce v. Com.* 104 Pa. 150; *Ex parte Snyder*, 64 Mo. 58; *People v. Bradley*, 60 Ill. 390; *Yerger v. Rains*, 4 Humph. 259; *Thompson v. Reno Sav. Bank*, 19 Nev. 108.

The only remaining question for discussion

is whether a Federal court in Tennessee will enforce the Mississippi Constitution with respect to the tort committed in that state. It is well settled by the decisions of the Federal courts that, "while it is true that the statutes of a state have in themselves no extraterritorial force, yet rights acquired under them are always enforced by comity in the state and national courts in other states, unless they are opposed to the public policy or laws of the forum." *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958; *Northern P. R. Co. v. Mase*, 27 U. S. App. 238, 11 C. C. A. 63, and 63 Fed. Rep. 114; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771; *The Antelope*, 23 U. S. 10 Wheat. 66, 6 L. ed. 268; *Smith v. Condry*, 42 U. S. 1 How. 28, 11 L. ed. 35; *The China v. Walsh* ("The China"), 74 U. S. 7 Wall. 53, 64, 19 L. ed. 67, 71; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829; *Huntington v. Attrill*, 146 U. S. 657, 670, 36 L. ed. 1123, 1128. The same view is taken by the courts of Tennessee. See *Bank of Columbia v. Walker*, 14 Lea, 306; *Woods v. Wicks*, 7 Lea, 47; *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214. There is nothing in § 193 of the Mississippi Constitution, here under consideration, which is repugnant to the policy of the Tennessee law on the subject. In Tennessee the law applicable to such a case is not governed by statute, but, in accordance with the view taken by the courts of that state of the common law, knowledge by the employee of the defect of the machinery, whence his injury arose, is a defense to an action therefor against the master, unless the employee complains, and a promise to repair is made to him. *Guthrie v. Louisville & N. R. Co.* 11 Lea, 373, 47 Am. Rep. 286; *East Tennessee, V. & G. R. Co. v. Duf-*

field, 12 Lea, 63; *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 208. The provision of the Mississippi Constitution as construed by the courts is that the company is liable for an injury caused by a defect in the machinery, unless the injury was due to the recklessness or wantonness of the employee. This is a mere change in the law in respect to the implied contract between master and servant, and, in only affecting such contracts in Mississippi made after its enactment, it is simply a variation from the common law of Tennessee, and is not to be regarded as repugnant to the spirit of the law of the latter state. The legislature of Tennessee has not hesitated to pass statutes which modify the rules with respect to the effect of contributory negligence of plaintiffs in suits against railroad companies much more radically than the change thus effected in Mississippi. This may be seen by an examination of two cases in this court where such statutes were fully considered and construed in the light of the decisions of the supreme court of Tennessee. See *Western & A. R. Co. v. Roberson*, 22 U. S. App. 187-216, 9 C. C. A. 646, and 61 Fed. Rep. 592; *Nason v. Kansas City, Ft. S. & M. R. Co.* 22 U. S. App. 220-231 *et seq.*, 9 C. C. A. 666, and 61 Fed. Rep. 606, 24 L. R. A. 693. So far as the record discloses, there was no request presented to the court to charge the jury that the constitutional clause was not a defense in case it should find that the injury resulted from the reckless negligence and wantonness of the plaintiff, and no exception seems to have been taken to the charge because of such an omission. Indeed, there was no evidence tending to show reckless negligence or wantonness on the part of the plaintiff.

The judgment of the Circuit Court is affirmed, with costs.

MICHIGAN SUPREME COURT.

Re Charles MILLER.

(.....Mich.....)

A statute denying to convicts under sentence for a second offense the same re-

ductions from their sentence for good behavior that are allowed to other convicts is not *ex post facto* as applied to the punishment of an offense subsequently committed, although the offender had been convicted of his first offense before the passage of the act.

NOTE.—Enhancing penalty of crimes when committed by habitual criminals or prior offenders.

I. Validity of statutes and ordinances.

- a. In general.
- b. *Ex post facto* laws.
- c. Cruel and unusual punishment.
- d. Equal protection of the laws.
- e. Second punishment or jeopardy for the same offense.

II. Construction and effect of statutes.

- a. In general.
- b. Third and subsequent offenses.
- c. Conditions as to prior conviction before commission of later offense.
- d. Conditions as to execution of or relief from prior sentence before commission of later offense.
- e. Effect of pardon of prior offense.
- f. Effect of appeal or writ of error to review prior conviction.

II.—continued.

- g. Effect of prior conviction in other state or country.
- h. What prior sentence must have been.
 1. Similarity or identity of prior and subsequent offenses.
- i. Procedure.
 1. In general.
 2. Pleas and admissions.
 3. Order of trial; separating issues.
 4. Proof.
 5. Attacking validity of prior conviction.
 6. Verdict and judgment.
 7. Appeal or writ of error.

I. Validity of statutes and ordinances.

a. In general.

The constitutional provision that "all penalties shall be proportioned to the nature of the offense"

(November 17, 1896.)

PETITION for a writ of habeas corpus to procure the release of petitioner from the

custody of the warden of the state prison to which he had been committed under sentence for a term of three years. *Petitioner remanded.*

(Ill. Const. 1870, art. 2, § 11) is not violated by a statute imposing severer penalties upon one who is shown to have been previously convicted. *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184.

A law imposing additional punishment for a second or subsequent conviction of the same offense is not unconstitutional. *Hopkins v. Com.* 3 Met. 480.

"The validity of that statute has heretofore been sanctioned by this court, and it is now needless to discuss it," says the court in *Combs v. Com.* 14 Ky. L. Rep. 245, in enforcing a statute providing for a life sentence of a person convicted the third time for a felony.

Such a statute is also said to be valid in *People v. Bosworth*, 64 Hun, 72.

The particular grounds of the constitutional objections are not stated in these cases, but are doubtless the same as those mentioned in the divisions following.

The discrimination against prisoners serving a second or third sentence by denying them a good-time allowance has been made in several cases prior to the main case of *Re MILLER*. Thus, *Re Prisoners* (Atty. Gen.'s Opinion) 3 Det. L. N. No. 24; and *Re Canfield*, 98 Mich. 644. The constitutionality of a statutory provision requiring such a discrimination is assumed in these cases without question.

"The party charged with the commission of a second offense is supposed to have known all the penalties denounced against it. If, therefore, the punishment denounced against the first offense proves to be insufficient to restrain his vicious propensities, it is but just and right that an increased punishment should be inflicted for a second or third offense; and he has no reasonable cause of complaint that his former transgressions under the same law are brought up in judgment against him. No constitutional objection exists to such regulation of punishment." *Maguire v. State*, 47 Md. 426.

"One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew, or is presumed to have known, before the commission of the second offense, all the penalties denounced against it; and if, in some sense, the additional punishment may be said to be a consequence of the first offense (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence, but one which could only arise on the conviction for the second offense, and one therefore which, being fully apprised of in advance, the offender was left free to brave or avoid." *Rand v. Com.* 9 Gratt. 738.

A statute is not the less a police regulation because it requires the court on conviction for a second offense to imprison the convict not less than a month nor more than a year, so that imprisonment is in a county jail or house of correction. *State v. Hodgson*, 86 Vt. 134.

The fact that the provisions of the Ohio habitual criminal act of May 4, 1885, are made a supplement to the statute regulating the management of convicts in the penitentiary rather than to that title of the Revised Statutes which relates to crimes and their punishment and to criminal procedure, is not sufficient to make the act invalid or ineffectual. It does not contemplate the creation of a new offense, but merely creates a class of convicts whose incorrigibility has been established by a series of convictions for felonies, and is therefore placed in its ap- 84 L. R. A.

propriate connection; but if it was not in the most appropriate connection it would be immaterial, if the legislative intent was apparent. *Blackburn v. State*, 50 Ohio St. 422.

An ordinance relating to places where intoxicating liquors are sold is not unreasonable or unlawful because it provides a fine for the first offense of not less than \$50 nor more than \$200, and for each subsequent offense not less than \$200 nor more than \$500. This was under Ohio Rev. Stat. § 18-2, providing that a fine for violation of an ordinance not exceeding \$50, or double that sum for a repetition of the offense, should not be deemed unreasonable, but that where a greater fine is imposed the court might reduce it to such amount as it may deem reasonable. The court holds that this section does not mean that fines greater than those specified should in all cases be deemed unreasonable, but that the court has power to reduce it as its wisdom and justice may dictate. *Alliance v. Joyce*, 27 Ohio L. J. 175.

b. *Ex post facto laws.*

The other cases agree with *Re MILLER* in holding that the constitutional provision against *ex post facto* laws is not violated by a statute providing for increased punishment of an offense because of a prior conviction of a like offense, even if the prior conviction was had before the statute was passed. *Rand v. Com.* 9 Gratt. 738; *Ex parte Gutierrez*, 45 Cal. 429; *Ross's Case*, 2 Pick. 165; *Riley's Case*, 41 172; *People v. Raymond*, 36 N. Y. 36, Affirming 32 Hun, 123.

So, a statute designating one who is convicted of a felony after having been convicted of two others an habitual criminal, and subjecting him to long imprisonment as such, is not *ex post facto*, although by its terms it may be enforced against one whose former convictions occurred before its passage. *Com. v. Graves*, 155 Mass. 183, 16 L. R. A. 256; *Sturtevant v. Com.* 155 Mass. 596; *Blackburn v. State*, 50 Ohio St. 422.

See also other cases in I. a, *supra*.

But a statute would be *ex post facto* if the later offense which is to be punished was committed before the statute was passed. *Ross's Case*, and *Riley's Case*, *supra*.

And a statute imposing an additional punishment for a second or third offense cannot operate on convictions previously had to increase their effect as prior sentences for the purpose of making a subsequent offense punishable by imprisonment for life in case the prisoner has been twice before convicted of offenses punishable by imprisonment at hard labor for a term of years. *Ex parte White*, 14 Pick. 90.

A change in the statute providing additional punishment because of prior offenses, which merely changes the tribunal which shall impose punishment, does not constitute an *ex post facto* law. *Com. v. Phillips*, 11 Pick. 28.

Thus, an information to impose additional punishment on a convict because of prior convictions may be authorized by the legislature to be prosecuted in a county different from that in which the convictions were had and in which the crimes were committed. *Ibid.*

In answer to a contention that the penalty is made greater by an amending statute, inasmuch as it provides for doubling the penalty on a repetition of the offense, the court says, in *State v. Wilbor*, 1 R. I. 199, 36 Am. Dec. 245: "This is a possible contingency, but not an incident of the sentence. The respondent may again violate the law, but this de-

The facts are stated in the opinion.

Mr. Thomas E. Barkworth for petitioner.

Mr. Fred A. Maynard, Attorney General, for respondent.

Moore, J., delivered the opinion of the court:

The petitioner is serving his second term in the state prison at Jackson. His first term expired April 19, 1893. His second term began

pends wholly upon his own will. It is not a right of which the sentence will deprive him, nor any result which the court can anticipate or which it can take into consideration as a part of its sentence. It cannot consider the penalty by such possible contingency as increased. To do so would be to presume that the breach of law would be repeated, and to be solicitous, not for the preservation of the rights of the respondent, but to guarantee to him impunity in wrongdoing. This is not the proper business of the court."

c. Cruel and unusual punishment.

It is not cruel or unusual punishment to impose upon a convict a severer sentence for a second or subsequent offense than for a first offense. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301. Affirming *State v. Moore*, 121 Mo. 514; *State v. Hodgson*, 66 Vt. 184; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401.

d. Equal protection of the laws.

A person is not denied the equal protection of the laws by imposing upon him a severer punishment for a second offense than is imposed for the first offense. *Moore v. Missouri*, *supra*.

e. Second punishment or jeopardy for the same offense.

The constitutional provision against putting a person twice in jeopardy for the same offense is not violated by imposing greater penalties upon persons convicted of a crime if they had been previously convicted. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301. Affirming *State v. Moore*, 121 Mo. 514; *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184; *Ingalls v. State*, 48 Wis. 647; *People v. Lewis*, 64 Cal. 401.

The increased severity of punishment for a second or subsequent offense is not a punishment for the same offense the second time. *Moore v. Missouri*, *supra*; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Lewis*, *supra*; *People v. McCarthy*, 45 How. Pr. 97; *Ingalls v. State*, *supra*; *Maguire v. State*, 47 Md. 485; *Ex parte White*, 14 Pick. 90; *Ross's Case*, 3 Pick. 165; *Blackburn v. State*, 50 Ohio St. 423; *Chenoweth v. Com.* 11 Ky. L. Rep. 561, 12 Crim. L. Mag. 234; *Taylor v. Com.* 3 Ky. L. Rep. 723; *Boggs v. Com.* (Ky.) 5 S. W. 307.

"The increased severity of the punishment for the subsequent offense is not a punishment of the person for the first offense a second time, but a severer punishment for the second offense, because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than should be inflicted upon the person guilty of the first crime." *Ingalls v. State*, *supra*.

It is said, in *Ross's Case*, *supra*, that the punishment for the last offense committed is rendered more severe in consequence of the situation into which the party had previously brought himself.

The prior conviction is regarded as giving a character of increased aggravation to the subsequent offense. *Ex parte White*, *supra*.

The law which imposes the increased punishment is presumed to be known to all persons, and is intended to deter those so inclined from the further commission of crime. *State v. Moore*, *supra*; *Raud v. Com.* 9 Gratt. 738; *Maguire v. State*, 47 Md. 485.

On the same ground, that the prior offense is

merely matter of aggravation, it is also held that an information is not objectionable as charging two offenses merely because it alleges a prior conviction of a similar offense. *People v. Boyle*, 64 Cal. 153.

II. Construction and effect of statutes.

a. In general.

The construction of statutes with reference to the effect of offenses and convictions antedating the statutes has not been uniform.

The enhanced punishment for a subsequent offense, provided for by the Alabama act of December 5, 1892, fixing penalties for violating laws as to intoxicating liquors, is construed to apply only when the former as well as the later conviction has been had since the act took effect, and not to cover the case of a second conviction thereafter, if the former conviction had taken place before the act was passed. *Carson v. State*, 108 Ala. 85.

So, the Connecticut act of August 1, 1895, providing larger punishment for second and all subsequent convictions, is construed to be applicable only to successive convictions under the new law. The court had no occasion to inquire whether a statute would be *ex post facto* if it imposed larger punishment for an offense subsequently committed if the convict had been convicted before the passage of the act of a similar offense, but held that as a provision would certainly be *ex post facto* if it increased the penalty for an act already committed, the provision of the act in question enlarging punishment for a first offense could have only a prospective effect, and the provisions as to punishment for second and subsequent convictions were construed to relate to a prior conviction under the same law. *State v. Sanford*, 67 Conn. 236.

But the California Penal Code, prescribing additional punishment for a second offense, is construed to apply to the punishment of all offenses thereafter committed, whether the prior conviction was before or after the statute was passed. *Ex parte Gutierrez*, 45 Cal. 423.

So, the Virginia statute providing that a prior conviction of a similar offense shall aggravate the punishment, is held applicable to a conviction which was made before the act was passed, when the subsequent conviction is had after the statute was passed. *Rand v. Com.* 9 Gratt. 733.

The same is true of New York Penal Code, § 668. *People v. Raymond*, 96 N. Y. 33, Affirming 32 Hun. 123.

For an offense committed before the Massachusetts act of 1833 and while the act of 1827 was in force, a conviction had after the act of 1833 had repealed the act of 1833 may be punished with the additional punishment prescribed by the act of 1827, because of prior convictions. *Com. v. Mott*, 32 Pick. 422. See also *Com. v. Getchell*, *infra*, II. d.

Under Cal. Penal Code, § 266, subd. 2, one convicted of an offense which for a first commission thereof is punishable by imprisonment in the state prison for any term less than five years is punishable for a subsequent conviction by imprisonment not exceeding ten years. *People v. Douglass*, 37 Cal. 281.

The provision of Ky. Gen. Stat. chap. 29, art. 1, § 13, for the confinement in the penitentiary for life of a person convicted the third time for felony, is enforced in *Combs v. Com.* 14 Ky. L. Rep. 245, where it is said that on proof of two prior convictions of a felony such punishment is inevitable, and the court could do no less than so instruct; and the jury on

February 10, 1894, and was for three years. Act No. 118, Laws 1893, took effect May 26, 1893. Section 83 of that act provides that convicts who shall have no infractions of the rules of the prison against them shall be en-

titled to a reduction from their sentences according to a certain scale, with a proviso that a convict who shall be serving a second term in said prison shall be entitled to a less favorable reduction. If the provisions of this act are ap-

plying the present offense a felony was bound to render the verdict in pursuance of the statute.

So, the imposition of the maximum penalty for the subsequent offense, under N. Y. Penal Code, § 698, if the convict has been previously convicted of a felony, is not a matter of discretion, but is imperative. *People v. Raymond*, 96 N. Y. 83, Affirming 32 Hun, 128.

And if a verdict of conviction for a third felony finds that two prior convictions of felony, with sentence and imprisonment therefor, as alleged in the indictment, had been imposed, the court, after passing sentence of imprisonment for a specific term, should, under the Ohio habitual criminal act of May 4, 1883, proceed to sentence the defendant to imprisonment for his natural life. *Blackburn v. State*, 50 Ohio St. 422.

A prisoner convicted of larceny upon an indictment after former conviction may be sentenced to transportation under 9 Geo. IV. chap. 84, § 21. *Reg. v. Byrne*, 4 Cox, C. C. 248.

The enhanced punishment is provided for a second conviction of uttering false money by 15 Geo. II. chap. 28, § 2, and also for committing such an offense twice on the same day or within ten days. *King v. Tandy*, 2 Leach, C. L. 833.

A prisoner convicted on a charge of false pretenses, and also of a previous conviction of felony duly charged in the indictment, cannot be sentenced to a less term of penal servitude than seven years, under 21 & 28 Vict. chap. 47, § 2, requiring such a sentence on conviction of an offense punishable with penal servitude after previous conviction of a felony. *Queen v. Deane*, L. R. 2 Q. B. Div. 305.

A previous conviction for felony cannot be charged in an indictment for obtaining money under false pretenses as in the case of simple larceny, under 24 & 25 Vict. chap. 93, § 118. *Reg. v. Garland*, 11 Cox, C. C. 224. The court says: "We are of opinion that the statute does not intend to allow a previous conviction for felony to be charged in an indictment for felony. That has been done here, and our powers do not extend to amending the indictment."

b. Third and subsequent offenses.

A life sentence for third conviction under Ky. Gen. Stat. chap. 20, art. 1, § 12, is none the less to be imposed because three, and not merely two, prior convictions are alleged and proved. *Taylor v. Com.* 3 Ky. L. Rep. 733.

The imposition of an additional punishment for a second offense will not prevent imposing additional punishment for a third offense. *Plumbly v. Com.* 2 Met. 413.

The fact that on a prior conviction there was a sentence of the prisoner as a common and notorious thief does not prevent imposing upon him in case of a subsequent conviction an additional punishment because of the prior conviction. *Ibid.*

So, the fact that a conviction of an offense has been relied upon to aggravate a later offense does not prevent relying upon it again to aggravate a still later offense during the same year, under Mass. Pub. Stat. chap. 207, § 27, providing that a male person guilty of drunkenness, if convicted of a like offense twice before within the next preceding twelve months, shall be subject to a greater penalty than for a first or second conviction. The first or second offense is a distinct offense, although relied on to aggravate the third, and it may be again relied on to aggravate a fourth or fifth offense committed within the year. *Com. v. Hughes*, 138 Mass. 406.

As to the effect of third and subsequent sentences to make one an habitual criminal, see also *Blackburn v. State*, *Com. v. Graves*, and *Sturtevant v. Com. supra*, I. b.

A sentence imposed as for a third offense under information manifestly filed with the intent of charging a third offense under How. Stat. (Mich.) § 9425, cannot be sustained under § 9441, as a sentence for a second offense, as it is not possible to say what penalty the court would have imposed for a second conviction. *People v. Ellsworth*, 68 Mich. 498.

c. Conditions as to prior conviction before commission of later offense.

The general doctrine on the subject is thus expressed by the supreme court of Texas: "All the states of the American Union that have adopted the penitentiary system make provision for the reformation of offenders by increasing the punishment for second and subsequent convictions. Many of the Codes of the different states declare in express terms that before the party can be visited with the increased penalty it must appear that the subsequent offense was committed after the conviction of the former offense. Though differing in language the same principle runs through them all, and we are not permitted to suppose that our legislature intended to introduce a principle entirely out of harmony with the general system by visiting the increased punishment upon an offender who has never had an opportunity of reformation from experiencing the beneficial discipline of the law." *Long v. State*, 38 Tex. 6.

"Where a statute makes a second offense felony or subject to a heavier punishment than the first, it is always implied that such second offense ought to be committed after a conviction for the first: . . . for the gentler method shall first be tried, which perhaps may prove effectual." This statement from 1 Hawkins, P. C. chap. 40, § 8, is quoted and adopted by the court in *People v. Butler*, 3 Cow. 347, construing the New York act of 1819, *Sees. 42*, chap. 245, § 4, to provide for enhanced penalty for a second offense of petit larceny only when such offense is committed after prior conviction. The court says the language of this statute has prevailed in various acts through a series of revisions and relations to different offenses. Some of them explicitly refer to persons a second time convicted, and the court concludes that the difference of phraseology is entirely accidental, that the legislature meant the same thing in each statute; that is, that a conviction should precede the second offense.

And in Kentucky the words "convicted a second time of felony" and "convicted a third time of felony," in Ky. Stat. § 1180, providing for increased punishment of persons thus convicted, must be restricted to felonies committed subsequent to the dates of the convictions relied on to effect the increased penalty, for otherwise no *locus penitentiae* would be afforded to the accused. The court says that the reformatory object of the statute, namely, to provide deterrent from future crime, would not be effected by a construction which gives to the offender no opportunity to reform. *Brown v. Com.* (Ky.) 37 S. W. 496.

So, in Virginia a subsequent offense must have been committed after a prior conviction in order

plied to the petitioner, and he is treated as now serving his second term, his term will not expire until November 16 of this year, but, if

he is treated as though serving his first term, he is now entitled to his release.

It is claimed that to regard the petitioner as

to justify the increased punishment for a second offense under 1 Va. Rev. Code 1792, chap. 107, § 4-Com. v. Welsh, 2 Va. Cas. 57.

And again, the provision for additional punishment of one who "had been before sentenced in the United States to a like punishment," made in Va. Code 1849, chap. 199, § 25, is construed in accordance with the general policy of such statutes to be applicable only to cases in which the prior conviction preceded the commission of the offense for which the increased punishment is to be imposed. *Rand v. Com.* 9 Gratt. 738.

Likewise in Massachusetts to render a person liable to the additional and aggravated punishment prescribed for a second conviction by Mass. Stat. 1852, chap. 322, § 7, his subsequent offense must have been committed after a conviction for the prior offense. *Com. v. Daley*, 4 Gray, 209.

But for the purpose of considering a later conviction the third one two convictions at one and the same term of the same court for two distinct larcenies or other crimes, each of which is punishable by confinement to hard labor for a term of years, are two convictions within the meaning of the Massachusetts statute of 1857, as much as if they had been at different terms of different courts. *Com. v. Phillips*, 11 Pick. 28.

Under such a statute a person convicted on three counts of one indictment cannot be sentenced under the second and third as in case of second and third convictions, because the fact of prior conviction must be averred in the indictment and proved. *Tuttle v. Com.* 2 Gray, 505.

So, a sentence as for a second offense cannot be imposed on conviction of a second sale immediately after the conviction of a prior sale, where the indictment did not charge that it was a second offense. *Rauch v. Com.* 78 Pa. 490.

d. Conditions as to execution of or relief from prior sentence before commission of later offense.

According to the doctrine expressed in the preceding division (II. c), the statutes contemplate a trial of penal discipline as a means of reforming the criminal before rendering him liable to more severe punishment for the second offense. Therefore some statutes require that the end of such discipline must have been reached either by compliance with the sentence or by exercise of executive clemency before the commission of another offense will incur an enhanced penalty because of the prior conviction. But other statutes make a prior conviction the only condition. For some of these, see cases in last preceding division, although in them the present question was not raised.

But in Kansas it is expressly held that satisfaction of the sentence to pay a fine for a first offense by payment of fine or pardon is not necessary for the purpose of having the former conviction considered to increase the penalty for a subsequent offense. *State v. Volmer*, 6 Kan. 379.

One who had been twice convicted but discharged only once prior to Mass. Stat. 1832, chap. 78, which provided that additional punishment because of prior convictions should be given when the prisoner had been twice discharged from such a sentence previously, may after the repeal of that statute have additional punishment imposed upon him under Mass. Stat. 1837, chap. 118, which provided for additional punishment of one who had been twice convicted and sentenced, as this statute was merely suspended, and not repealed, by that of 1832. *Com. v. Gutchell*, 16 Pick. 452. See also *Com. v. Mott*, *supra*, II. a.

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Under an information which alleges two prior convictions for the same offense but only one sentence, defendant cannot be sentenced as for a third offense, under How. Stat. (Mich.) § 9425, providing for heavier punishment of a convict twice before "sentenced" to imprisonment at hard labor for a certain period. *People v. Ellsworth*, 68 Mich. 496.

Either a pardon or discharge must be averred in the indictment for a second offense after prior conviction and discharge by pardon or otherwise, under 2 N. Y. Rev. Stat. 584, 2d ed. § 2. *Stevens v. People*, 1 Hill, 251.

So, an averment not only of a conviction but of a discharge, either upon pardon or the expiration of the sentence, in an indictment under 2 N. Y. Rev. Stat. 609, § 8, is declared necessary in *Wood v. People*, 53 N. Y. 511.

In *Gibeon v. People*, 5 Hun, 542, an averment of this was held sufficient although not in the exact words of the statute.

So, in Missouri it must appear that the defendant has complied with the former sentence, and also that he has been discharged therefrom. *State v. Austin*, 113 Mo. 538; *State v. Loehr*, 93 Mo. 103. (Both of these cases involved the sufficiency of the allegations of these facts.)

Mere lapse of time does not authorize the presumption that a person previously convicted has been imprisoned and discharged upon the expiration of the term for which he was sentenced so as to cast upon him on trial for a second offense the burden of proving that he was not discharged either by pardon or upon the expiration of his sentence. He may have escaped, or the judgment may have been arrested or reversed, or he may have been discharged upon habeas corpus; and as there are other means and processes by which he might be discharged or found at liberty, it is error for the court to assume, in the absence of evidence, that he was discharged upon the expiration of the term of imprisonment and therefore liable to conviction for the aggravated offense. *Wood v. People*, 53 N. Y. 511.

e. Effect of pardon of prior offense.

In a considerable number of states the statutes expressly provide for the enhanced punishment for a crime committed after conviction of a prior offense and a discharge therefrom by pardon or otherwise. See cases *supra* in division last preceding.

Where the statutes make no reference to a pardon of the prior offense there is room for doubt as to the effect of such pardon to prevent considering the prior offense for the purpose of more severely punishing a subsequent crime.

Such a doubt was suggested in a Pennsylvania case. There an application by the district attorney for the imposition of double the ordinary punishment because of prior conviction was withdrawn because of the fact that the governor had pardoned the defendant for his first offense, whereupon the court said: "Upon reflection I do not feel disposed to sentence the prisoner as for a second offense. It is at least questionable whether it could be done legally in view of the pardon. Without, however, deciding this point, it is sufficient to say that it would seem to be a harsh administration of the law to visit the prisoner with any of the consequences of an offense for which he has received a full and free pardon from the governor." *Com. v. Morrow*, 9 Phila. 553.

In Virginia it is expressly decided that pardon of the first offense takes away the right to inflict additional punishment for a second offense under Va.

now serving his second term is to apply *ex post facto* legislation to him, and subject him to additional punishment for a crime which he

has fully expiated, under the laws existing at the time of its occurrence. Counsel cite *Calder v. Bull*, 3 U. S. 8 Dall. 386, 1 L. ed. 648;

Code 1893, chap. 126, § 23, providing that a convict sentenced to the penitentiary shall have five years added to his term if it is proved that he has before been sentenced in the United States to a like punishment. *Edwards v. Com.* 78 Va. 30, 49 Am. Rep. 377. The court says pardon relieved the defendant not only "of the punishment annexed to the offense for which he had been convicted, but of all penalties and consequences except political disabilities growing out of his conviction and sentence. One of those consequences was the liability to which it subjected him to receive the additional punishment prescribed by the statute in case he should be afterwards sentenced to the penitentiary in this state. And that additional punishment has been imposed in this case, not by reason of the sentence for the second offense alone, but in consequence of that sentence and the sentence in the former case. Both causes must exist together to produce the effect contemplated by the statute; in the absence of either, no case is made for the imposition of the additional punishment the statute prescribes. But as the first offense was in legal contemplation blotted out, and its consequences removed by the pardon of the governor, it must be regarded for the purposes of this case as though it had never been committed."

But, on the other hand, it is decided in Kentucky that a pardon of a convict does not prevent his conviction from being considered to enhance the penalty of an offense subsequently committed, where the statute provides for increased punishment on a second conviction. *Mount v. Com.* 2 Dav. 94. The court says: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. It neither did nor could relieve from any penal consequences resulting from a different offense committed after the pardon and never pardoned. The increased punishment prescribed by statute for the subsequent offense was no part of the penal consequences of the first offense but applied exclusively to the last as aggravated by its repetition of the same crime. The legislature, as required by justice and policy, ought to have provided a severer punishment for repeated than for only one crime; and whether it had done so by duplicating for a second offense the punishment of the first, or by any other measure of augmentation, cannot be material. In any aspect the augmented punishment is for the last and not at all for the first offense; and, of course, a pardon of the first could in no way or degree operate as a pardon of the last offense or remission of any portion of the punishment denounced for perpetration of it."

It is plain that the reasoning of the Kentucky court is in harmony with all the decisions which sustain these statutes against constitutional objections, as they all proceed on the theory that the enhanced penalty is not in any sense a new punishment for the prior offense. If it were the statutes would violate the constitutional provisions considered at the beginning of this note. But if the statutes are to be upheld on the ground that the enhanced penalty is not a new or additional punishment of the prior offense, a pardon of that offense does not relieve from that penalty. The admirable statement of the matter by the Kentucky court, which is above quoted, seems to be conclusive.

In agreement with this doctrine, it is held in a New York case that a pardon by the governor of another state of a person there convicted of an offense will not prevent the effect of such former conviction from operating under the New York

statute to make him liable to an increased punishment for a subsequent offense in New York. *People v. Price*, 53 Hun, 185.

f. Effect of appeal or writ of error to review prior conviction.

An adjudication that a judgment of conviction for a first offense was erroneous will make necessary the reversal of a judgment imposing an additional punishment on the same person in sentencing him for a second offense when writs of error have been taken from both judgments. *Hopkins v. Com.* 8 Met. 460; *Hutchinson v. Com.* 4 Met. 350.

A pending appeal from the former conviction suspends its effect as such for the purpose of increasing the punishment for the second offense. *State v. Volmer*, 6 Kan. 379.

So will a pending writ of error and supersedeas. *White v. Com.* 79 Va. 611.

g. Effect of prior conviction in other state or country.

A prior conviction in another state is not the ground of increased punishment for the offense of petit larceny under 2 N. Y. Rev. Stat. 690, § 9, providing in general terms for such punishment of persons who have been convicted without in terms confining the first conviction to that state. *People v. Caesar*, 1 Park. Crim. Rep. 645. This construction is supported by the fact that there is an express provision in regard to felonies as to the effect of prior conviction in any of the United States or in any district or territory thereof or in any foreign country.

So, a plea of guilty to an indictment which alleges a prior conviction in another state will not sustain a sentence as for a second offense, where the statute provides such punishment only for prior convictions in the state. *People v. Caesar*, *supra*.

But this question depends, of course, upon the statutory provisions. Some statutes, like that of Virginia construed in *Edwards v. Com.* 78 Va. 30, 49 Am. Rep. 377, and *Rand v. Com.* 9 Gratt. 733, apply to persons "before sentenced in the United States" to a like punishment.

So, the New York Penal Code, § 688, construed in *People v. Price*, 53 Hun, 185, Affirmed 119 N. Y. 650, *mem.* applies to persons "convicted under the laws of another state, government, or country."

So, Mass. Stat. 1827, chap. 436, upheld in *Com. v. Graves*, 155 Mass. 163, 16 L. R. A. 236, deems those habitual criminals who have been twice convicted and sentenced to prison for terms not less than three years each, providing that at least one such conviction and sentence shall have been in Massachusetts.

Other statutes contain similar provisions, but no attempt is made to collect them here except so far as they have been passed upon by the courts.

h. What prior sentence must have been.

A sentence as a common and notorious thief pursuant to Mass. Stat. 1804, chap. 143, § 3, although it may have been upon three simple larcenies, neither of which would separately be punishable by hard labor for more than one year, is a sentence for an offense punishable by confinement to hard labor for a term of years, within the meaning of Mass. Stat. 1827, chap. 118, §§ 19, 20, relating to additional punishment for successive convictions. *Ex parte White*, 14 Pick. 90.

"Any term of years" for which a person may have been sentenced within the meaning of Mass. Stat. 1817, chap. 176, §§ 5, 6, and 1827, chap. 118, §§ 19, 20, providing that on such sentence of a person

Fletcher v. Peck, 10 U. S. 6 Cranch, 87, 8 L. ed. 162; *Cummings v. Missouri*, 76 U. S. 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*,

71 U. S. 4 Wall. 333, 13 L. ed. 366; *Re Walsh*, 87 Mich. 466; *Re Canfield*, 98 Mich. 644. We do not think any of these cases sustain the claim

Previously sentenced to a like punishment an additional penalty should be imposed, must be construed to mean a period of time not less than two years, and therefore inapplicable to a sentence for larceny without aggravation to an amount less than \$100, which is punishable by imprisonment for not more than one year. *Ex parte Seymour*, 14 Pick. 40; *Ex parte Stevens*, Id. 94.

But it is sufficient that the crime for which the sentence is to be imposed is punishable by confinement to hard labor for a term of years, although the sentence for the former conviction must have been actually made for not less than two years. The words "sentenced to a like punishment" mean not only a sentence to confinement to hard labor but for a "term of years." *Ex parte Dick*, 14 Pick. 86.

Under the act of 1833 the provision is changed from "any term of years" to "more than one year." *Ex parte Stevens*, *supra*.

The word "prison," as used in Mass. Stat. 1887, chap. 436, § 1, relating to the effect of prior sentence and commitment to prison, is not limited in its meaning to the state prison, but includes all places of imprisonment for crime, and therefore the statute does not discriminate between the effect of prior sentences to state prison and those to jails or houses of correction. *Sturtevant v. Com.* 158 Mass. 598.

1. Similarity or identity of prior and subsequent offenses.

The prior and subsequent offenses need not be of the same character or grade under N. Y. Penal Code, § 683, to make one who has been convicted within the state of a felony liable on conviction of a subsequent crime to the maximum penalty that could be imposed for such crime as a first offense. Therefore, one who had previously committed the offense of forgery in the third degree must, on the subsequent conviction of forgery in the first degree, be sentenced to imprisonment for life, that being the maximum penalty for forgery in the first degree. *People v. Raymond*, 96 N. Y. 38, affirming 32 Hun, 123.

And the former conviction need not have been for the same crime as that for which the subsequent conviction is had in order to permit the imposition of the enhanced penalty because of prior conviction under the Illinois act of June 22, 1883, providing that one convicted of either of certain specified crimes may have the enhanced penalty imposed on subsequent conviction of any of said crimes. *Kelly v. People*, 115 Ill. 533, 56 Am. Rep. 184.

But previous convictions for felonies must be for offenses which were in themselves penitentiary offenses, and not made so merely because of repeated convictions and sentences for offenses which would otherwise be misdemeanors, in order to permit a life sentence under Va. Code 1887, §§ 3905, 3906, providing for such sentences of convicts twice previously sentenced to the penitentiary. *Stover v. Com.* 92 Va. 780.

A former conviction for selling liquors was held, in *Scot v. Turner*, 1 Root, 163, to be insufficient to justify an increased punishment on a subsequent conviction for selling victuals, hay, etc., without license, because this was a different offense.

A conviction of breaking and entering a building in the night-time and stealing therefrom is not such a conviction of larceny as will justify the sentence of a person subsequently convicted of larceny as a common and notorious thief under the Massachusetts statute (Rev. Stat. chap. 123, § 19). 24 L. R. A.

The gist of the prior offense in such case is the burglary. *Kite v. Com.* 11 Met. 581.

A sentence on conviction under an indictment charging burglary, and also larceny in a separate count, where the conviction is for the whole charge laid in the indictment, is presumed to be for the burglary, merging the larceny therein, so that it will not constitute a conviction for larceny within the meaning of the statute providing that on subsequent convictions for larceny a person may be sentenced as a common and notorious thief. *Ibid*.

A conviction on a combined charge of house breaking and larceny is not to be considered as for one of "three distinct larcenies" which will render a party liable to be adjudged a common and notorious thief, under Mass. Rev. Stat. chap. 123, § 19. *Com. v. Hope*, 23 Pick. 1.

Under Mass. Pub. Stat. chap. 215, § 3, providing that a sentence may be either to fine, or to imprisonment only if the prisoner shows that he has not been before convicted of a similar offense, a prior conviction of an offense against the same statute is none the less for a similar offense because at the time of its commission the penalty was different. The whole punishment to be imposed is for the later offense. *Com. v. Marchand*, 155 Mass. 8.

The effect of the ruling in this case is that the statute bears more heavily upon future offenses by previous offenders than upon first offenses, so far that no discretion is given to mitigate the statutory penalty in the former case as it is in the latter.

The provision of Mass. Rev. Stat. chap. 127, § 17, for adjudging a person to be a common utterer of counterfeit coin if convicted three times at the same term of court for such offenses, or if convicted of such an offense committed after a previous conviction, does not apply where a person is twice convicted at the same term of uttering counterfeit coin, and also convicted of having such coin in his possession with intent to utter it as genuine. *Murray v. Com.* 18 Met. 514.

1. Procedure.

1. In general.

The fact of a previous conviction may be set forth in a prosecution by information as well as by indictment in order to have enhanced punishment imposed on account of the repetition of the offense under Cal. Penal Code, § 666. *People v. Carlton*, 57 Cal. 559.

The sufficiency of allegations in indictments or informations charging prior convictions is a matter not included in this note.

Under the English statute, 15 Geo. II., chap. 23, § 2, providing severer punishment for uttering false money if it is done twice on the same day or within ten days, the two facts of uttering twice in the time limited should be united in one count as a single charge. *King v. Tandy*, 2 Leach, C. L. 833.

Alternative proceedings are provided for by the Massachusetts statute either to aver a former conviction or convictions in an indictment and have the whole punishment awarded in a sentence thereon, or, in the absence of such an averment, to file a subsequent information to have the additional punishment imposed. *Plumbly v. Com.* 2 Met. 413.

But both these proceedings cannot be taken. *Ibid*.

The provision for solitary imprisonment, made by Mass. Rev. Stat. chap. 120, § 8, in case a convict is sentenced to state prison, does not apply to additional sentences awarded upon information against those who have been previously convicted

of counsel for the petitioner. It is held in 3 U. S. 8 Dall. *supra*, that the legislature may declare new crimes, and establish rules of con-

duct in future cases. In 10 U. S. 6 Cranch, *supra*, an *ex post facto* law was defined to be one which renders an act punishable in a manner

and sentenced. The latter is only the completion or filling up of the former sentence. Bump v. Com. 8 Met. 583.

After sentence for a third offense under an indictment reciting two former convictions which are found by the verdict, it must be assumed that the additional punishment because of the prior conviction was embraced in the sentence awarded, and no information will afterward lie to award any additional punishment because of them. Com. v. Phillips, 11 Pick. 28.

Where an indictment for a third offense recites two former convictions and sentences to a state prison, and this is supported by proof, the additional punishment prescribed by the Massachusetts statute ought to be included in the sentence then passed upon the convict, and cannot legally be awarded on a subsequent information against him. Plumbly v. Com. *supra*.

An information for additional punishment on account of a prior conviction cannot be filed under the Massachusetts statutes after the prisoner's term of punishment has expired. Com. v. Keniston, 5 Pick. 420.

2. Pleas and admissions.

A confession of guilt and of the fact of a former conviction is held in State v. Zimmerman, 83 Iowa, 118, to cure defects in the allegation of a prior conviction if it was defective.

The identity of a defendant with the person convicted in a prior case when a prior conviction is alleged to enhance the punishment may be established by the defendant's own admission without other proof. Kane v. Com. 100 Pa. 541.

But an admission by a prisoner that he had been twice convicted of felony, once for stealing a shotgun and another time for stealing cattle, without any record evidence of his former convictions, although it is sufficient to identify him, is not sufficient proof of such convictions, under Ky. Gen. Stat. chap. 26, art. 1, § 12, requiring the jury to find the fact of such convictions from "record and other competent evidence." Rector v. Com. 80 Ky. 468.

Although in Kane v. Com. *supra*, in answer to an objection to an allegation and evidence of prior conviction the court said "in this manner alone can the provisions of the statute be carried into effect." The language just quoted is regarded in Com. v. Hagan, 10 Pa. Co. Ct. 22, as a *dictum* so far as the use of the word "alone" is concerned, and it is held, therefore, that the fact of previous convictions as a basis for a double sentence may properly be brought before the court by suggestion filed by the district attorney, and that when such suggestion is made and the defendant admits his identity with the person previously convicted, the double sentence may be imposed.

A voluntary confession of the prior convictions alleged in an information is sufficient to permit their consideration in passing sentence, as provided by Cal. Penal Code, § 667, where defendant is convicted on a plea of not guilty to the offense charged in the information. *Ex parte Young Ah Gow*, 73 Cal. 438. The court in this case carefully reviews the prior cases of People v. King, 64 Cal. 338; People v. Lewis, 1d. 401; and People v. Brooks, 65 Cal. 236,—holding that they are not inconsistent although some of the language in People v. King must be held *obiter*.

In People v. King, *supra*, defendant pleaded not guilty of the specific offense charged, but when asked by the court whether or not he had suffered the previous conviction admitted that he had. This was held to be an improper question, and his

answer therefore incompetent as evidence against him to prove such prior conviction. It was the illegality of the arraignment for which the conviction was reversed.

In People v. Lewis, *supra*, it was held that defendant's admission of a previous conviction, made after a plea of "not guilty of the offense charged in the indictment," is not sufficient to permit an increased punishment because of it, since the repeal of §§ 969, 1025, of Cal. Penal Code. Having regularly pleaded not guilty of the offense charged, the court is not bound afterwards on the trial to accept his plea of guilty of the previous conviction.

But it was held in People v. Brooks, *supra*, that when defendant was properly arraigned by simply asking him the question "guilty or not guilty?"—on which he pleaded not guilty of the offense charged, but further said that he "confesses and admits" the prior conviction, the voluntary confession was legal and sufficient to authorize the jury to find the fact of a prior conviction.

On a plea of guilty to an indictment or information charging a prior conviction no trial by jury is necessary, although on a plea of not guilty the issue of previous conviction must be tried by the jury. People v. Carlton, 57 Cal. 559.

A plea of "guilty of the offense as charged in the indictment" confesses the previous conviction as well as the other allegations of the indictment, where previous conviction is alleged. People v. Delany, 49 Cal. 394.

But it is held in Virginia that the plea of not guilty does not put in issue the allegation of a previous conviction and sentence. Thomas v. Com. 22 Gratt. 912.

3. Order of trial; separating issues.

As to the proper practice in respect to bringing a prior conviction into the case, the court, in Com. v. Morrow, 9 Phila. 568, points out that an allegation thereof in the indictment is damaging to the defendant's character, and will go far to secure his conviction; while, on the other hand, proof thereof after the verdict might raise an embarrassing question of identity which should be settled by the verdict of the jury, and that it is a question whether a jury is not the constitutional right of the defendant in such case.

The practice adopted is by no means uniform. In England the statute regulates it.

Thus, the prisoner must first be arraigned "upon so much only of the indictment as charges the subsequent offense," under 24 & 25 Vict. chap. 96, § 116, and if the jury find him guilty, or if on arraignment he plead guilty, "he shall then, and not before, be asked whether he has been previously convicted as alleged in the indictment," and a finding of the jury on the previous conviction is then provided for. Reg. v. Fox, 10 Cox, C. C. 502, 15 Week. Rep. 106. The above provisions are held material and a conviction quashed for want of observance of them.

The arraignment of a prisoner and his trial for the subsequent offense only in the first instance is expressly required by § 37 of 24 & 25 Vict. chap. 96, respecting offenses relating to the Crown by one who has been previously convicted of such an offense, and the question of his previous conviction under this section can be inquired into only after he is found guilty. Queen v. Martin, L. R. 1 C. C. 214, 21 L. T. N. S. 469, 18 Week. Rep. 72.

But under 14 & 15 Vict. chap. 19, § 9, the proper mode of proceeding on trial of an indictment charging previous conviction was to arraign the

in which it was not punishable when it was committed. The act of 1898 was in force before the second conviction of the petitioner oc-

curred. He is presumed to have known its provision when he committed the offense for which he is now serving time. He served the

prisoner on the whole indictment, but to charge the jury with the subsequent offense only in the first instance, and after conviction of that offense then to charge them with the previous conviction. *Reg. v. Key*, 5 Cox, C. C. 369, 2 Den. C. C. 347, 3 Car. & K. 371; *Reg. v. Shuttleworth*, 5 Cox, C. C. 371, 3 Car. & K. 375, Temp. & M. 626, 2 Den. C. C. 351, 21 L. J. M. C. N. S. 36, 15 Jur. 1066.

Prior to the statutes just referred to the English practice was somewhat unsettled.

Thus, in *Rex v. Jones*, 6 Car. & P. 391 (1834), where the prisoner was charged with a previous conviction, Park, J., is reported as using the following language in summing up: "I used never to allow the jury to know anything of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because I thought that if the jury were aware of the previous conviction it was (to use a common expression) like trying a man with a rope about his neck. However, the judges have had a meeting on the subject at which thirteen of them were present, and they held that my practice and that of another learned judge was wrong; and the opinion of the judges is that the previous conviction must be proved before the prisoner is called on for his defense."

Under La. Rev. Stat. § 774, the judge has power to sentence any person who may be convicted for a second or third offense to double and triple the penalty imposed by law, and for a fourth offense to perpetual imprisonment. But it is held that the convict should have the opportunity to show cause why the increased punishment should not be inflicted. *State v. Hudson*, 32 La. Ann. 1052.

In this case the prior convictions were noticed judicially, being of record in the same court.

So, in a South Carolina case the court says: "It is only necessary to decide upon the existence or nonexistence of the record when the court is called on to pronounce the sentence of the law. If there be but one conviction, then, of course, the law imposes only the punishment for the first offense. If there be two convictions then the punishment for the second offense follows, and for this purpose it is certainly immaterial whether the first conviction is or is not recited in the record of the second, and this is in conformity with the practice here and every where else." *State v. Smith*, 8 Rich. L. 460.

But in most jurisdictions in this country the prior conviction is proved on the trial of the main issue, as will appear from the cases immediately following and others deciding questions of evidence in the division next below this.

For the court to tell the jury that no proof of a former conviction which is alleged in the indictment is necessary, and to accept a verdict of "guilty," and then for the court itself to hear evidence as to whether or not the offense was a second one and on such evidence to impose punishment as for a second offense, is erroneous. *Hines v. State*, 26 Ga. 514.

The question whether the offense was a second one or not is a question for the jury, involving the question of identity as well as other matters. *Id.*; *State v. Lashus*, 79 Me. 504; *State v. Robinson*, 39 Me. 150.

Proof of a prior conviction should be made before verdict in order to impose the enhanced penalty therefor, under Vt. Rev. Laws, § 3848, providing that the prior conviction shall be alleged, § 3804, providing for proof thereof upon the trial, and § 3850, providing a special verdict where it is necessary to enable the court to pass the proper sentence. *State v. Spaulding*, 61 Vt. 505.

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The court holds that these statutory provisions by which the original act of 1852 for increased penalty on account of a prior conviction had been amended changed the rule of the prior decisions made in *State v. Freeman*, 27 Vt. 523, and *State v. Haynes*, 35 Vt. 570.

It had been said in *State v. Freeman*, *supra*, that "if any question bona fide arises" in regard to the identity of the person charged with a prior conviction for a similar offense, the "county court or this court might order an issue upon the point to be submitted to a jury in the proper tribunal."

So, in *State v. Haynes*, *supra*, it was held to be unnecessary to show the former convictions on the trial before the jury, but they may be shown to the court after conviction for the purpose of affecting the sentence, although if an issue of fact is made as to the identity of the offender or as to any other fact he may have a jury to try it.

To obtain the benefit of the Michigan statute providing that a person convicted for the first time of receiving stolen property may by restitution thereof avoid imprisonment in the state prison, it is his duty to show the facts to the court before sentence, and he cannot set them up after sentence. *People v. Smith*, 94 Mich. 644; *People v. Hubbard*, 86 Mich. 440.

The right of the defendant to make peremptory challenges of jurors on an issue as to his identity with the person formerly convicted is denied in *Brooks v. Com.*, 2 Rob. (Va.) 845, on the ground that such challenges are not allowed on the trial of collateral issues.

So, in England, the right to challenge jurors cannot be claimed by a prisoner when they are sworn afresh to try the issue of a former conviction. *Reg. v. Key*, 5 Cox, C. C. 369, 2 Den. C. C. 347, 3 Car. & K. 371; but it is expressly held in the companion case of *Reg. v. Shuttleworth*, 5 Cox, C. C. 371, 3 Car. & K. 375, Temp. & M. 626, 2 Den. C. C. 351, 21 L. J. M. C. N. S. 36, 15 Jur. 1066, that the jury need not be resworn to try the issue of former conviction.

4. Proof.

Putting the record of a prior conviction in evidence to prove the fact of such conviction under a statute providing for increased punishment in such cases is not subject to the objection that it is proof of defendant's bad character before he has put his character in issue, as the object is not merely to prove bad character. *Johnson v. People*, 65 Barb. 342, Affirmed 55 N. Y. 512.

To prove a previous conviction many may be alleged, and if one should be proved that will be sufficient. *Reg. v. Clark*, 6 Cox, C. C. 210, 22 L. J. M. C. N. S. 126, 17 Jur. 582, Dears. C. C. 198, 3 Car. & K. 367.

On a joint prosecution for an offense under an indictment alleging previous convictions the proof need not be of joint convictions, but it is sufficient to show that the defendants had been severally convicted. *State v. Dolan*, 69 Me. 873.

Oral evidence of a previous conviction is competent if not objected to. *State v. Rockett*, 37 Mo. 686.

The record of a previous conviction may properly be set forth in an indictment and offered in evidence on the trial in order to have double punishment imposed, under Pa. act March 31, 1860, § 182, for a second conviction of manslaughter. *Kane v. Com.* 109 Pa. 541.

Evidence of a prior conviction of felony, not alleged in the indictment and not proved by any record or certificate of the conviction, is not sufficient to justify the imposition of seven years penal serv-

penalty of his first conviction, and, if he had not again violated the criminal law, he would not now be an inmate of prison. The penalty

he is now serving is imposed for the offense committed by the prisoner after the act of 1893 took effect. Under such circumstances, the

itude, under 27 & 28 Vict. chap. 47, § 2, on account of the prior conviction of a felony. *Queen v. Summers*, L. R. 1 Q. C. 182, 38 L. J. M. C. N. S. 62, 17 Week. Rep. 384, 11 Cox, C. C. 248.

Placing before the jury the record of a prior conviction of a person whose identity with the present prisoner is not proved or admitted will require a new trial where he was convicted under an indictment alleging a former conviction. *Com. v. Briggs*, 7 Pick. 177, 5 Pick. 429.

Proof of the identity of the offender with the person named in the record of prior conviction is necessary, although the statutes provide that the conviction must be proved by certified copy. *Reg. v. Leng*, 1 Fost. & F. 77.

See also *supra*, II., as to admissions.

Evidence from which a jury may draw the conclusion that defendant is the same person named in a certificate of conviction is sufficient, although no witness saw him convicted at his trial. Thus, it was held sufficient where the evidence showed that the prisoner was committed under a warrant which corresponded with the certificate of conviction in respect to offense, date, etc. *Ibid*.

The fact that the term for which a person was sentenced on a previous conviction has expired is sufficient evidence to go to the jury as to his being discharged of that conviction. *Johnson v. People*, 65 Barb. 342.

The sufficiency of the authentication of a record of a prior conviction to permit its use in evidence is not considered in this note.

An indictment charging a prior conviction in another state, found without any evidence before the grand jury of the identity of the defendant, was quashed in *People v. Price*, 6 N. Y. Crim. Rep. 144.

5. *Attacking validity of prior conviction.*

A former conviction which is merely erroneous but not a nullity, and which could be set up in bar of another indictment for the same offense, is sufficient to sustain the imposition of an enhanced penalty on subsequent conviction, under the Illinois statute, of a second offense. *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184.

To similar effect, it is held in Massachusetts that the regularity of former judgments of conviction cannot be inquired into on the trial of an information for additional punishment for a subsequent offense. *Hopkins v. Com.* 3 Met. 460; *Wilde v. Com.* 2 Met. 408.

A sentence to additional punishment on an information setting forth three previous convictions and sentences is not invalid because one of those sentences was erroneous and has been reversed, if the other two were valid, where the statute requires only two previous convictions as the basis of the enhanced punishment. *Newton v. Com.* 8 Met. 585.

But a conviction of a second offense was held wrong in *Rex v. Allen*, Russ. & H. C. C. 513, where the counsel for the prisoner objected; first, that the indictment did not state that the prisoner was duly convicted; second, that he was not duly convicted because the conviction was not in the proper county; and third, that there was a fatal variance because it stated a conviction of the defendant whereas it was a conviction of four persons. It does not appear which of these objections was held fatal, except by a footnote in which it is stated that it was probably the second one.

6. *Verdict and judgment.*

Failure to prove a prior conviction alleged in the indictment is not fatal, but the defendant may be
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found guilty of the offense charged as a first offense. *Palmer v. People*, 5 Hill, 427.

Although not involved in the questions presented on the appeal, it is said in *Maguire v. State*, 47 Md. 486, that it may not be improper for the court to notice "that as the verdict appears to have been guilty generally without anything more the judgment to be entered on it can only be as for a first offense."

The imposition of a sentence greater than can be imposed for a first offense is erroneous, where the record does not show whether the present offense is the first one or not. *Walters v. State*, 5 Iowa, 507.

A verdict of "guilty" simply does not sufficiently find that the defendant had also been previously convicted as alleged in the indictment. *Thomas v. Com.* 22 Gratt. 912.

A general finding of guilty and fixing punishment at confinement for life, which could only be done in case of former convictions, is not sufficient without finding the fact of the former convictions, where the statute provides that the increased penalty shall not be given "unless the jury shall find from record and other competent evidence the fact of former convictions. *Rector v. Com.* 80 Ky. 468.

A verdict that defendant was guilty of uttering counterfeit coin, but finding against the fact of a former conviction, will not sustain a conviction of the misdemeanor of uttering where the prisoner was indicted under 24 & 25 Vict. chap. 90, § 12, for the felony of uttering counterfeit coin after previous conviction for a like offense. The court says the offense is a compound one, and the previous conviction is a part of and a necessary ingredient in it. *Queen v. Thomas*, L. R. 3 Q. C. 141, 13 Cox, C. C. 62.

A consolidated judgment against a defendant as a common and notorious thief is required by Mass. Rev. Stat. chap. 120, § 19, when a person is convicted of three distinct larcenies at the same term of court. Separate judgments on the separate convictions in such case are erroneous. *Haggett v. Com.* 3 Met. 457.

On overruling a demurrer to an information for additional punishment of a convict because of a prior conviction judgments in chief may be rendered without a *respondet oster*. *Evans v. Com.* 8 Met. 453.

A *nolle prosequi* as to the matter in aggravation of an offense by reason of a former conviction is held to be properly entered after a conviction on the whole indictment. *Com. v. Briggs*, 7 Pick. 177, 5 Pick. 429.

The omission of additional punishment from a sentence does not render the judgment erroneous, although the prior convictions were alleged and proved. *Phillips v. Com.* 8 Met. 588.

But the imposition of the maximum penalty is imperative, and not discretionary with the court, under N. Y. Penal Code, § 683. *People v. Raymond*, 96 N. Y. 88, *Affirming* 22 Hun, 123.

So is the life sentence, under Ky. Gen. Stat. chap. 29, art. 1, § 12, for a third conviction. *Combs v. Com.* 14 Ky. L. Rep. 244, as to which, see further, *supra*, II. a.

The double penalty for second conviction under that statute, is the minimum, but the jury may make it more than double. *Chenoweth v. Com.* 11 Ky. L. Rep. 561, 12 Crim. L. Mag. 234.

The prisoner cannot complain that the jury does not take into consideration his previous conviction if proved under an indictment charging such prior conviction. *Vincent v. People*, 5 Park. Crim. Rep. 88.

A sentence which is right as for a second conviction

act cannot be regarded as *ex post facto*. It was stated in *Re Canfield*, 98 Mich. 648, that "this is not a case where the law has authorized the imposition of an increased penalty for a second offense, but one where a certain class of offenders are denied the benefits of a certain rule, made for the maintenance of good order in the prison." We think it competent for the legislature to establish such a rule, and that it is not *ex post facto* legislation. See *Cooley*,

Const. Lim. 6th ed. 327; *Ross's Case*, 2 Pick. 165; *Com. v. Phillips*, 11 Pick. 27; *Plumbly v. Com.* 2 Met. 413; *Com. v. Marchand*, 155 Mass. 8; *Ex parte Gutierrez*, 45 Cal. 429; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *Blackburn v. State*, 50 Ohio St. 428; *Com. v. Graves*, 155 Mass. 163, 16 L. R. A. 256
The petitioner is remanded.

The other Justices concur.

tion which is proved will not be reversed because the court may have supposed the statutes regarded it as for a third conviction. *Ex parte Stevens*, 14 Pick. 94.

7. Appeal or writ of error.

Proof of a prior conviction to enhance the punishment cannot be received for the first time in the supreme court on appeal. *State v. Haynes*, 35 Vt. 570.

From a judgment of conviction under an information filed to have additional punishment imposed because of a prior conviction a writ of error will lie. *Wilde v. Com.* 2 Met. 408.

The remedy to reverse a judgment rendered on an information to impose additional punishment because of a prior conviction is by writ of error and not by certiorari, since the proceeding upon the information is according to the course of the common law. *Re Cooke*, 15 Pick. 234.

A defendant punishable because of the three convictions by imprisonment at hard labor for a term not exceeding twenty years, is entitled to appeal under a provision allowing an appeal from such a sentence for a term exceeding five years, although there would be no right of appeal from a conviction for a single offense. *Com. v. Tuck*, 20 Pick. 356.

Failure to prove on the trial that the prisoner had been discharged from a previous conviction, or pardoned, although necessary under the statute, is not available as an objection if the question is raised for the first time on appeal. *Johnson v. People*, 55 N. Y. 512.

A defendant cannot on appeal object that there was no proof of his identity with the person convicted in a prior case, where the exceptions do not show whether there was or was not such proof on the trial, or that any such objection was then made. *State v. Regan*, 68 Me. 127. B. A. R.

NEW YORK COURT OF APPEALS.

JOHN F. RATHBONE *et al.*, *Respts.*,

v.

Jacob WIRTH, Jr., *et al.*, Impleaded, etc.,
Appts.

(150 N. Y. 459.)

1. The power to designate the local authority who shall appoint local officers, conferred on the legislature by Const. art. 10, § 2, if the election or appointment of such officers is not provided for by that Constitution, does not authorize the enactment of Laws 1896, chap. 427, providing that the police board of the city of Albany shall consist of four commissioners, of whom two shall belong to the political party having the highest representation in the common council, and the other two to the party having the next highest representation therein, and that each member of the council shall be entitled to vote for only two of such officers, since the minority which is thus given power to appoint two of the commissioners is not a city authority within the meaning of the Constitution.

2. The right of local self-government is violated by Laws 1896, chap. 427, which prevents majority rule in the selection of local officers by providing that each member of the common council shall vote for but two of the four police commissioners to be chosen, and that no person shall be eligible to the office who does not belong to the political party having the highest or next

highest representation in the council, and that in case the board cannot agree in continuing in office the present force before a certain date the police force shall cease to exist, except a certain person who was senior captain on a specified day, who shall be chief of police until the board shall agree. [*Per Gray and O'Brien, JJ.*]

3. The unconstitutionality of a provision that each member of a common council may vote for but two of the four commissioners to be chosen, and that only members of the highest and the next highest political party represented in the council shall be eligible, is so essential a part of the scheme of Laws 1896, chap. 427, the main purpose of which was to secure a bipartisan police board, that the whole act must fall.

4. A statute making any person ineligible to appointment as police commissioner who did not belong to the party having the highest or next highest representation in the common council, which must appoint two from each of those parties, is in violation of Const. art. 1, § 1, declaring that no member of the state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers, and art. 13, § 1, prohibiting any oath, declaration, or test as a qualification for office. [*Per O'Brien, J.*]

(*Bartlett, Martin, and Haight, JJ., dissent.*)

NOTE.—For discrimination between members of political parties in respect to their eligibility to office, see also *State, Holt v. Denny* (Ind.) 4 L. R. A. 65; *Evansville v. State*, *Blend* (Ind.) 4 L. R. A. 93, and *Rogers v. Buffalo* (N. Y.) 9 L. R. A. 579.

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For local self-government, see the Indiana cases above named; also *State, Jameson v. Denny* (Ind.) 4 L. R. A. 79; *Com. v. Plaisted* (Mass.) 2 L. R. A. 142; *State, Terre Haute v. Kolsen* (Ind.) 14 L. R. A. 596; and *Davock v. Moore* (Mich.) 28 L. R. A. 788.

(October 27, 1896.)

APPEAL by certain of the defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Special Term for Albany County in favor of plaintiffs in an action brought to enjoin defendants from proceeding to elect police commissioners in accordance with a state statute which was alleged to be unconstitutional. *Affirmed.*

Statement by Gray, J.:

This action was brought to obtain a judgment which should perpetually restrain the common council of the city of Albany from electing police commissioners in pursuance of the provisions of chapter 427 of the Laws of 1896. The ground of the action is the unconstitutionality of the act, which was passed to amend chapter 77 of the Laws of 1870 and other acts relating to the police department of that city. The 1st section of the present act amends § 8 of the previous act, so as to make it read as follows: "The police board of the city of Albany shall consist of four police commissioners, not more than two of whom shall belong to the same political party or organization, and who shall be chosen and hold office as hereinafter provided. On the 1st Monday after the passage of this act, the common council shall meet at 8 o'clock in the evening in the common council chamber and shall proceed to elect four persons, residents and freeholders in the city, as such police commissioners, and for the purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners. The common council shall not transact any other business until the said four police commissioners are elected. The commissioners so appointed shall hold office as such until the 1st day of February, 1898. During the month of January, 1898, and in each and every second year thereafter, the common council shall meet and proceed in like manner to elect four police commissioners, who shall hold office for two years from the 1st day of February following. If a vacancy shall occur in said board of police commissioners, otherwise than by expiration of term, it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. No person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or the next highest representation in the common council. The commissioners shall receive no compensation for any services performed by them under the provisions of this act." The supreme court, at special term and in the appellate division, has upheld the plaintiffs in their demand for an injunction, and certain of the defendants have appealed to this court.

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Messrs. Arthur L. Andrews and J. Newton Fiero, for appellants:

The judiciary has no power or authority to substitute its views of the wisdom or policy of the statute for that of the legislature, and its functions are confined to the interpretation of the organic law as it stands, and they can consider only its actual provisions and the reasonable implications and inferences to be drawn therefrom.

Cooley, Const. Lim. 6th ed. 204; *People, Smith, v. Fisher*, 24 Wend. 215; *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Wynehamer v. People*, 13 N. Y. 430; *Bank of Chenango v. Brown*, 26 N. Y. 467; *People v. Cannon*, 189 N. Y. 32; *People, McLean, v. Flagg*, 46 N. Y. 401.

Every presumption is in favor of the validity of legislative acts.

People, Rochester, v. Briggs, 50 N. Y. 553; *People v. Gillson*, 109 N. Y. 389; *People, Kemmler, v. Durston*, 119 N. Y. 569, 7 L. R. A. 715; *People, Carter, v. Rice*, 135 N. Y. 478, 16 L. R. A. 886; *People, Henderson, v. Westchester County Supers.* 147 N. Y. 1, 30 L. R. A. 74.

This act is not in conflict with any fundamental principles of our government or with the meaning and intent of the Constitution, either expressed or reasonably to be intended or implied.

A police officer is an officer of the state, and not of the municipality.

Dill. Mun. Corp. 3d ed. § 210.

The method provided for the appointment of police commissioners does not violate Const. § 2, art. 10, since it provides for their appointment by such "authorities" of the city as the legislature has designated for that purpose.

People, Williamson, v. McKinney, 52 N. Y. 375; *People v. Raymond*, 87 N. Y. 428.

The aldermen are collectively a city authority and individually city authorities.

Purdy v. People, 4 Hill, 884; *People, Sherwood, v. State Bd. of Canvassers*, 129 N. Y. 866, 14 L. R. A. 646; *Wood's Case*, 2 Cow. 80, note; *People, Woods, v. Crissey*, 91 N. Y. 616; *People, Angerstein, v. Kenney*, 96 N. Y. 803.

A power for filling vacancies is expressly conferred upon the legislature by the Constitution, and the manner of its exercise is exclusively within the discretion of the legislature.

People, Henderson, v. Snedeker, 14 N. Y. 52; Gen. Corp. Law, § 26; Stock, Corp. Law, § 20.

The act does not violate either § 1 of art. 1, or § 1 of art. 13, of the Constitution. It does not deprive any person of a privilege, nor require any unlawful test as a qualification for office.

People, Bishop, v. Palen, 74 Hun, 292; *People, Furman, v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *Davenport v. New York*, 87 N. Y. 456; *People v. Platt*, 117 N. Y. 159; *Rogers v. Buffalo*, 123 N. Y. 178, 9 L. R. A. 579.

The meaning of the word "test" as used in this provision has been held to be synonymous with oath, and to refer to something required to be done by the appointee to office.

Barker v. People, 20 Johns. 457; *People, Bishop, v. Palen*, *supra*; *Re Wortman*, 22 Abb. N. C. 137; *Rogers v. Buffalo*, 123 N. Y. 181, 9 L. R. A. 579; *People, Grinnell, v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *People, Van*

Wyck, v. Wheeler, 18 Hun. 540; *Patterson v. Barlow*, 60 Pa. 54; *People, LeRoy, v. Hurlbut*, 24 Mich. 76, 9 Am. Rep. 108.

Abundant reasons may be given to justify the legislature in the organization of bi-partisan boards, a power which it has exercised for many years.

People, LeRoy, v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 108.

The legislature having the power to create the office of police commissioner and to provide that it should be appointive has the right to limit the number from whom the selection should be made.

People, McMullen, v. Shepard, 86 N. Y. 285; *People, Furman, v. Clute*, 50 N. Y. 459, 10 Am. Rep. 508; *Dill. Mun. Corp.* 8d ed. § 87; *People v. Morris*, 18 Wend. 825; *Billings v. New York*, 68 N. Y. 418; *Demarest v. New York*, 74 N. Y. 161.

The practical construction of the Constitution given by the legislature and acquiesced in and acted upon by the executive and administrative departments of the government accords with the appellant's contention.

People, Williams, v. Davton, 55 N. Y. 867; *People v. Home Ins. Co.* 92 N. Y. 837; *People, Hinsfeld, v. Murray*, 149 N. Y. 867, 83 L. R. A. 844.

The objectionable clauses are not essential or necessary to the plan and scope of the act, and can be stricken from it as null and void without in any way affecting the right of the common council to elect police commissioners.

People, Townsend, v. Porter, 90 N. Y. 68; *Jones v. Jones*, 104 N. Y. 234; *New York v. Manhattan R. Co.* 143 N. Y. 1; *Hennessey v. Volkening*, 80 Abb. N. C. 100; *Duryee v. New York*, 96 N. Y. 477; *People, Angerstein, v. Kenney*, 96 N. Y. 294; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 184; *People, Murphy, v. Kelly*, 75 N. Y. 489; *Re Middletown*, 82 N. Y. 196; *Gordon v. Cornes*, 47 N. Y. 617; *People, Fowler, v. Bull*, 46 N. Y. 69, 7 Am. Rep. 302; *Re New York & L. I. Bridge Co. v. Smith*, 143 N. Y. 540; *People, Rochester, v. Briggs*, 50 N. Y. 553; *Fishkill v. Fishkill & B. Pl. Road Co.* 22 Barb. 642; *People v. O'Brien*, 88 N. Y. 193; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 831; *Com. v. Hitchings*, 5 Gray. 482; *Sedgw. Stat. & Const. L.* 418; *State v. Wheeler*, 25 Conn. 290; *Duer v. Small*, 17 How. Pr. 205; *Bank of Hamilton v. Dudley*, 27 U. S. 2 Pet. 526, 7 L. ed. 508; *Com. v. Kimball*, 24 Pick. 862, 85 Am. Dec. 826; *Maize v. State*, 4 Ind. 342; *Willard v. People*, 5 Ill. 461; *Hagerstown v. Dechert*, 32 Md. 369; *Beagan v. Farmers' Loan & T. Co.* 154 U. S. 862, 38 L. ed. 1014; *Allen v. Louisiana*, 108 U. S. 80, 26 L. ed. 818; *People, Wood, v. Draper*, 15 N. Y. 546; *People, McMullen, v. Shepard*, 86 N. Y. 290; *Sweet v. Syracuse*, 129 N. Y. 316; *People, Henderson, v. Westchester County Supers.* 147 N. Y. 16, 30 L. R. A. 74; *People, Kemmler, v. Dureton*, 119 N. Y. 577, 7 L. R. A. 715.

The provisions for the appointment of commissioners being valid, the other provisions contained in the statute to which objection is made are not for consideration in this action.

Re Hathaway's Will, 71 N. Y. 238; *People v. Duane*, 121 N. Y. 875; *United States v. Germaine*, 99 U. S. 508, 25 L. ed. 482; *People, Henderson, v. Snedaker*, 14 N. Y. 59; *People*, 84 L. R. A.

Ryan, v. Civil Service Supervisory & E. Boards, 41 Hun. 287.

The provision legislating out the police force is not unconstitutional.

Smith v. New York, 37 N. Y. 516; *Long v. New York*, 81 N. Y. 425; *People, Gere, v. Whitlock*, 92 N. Y. 191; *People, Thornton, v. Hogan*, 14 Misc. 48.

Messrs. E. Countryman and Hale, Bulkeley, & Tennant, for respondents:

The provisions of the amendatory act contravene the Constitution of the state in so far as they render ineligible and disfranchise all citizens who are not "members of the political party or organization having the highest or the next highest representation in the common council."

Barker v. People, 3 Cow. 706, 15 Am. Dec. 322; *Rogers v. Buffalo*, 123 N. Y. 178, 9 L. R. A. 579; *Baltimore v. State Board of Police*, 15 Md. 879, 74 Am. Dec. 572; 19 Am. & Eng. Enc. Law, *Public Officers*, pp. 398, 399; *Louhan v. Com.* 79 Va. 196, 52 Am. Rep. 626; *Rawle, Const.* 2d ed. 164.

These provisions of the amendatory act are also in contravention of the constitutional provision prohibiting any other oath, declaration, or test than the constitutional oath of office as a qualification for any office of public trust.

People, Le Roy, v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen. v. Detroit*, 68 Mich. 218, 55 Am. Rep. 675; *Evansville v. State*, *Blend*, 118 Ind. 426, 4 L. R. A. 98.

No member of the state shall be disfranchised or deprived of any right or privilege unless the matter shall be adjudged against him on trial had according to the course of the common law.

Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; *White v. White*, 5 Barb. 474; *People, Mathews, v. Toynbee*, 20 Barb. 168; *Wynchamer v. People*, 18 N. Y. 378.

A legislative enactment is not necessarily the law of the land.

Cooley, Const. Lim. 4th ed. 354, 438; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 269; 2 Story, *Const.* §§ 1948-1945; *Rockwell v. Nearing*, 85 N. Y. 302.

The essential purpose of the amendatory act is the reorganization of the police force upon the basis of a commission created and organized to perpetuate partizanship and prevent home rule.

Where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part.

Lawton v. Steele, 119 N. Y. 236, 7 L. R. A. 184; *People, Townsend, v. Porter*, 90 N. Y. 68; *Jones v. Jones*, 104 N. Y. 234.

The statute in question is violative of State Const. art. 10, § 2.

People, Wood, v. Draper, 15 N. Y. 532; *People, Jackson, v. Potter*, 47 N. Y. 875; *People v. Rathbone*, 145 N. Y. 484, 28 L. R. A. 884.

Since the Constitution has made no provision for the election or appointment of police commissioners and other officers of the Albany police department whose offices were existent at the time of its adoption, such officers can only

be chosen or appointed by the "authorities" of the city of Albany.

People, Bolton, v. Albertson, 55 N. Y. 50; *People, Williamson, v. McKinney*, 52 N. Y. 874; *People, Townsend, v. Porter, supra*; *People v. Pinckney*, 32 N. Y. 377; *People, McCune, v. Board of Police*, 19 N. Y. 188; *People, Wood, v. Draper, supra*.

The common council of the city of Albany is a body composed of nineteen aldermen elected by the people in the several wards of the city, and can act only as a body at a meeting regularly called or appointed and by a majority of its quorum.

Laws 1883, chap. 298, title 3, §§ 2, 7; *People, Washington, v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 821; *Ex parte Willcocks*, 7 Cow. 402, 17 Am. Dec. 525; *Cincinnati, H. & D. R. Co. v. McKeen*, 149 U. S. 259, 37 L. ed. 725.

Wherever the Constitution has unqualifiedly conferred the power of appointment to office upon any tribunal, body, or authority, or has authorized the legislature to confer such power without qualification, on any tribunal, body, or authority, any attempt by the legislature (1) to authorize the exercise of such power by a part only of the members composing such tribunal, body, or authority, or (2) to control, limit, embarrass, or trammel such tribunal, body, or authority in the exercise of such power, is unconstitutional and void.

Warner v. People, Conner, 2 Denio, 272, 43 Am. Dec. 740; *People, Williamson, v. McKinney, supra*; *Menges v. Albany*, 47 How. Pr. 244; *Id.* 56 N. Y. 874; *People, Killen, v. Angle*, 109 N. Y. 564; *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *Olapp v. Ely*, 27 N. J. L. 622.

In construing the language of a Constitution arguments *ab inconvenienti* cannot be listened to for the purpose of enlarging or contracting its import.

People v. Morrell, 21 Wend. 568; *Newell v. People, Phelps*, 7 N. Y. 1; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 188, 6 L. ed. 68; *People v. Rathbone*, 145 N. Y. 434, 28 L. R. A. 894.

The provision in this statute appointing in a certain contingency the person who was senior captain on January 1, 1896, to the office of acting chief of police, and giving him power to appoint or assign to duty the entire police force of the city of Albany, is clearly unconstitutional and void.

Stuart v. Palmer, 74 N. Y. 188, 30 Am. Rep. 289; *Cox v. State*, 144 N. Y. 896; *Gilman v. Tucker*, 128 N. Y. 190, 18 L. R. A. 804; *Throop, Pub. Off. § 10*; *People v. Rathbone, supra*; *Re Hathaway's Will*, 71 N. Y. 288; *United States v. Germaine*, 99 U. S. 506, 25 L. ed. 482; *Collins v. New York*, 8 Hun, 680; *State, Yancey, v. Hyde*, 121 Ind. 20.

The doctrine of practical construction of the constitutional provisions here in question has no application to this case, and is unavailing to the appellants.

People, Williams, v. Dayton, 55 N. Y. 367; *People v. Home Ins. Co.* 92 N. Y. 337; *People, Einsfeld v. Murray*, 149 N. Y. 367, 32 L. R. A. 344.

The main object of the statute in question being unconstitutional, and the other provisions being connected therewith, all parts of a sin-

gle scheme, permeating the entire act, the whole fails, and it cannot be adjudged good in part and void in part. It must stand or fall together.

People, Rochester, v. Briggs, 50 N. Y. 558; *People, Angerstein, v. Kenney*, 96 N. Y. 294; *Re New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540; *Cooley, Const. Lim.* 4th ed. 215; *Sutherland, Stat. Constr.* 281; *People, Townsend, v. Porter*, 90 N. Y. 68; *Jones v. Jones*, 104 N. Y. 234; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Poindezler v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Warren v. Charles-town*, 2 Gray, 99; *Slawson v. Racine*, 18 Wis. 398; *State, Huston, v. Perry County Comrs.* 5 Ohio St. 507; *Allen County Comrs. v. Silvers*, 22 Ind. 491.

Gray, J., delivered the opinion of the court:

The learned justices who, at the special term and in the appellate division, have expressed their views of the unconstitutionality of this act, have done so with such thoroughness as to leave but little to be added to this very important discussion. Mr. Justice Parker, at special term, rested his determination of the question upon the ground that the act violates § 1 of art. 1 and § 1 of art. 18 of the state Constitution; the former of which declares that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers;" and the second of which declares that "no other oath, declaration, or test shall be required as a qualification for any office of public trust" than the oath or affirmation prescribed in the Constitution to be taken. Mr. Justice Herriek, in the appellate division, while expressing his assent to the views which Mr. Justice Parker has so well presented, has devoted the greater part of his opinion to pointing out the respects in which the act is in conflict with § 2 of art. 10 of the Constitution of the state, which requires that "all city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or by some division thereof, or be appointed by such authorities thereof, as the legislature shall designate for that purpose." In this view the majority of the learned justices of the appellate division have been able to concur. The discussion of the question exhibits a critical examination of many authorities, and its statement of the general principles which underlie our popular form of government and which recognize the existence of a right in the people of the various political subdivisions of the state to self-government, without hindrance from the state government as to the right of choosing or appointing local officers, should command our acquiescence. Without denying force to the objection that such legislation violates the spirit, if not the letter, of the constitutional inhibition against the requirement of any other test than is prescribed, I think the main and the insuperable objection consists in the plain attempt to limit or to control the exercise of a power of appointment which the Constitution has unqualifiedly conferred upon the local authority

to be designated. If that be true, there is no occasion to consider other objectionable features, for the question then presented becomes one of surpassing importance to the citizens of the state. The constitutional provision, I repeat, is that "all city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall . . . be appointed by such authorities thereof, as the legislature shall designate for that purpose." It is, of course, evident that the provision authorizes the legislature to confer the power of appointment upon any local authority; but that the power, which is to be thus conferred, may be qualified, or hampered in its exercise, by the legislature, is not only not evident, but such a proposition, in my opinion, threatens what we are bound to regard as a cardinal principle of our form of government. I refer to the right of local self-government; a right which inheres in a republican government, and with reference to which our Constitution was framed. The habit of local self-government is something which we took over, or rather continued from, the English system of government, and, as Judge Cooley has remarked with reference to the Constitutions of the states, "if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view." Const. Lim. *35. The principle is one which it takes but little reflection to convince the mind of being fundamental in our governmental system, and as contributing strength to the national life, in its educational and formative effect upon the citizen. It means that in the local or political subdivisions of the state the people of the locality shall administer their own local affairs, to the extent that that right is not restricted by some constitutional provision. I do not think it can be seriously disputed that the conception of the state is free from the element that it belongs to it to control purely local affairs, and that state interference finds justification only when state policy or local abuses demand it. I think that no inference is warranted that other powers have been conferred by the people upon their legislative body than those which are mentioned in the Constitution, or which are necessary to carry into effect those which are expressly given.

In this clause of the Constitution under consideration we find the express reservation of the right of local self-government. The legislature is expressly authorized to designate the local authority, who shall appoint the local officers, and it is impliedly prohibited from doing more than that, or from placing limitations upon this power of appointment. As it was said in *People, Wood, v. Draper*, 15 N. Y. 544: "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision." When, therefore, we read in the act under consideration that "no person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest, or the next highest, representation in the common council," we must perceive a very clear violation of the Constitution. A right which is an accompaniment of our polit-

ical institutions, which is expressly recognized as such by the Constitution, and the permanency of which is guaranteed therein, is deliberately trenching upon by the legislative body. What becomes of the right of the majority of the people in a locality to manage their own affairs, and to appoint their local officers, when that majority can have no advantage in the Constitution of the board by numbers, or when the choice is limited to the members of a designated class? Is it not clear that the legislature has assumed to add to the power to designate the appointing authorities of the municipality the further power to designate the particular persons from whom the appointments must be made, and, still further, to place the minority upon an equality with the majority? This is too evident an excess of power to be explained away, or to be excused upon the ground of a political expediency. It is not too much to say of it that it is an attack upon one of those fundamental forms of personal liberty against which the constitutional provision was intended to act as a safeguard. I think it to be as opposed to a safe state policy as to the very letter of the Constitution.

It ought not to require much of argument to show the importance of this clause in our Constitution, or what its presence means for our political institutions. Its very presence in the Constitution of the state since 1846 evidences the importance which the people attach to the preservation of this right in the management of their local affairs. It means the right to choose their local officers, in all its reality, or it means nothing. If it does not mean that the people have reserved the right of administering existing local offices by officers of their own choosing, whether it be done directly, through an election, or indirectly, through the method of an appointment by some of their local authorities, I am at a loss to understand its significance or in what consists its peculiar value. This clause was inserted in the Constitution of 1846, and it has been, not infrequently, considered by this court. In *People, Williamson, v. McKinney*, 52 N. Y. 374, the present chief judge of this court then said of it: "The obvious purpose of the provision of the Constitution which has been quoted was to secure to the people of the cities, towns, or villages of the state the right to have their local offices administered by officers selected by themselves." Later, in *People, Bolton, v. Albertson*, 55 N. Y. 50, Judge Allen spoke to the same effect, and used the following language: "Faithfully observed, and effect given to it in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers, without let or hindrance from the state government, and none can be deprived of the rights and franchises thus guaranteed to all. The theory of the Constitution is that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined. This right of self government lies at the foundation of our institutions, and cannot be disturbed or inter-

ferred with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned; especially by the courts, when such acts become the subject of judicial investigation." This is strong and significant language. Read in its light, the provision of the act under consideration appears as legislation hostile to that freedom of action which the people of Albany have the right to claim, under the Constitution, in the management of their own affairs. It cannot be denied that legislation of this character has an inimical tendency, and, unless the check of the Constitution is strictly enforced by the courts, it may develop a germ of menace to local self-government, to the presence of which we should not suffer ourselves to be blinded by any partisan considerations; or until it becomes too late to extirpate it. I believe the principle to be too useful and too healthful a part of our governmental system to be denied its full effect, and, while it is recognized in the fundamental law of the state, the court should not be reluctant to enforce it whenever a case fairly involving its efficacy is presented. The judicial power was intended to stand as a bulwark against all legislation which impairs any of the constitutional guaranties. The legislative power of the state is vested in the legislature, and it is plenary with respect to the state at large, or to any portion thereof, in matters of government, except as restricted by the Constitution. But the people not only have not consented that the legislative power shall include the power to control their selection of local officers; but, fearing to trust the discretion of the legislature not to assume such a power, they have inserted in their Constitution an express restriction. We must not forget that a Constitution is the measure of the rights delegated by the people to their governmental agents, and not of the rights of the people. It apportions the powers of government, with such limitations as are appropriate to keep their exercise clearly defined. The judicial power can and should pronounce null all laws which contravene its provisions,—a feature of our governmental system which De Tocqueville declared to be "one of the strongest barriers ever devised against the tyrannies of political assemblies." Vol. 1, p. 129. The remarks of Judge Denio, in *People, Wood, v. Draper*, 15 N. Y. at page 537, where § 2 of art. 10 was under consideration, may be quoted in connection with our application of this section: "We must keep in mind that the Constitution was not framed for a people entering into a political society for the first time, but for a community already organized and furnished with legal and political institutions adapted to all or nearly all the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the Constitution then framed."

Having in mind this principle of local self-government, as an inherited and pronounced feature in the general governmental system, let us turn to the statute in question, and, more

particularly, consider the provisions of the 1st section. What was it intended to do, and what will it do, if allowed effect? What are its spirit and its purpose? for we must consider them in determining whether the legislative intent may be effectuated. It was passed as an amendatory act, affecting chapter 77 of the Laws of 1870, and the acts supplemental thereto, which related to the police department of the city of Albany. At the time of its passage the board of police commissioners consisted of five persons, *vis.*, of the mayor *ex officio* and of four persons whom he might appoint. The present statute provided for a board of only four commissioners, "not more than two of whom shall belong to the same political party," who shall be chosen or elected at a prescribed meeting of the common council, and "for the purpose of such meeting the members attending shall constitute a quorum." Each member of the council is restricted in his vote to two persons, and "no person is eligible to the office . . . unless, at the time of his election he is a member of the political party or organization having the highest or the next highest representation in the common council." If a vacancy occur in the board, "it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council, belonging to the same political party or organization as the police commissioner whose office shall become vacant." These provisions are very radical and peculiar in their character. Whereas, under existing statutes, the mayor was designated as the appointing authority, unfettered in his choice of men, and in the board which would result, a majority could always act, the legislature, by this act, has undertaken to designate an appointing authority whose appointees should only be taken from, and equally divided between, the two political parties dominant in the common council upon a certain date, and provision is made that that order of things should not be disturbed in the filling of any vacancy which might arise later. Then, again, instead of leaving the designated local authority to act in its regular or chartered way, provision is made for its action in ways unsanctioned by custom, or by other law than the act itself provides. The purpose of the act was to change the *personnel* of the board, and taking the appointments from the executive power of the city, to place them with its legislative power, under such restrictions as to choice as to compose a body of four commissioners, equally divided among two sufficiently well-defined political organizations. The spirit of the legislative act is manifested by the attempt to secure the appointment of such a board at the time fixed therein, by constituting an arbitrary quorum of the body out of any number of members attending. It may also be remarked, as illustrating the spirit of an act which provides for a board whose action may be blocked by a division of the members, that in § 4 provision is made for the discharge upon a certain date of every member of the force from office, "with the exception of the person who was senior captain on January 1, 1896," and, in the event of a failure of the board to appoint a chief of police, "the said senior captain . . . shall act as such," and in case of its failure to appoint the captains and

sergeants, "then it shall be the duty of the chief or acting chief to assign members of the force to perform such duties until the board shall make such appointments." Thus "the person who was senior captain on January 1, 1896," is not only protected and kept in office by this act, but, in the very possible contingency of a tie in the board of commissioners blocking any action, he is invested with extraordinary powers of control. I do not need to comment upon the wisdom or the prudence of the legislative act, for the court is not concerned with that. Its concern ceases when it determines that the legislature has not transcended the limits of its powers, as they are defined in the Constitution of the state. If it has the right to interfere, to the extent that the act proposes, with the local government and concerns of the city of Albany, then we have only to affirm the constitutionality of its proceeding. If it has exceeded its legislative power, we are bound to say so, and to declare its act null, because unconstitutional.

That this statute violates the Constitution in its letter, as in its spirit, seems to me an indisputable proposition. It goes beyond the power to designate the local authority who, under the new system, shall appoint police commissioners. It designates the class of persons from whom the selection must be made and excludes all others, and it precludes the majority in the common council from naming the majority of the board. Nor does it confine the designation of an authority to what would be, in fact, such under the charter of the city of Albany; for it attempts to create an appointing body in violation of the provisions of the city charter. At the time of the adoption of the Constitution of 1894 the local authorities of the city of Albany, under its charter, were the mayor as the executive power, and the common council as the legislative power. Laws 1888, chap. 298. The reference, therefore, of the constitutional provision in question was to local authorities as they were constituted by force of existing public laws, for the legal presumption must be that the revisers used those words not only intelligently, but with knowledge of the forms of municipal government and of the rules which guide executive and administrative action. The legislature was, consequently, clearly restricted, in its designation of an appointing authority, to what was a local authority within the meaning of the public laws; and in determining upon the common council it could not go further and reform or reconstitute its powers as a municipal agent or authority, by this indirect method. Power was not vested in any one member of the common council, but in the aggregate of the members who compose the body, and its action is the action of the body as a whole. *United States v. Balkin*, 144 U. S. 1, 86 L. ed. 821. To act validly, the vote of a majority of the members was required, both at common law and under the charter. *Ex parte Wilcocks*, 7 Cow. 402, 17 Am. Dec. 525; Laws 1888, chap. 298, title 8. One alderman, or member of the common council, or a group of members, or anything short of what is required by the charter to constitute a valid meeting of the board, would not be a local authority, competent to perform an act of municipal government. The legisla-

tive power is vested only in the common council, acting by a majority of the body. The minority was not empowered to bind the city, and the legislature cannot give it that power. The provision, therefore, for a quorum, to consist of any number of attending members, is clearly in conflict with the Constitution. In passing upon the validity of an act, we are to consider what is possible and what may be done under its authority, and the vice of the one before us is that it affects the common council's power to act, as designed and created by law to act,—that is to say, through the majority of its members; and it authorizes, in a certain contingency, something less or other than that local authority to act. The legislature could not, constitutionally, deprive the municipal authority, selected for the purpose, of the power to exercise its functions as prescribed by the law of its being,—an indisputable proposition with respect to a law which purports not to amend a municipal charter, but to confer some new power upon a municipal authority. We are not confronted here with any question of "minority representation." That is not the purpose of the act. It places the political minority in the legislative body upon an equality with the political majority, and in that feature consists the violation of that fundamental principle of our popular form of government, which demands that the majority shall govern. The principle of minority representation recognizes the right in the majority to control. It must be the majority who shall appoint the officers of government, and this extends more clearly to the governmental officers of localities, perhaps, than to the affairs of the state government. Mr. Justice Herrick refers to the only instance of the surrender by the people of the power of the majority to select their officers as being found in the constitutional provision for the passage of a law securing equal representation among the election officers of the two political parties which at the next preceding general election cast the highest and the next highest number of votes (§ 6, art. 2), and he appropriately observes that "the provision for such equal representation in the one case, by implication excludes it in all others." He reinforced his observation by a reference to the constitutional debates, which resulted in the defeat of propositions authorizing the legislature to provide for minority representation in city governments.

I will refer to two cases which are deemed to bear upon the discussion of this case. In *Rogers v. Buffalo*, 128 N. Y. 178, 9 L. R. A. 579, the law provided, as to a board of three civil service commissioners there in question, that "not more than two of whom shall be adherents of the same political party." It was held that "nothing in this statute compels the appointment of even one member of any political party. It simply prevents the appointment of more than two from such party." Commenting upon the case of *Atty. Gen. v. Detroit*, 58 Mich. 218, 55 Am. Rep. 675, where the provision was for the appointment of two election inspectors from each of the two leading political parties, Peckham, J., said: "The law recognized but two political parties, and made it a necessity for the appointments to be made

from and confined to members of those parties. An individual not a member of either was not eligible to appointment. In the case before us there is not a citizen in the state, otherwise capable, who would not be eligible in the first instance to one of these appointments. . . . There is no provision making it necessary to appoint two from the same party, or making it necessary to appoint someone who has been known up to that time as a member of any particular party." Again he says: "The purpose of the statute . . . is not to arbitrarily exclude any citizen of the state, but to provide that there shall be more than one party or interest represented." The opinion in the *Rogers Case* seems very strongly to support the view that the act in question now violates the Constitution. The case of *People, Woods, v. Crissey*, 91 N. Y. 616, cannot be deemed to confuse the present discussion. The act confined the vote of each alderman for police commissioners to one of the two to be chosen, so that the minority would be sure to elect one. The common council had already acted upon the appointments and the court refused to pass upon the restriction in the act. Finch, J., observed, in that connection: "If we assume this provision to be unconstitutional, it was a nullity. . . . They [the common council] are presumed to have known the law, and had an official legal adviser. . . . They must be held then to have voted without restraint." In the case at bar, however, the appointments remain to be made, and the answers either admit that the defendants intended to comply with the provisions of the act or are silent as to the allegations of the complaint with respect to what is proposed to be done in obedience to the provisions of the act.

I perceive no force in the argument that there has been a practical construction of the Constitution given by the legislature, and acquiesced in and acted upon by the executive and administrative departments of the government. The question here is purely one of law: Is the constitutional provision referred to violated by this statute? Is the passage of such a law authorized by the Constitution? Practical construction of a law is usually accorded force when it relates to the business conducted by the departments of the state government, and when the legislation depended upon to establish it has been clear and uniform in character for a long period of years. But, to use Judge Cooley's language, "acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it." The question before us is not one of legislative policy in relation to the business of state government. It is whether the legislature has the power to interfere with the local concerns of a municipality, and by arbitrary methods to prevent majority rule in the selection of local officers. In the presence of the constitutional provision, is it not an assumption of a power, neither expressly granted nor to be implied? The question is no less than this: Having a written Constitution, shall we, and may we, disregard one of its commands, and, though the court is set as the people's bulwark against legislation which contravenes constitutional provisions,

shall it aid the legislature when overstepping the limits assigned to its action? We cannot dispose of the question as one of legislative discretion; for, if we construe away such an express provision, upon however so plausible a theory, we open the door to future attacks upon the fundamental law, which underlies the structure of the state.

It is argued, however, that the objectionable clauses can be stricken out as null and void, and that the statute may remain valid to the extent of conferring power on the common council to appoint police commissioners. I do not see how that may be done, within any correct or salutary application of a rule which is frequently resorted to to uphold the acts of the legislative department of government. It is only applicable where not only that which is vicious in the law is so distinct as to permit of being severed from the rest, but where, the severance being made, enough remains to effectuate the object which the legislature had in view. It will not do, to save legislative enactments from annulment, to strike out provisions which so clearly express the intention of the legislature as to characterize the purpose of the act, and make their presence essential to the existence of the statute. Judge Cooley, in his work on *Constitutional Limitations* (*178), has so well expressed himself on this point that I will repeat his words: "If its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." This case falls within the class of cases thus referred to. This is not a new scheme for the creation of a municipal body of police commissioners. This statute was intended to amend the existing law upon the subject of a police commission, and it is perfectly plain, upon its reading, that what was aimed at was to remove from office the present four commissioners and all of their subordinates, except "the person who was senior captain on January 1, 1896," and to compel the substitution, as commissioners, of four persons, who would be representatives of two certain political organizations. If we eliminate the prescribed methods for the accomplishment of this purpose, we emasculate the legislative act, and it cannot seriously be contended that then there would remain any such law as was intended to be enacted by the legislature. In the performance of the duty of endeavoring to uphold the validity of a legislative act the court may not carve out from its provisions such as would make a law, to which the judicial approval might be given, unless the law then be such as can be deemed to have been within the contemplation of the legislature. In other words, the court is not to make a law for the people, but to uphold one which its representatives have enacted; and its duty in

that direction, where provisions are found which are antagonistic to any of the constitutional guaranties, is to see if by their excision the main object of the enactment can be preserved. If that object constitutes an evident interference with constitutional rights, if it can only be effectuated through unconstitutional provisions, then the court can do nothing, and must pronounce its condemnation of the statute as a whole. The recent case of *Re New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, furnishes an illustration. There the act was in amendment of various acts, the original of which provided for a single scheme to construct a bridge over the East river. The act, however, contained many provisions of an extraordinary nature, and foreign to that single purpose, which empowered the construction of indefinite extensions by way of approaches, connections with railroad companies, and consolidations with other corporations. It was held that these were void provisions, and, under the rule, separable from those which were lawful, and that what remained was capable of being executed as complete in itself. Here, however, one scheme runs through the act, and towards its accomplishment provisions have been enacted which are interdependent, and without which the scheme falls. The very language of the 1st section makes the birth of a new commission to depend upon a definite and prescribed action being taken, and it is not reasonably conceivable that the legislature would ever have passed this statute without its particular mechanism for the formation of a new police commission from the certain political materials allowed to be used. I quote the language of the present chief judge in *Lawton v. Steele*, 119 N. Y., at page 241, 7 L. R. A. 134: "Where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part." The main purpose of this statute was to bring about the appointment of a new police commission in such a way as that its body will be equally composed from two certain political elements dominated for the time in the common council. We cannot assume that the legislature would have passed this act except as a whole, and therefore it is our duty, for the reasons assigned, to declare it to be unconstitutional and void.

The judgment appealed from should be affirmed, with costs.

O'Brien, J., concurring:

This action was brought by the plaintiffs, who are residents and taxpayers of the city of Albany, to enjoin the common council of that city from proceeding to execute and carry out a statute passed during the last session of the legislature, which, in effect, removes the present police force from office and provides for the organization of a new one. The act is chapter 427 of the Laws of 1896, and by its title and provisions amends chapter 77 of the Laws of 1870, and also amends or repeals various other statutes relating to the municipal government of that city and to the organization and government of the police force therein.

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It is alleged in the complaint that this act is in conflict with the Constitution of the state, and therefore void, and that proceedings on the part of the common council in execution of its various provisions would be illegal official acts, within the meaning of the statute, which should be enjoined by the courts.

On a trial of the issues at special term the action was sustained, and the judgment there pronounced has been affirmed by the appellate division of the same court. The controversy involves important principles concerning the right of local self government in cities and the individual and political rights of the citizen. These questions always open a very wide field of discussion, the materials for which are to be found in abundance in historical and judicial records. The provisions of our Constitution on these subjects, which it is claimed have been violated in the passage of this act, are, as is well known, but the expression in brief and comprehensive language of general principles of remote origin, the development and recognition of which required centuries of discussion and civil strife before they were adopted here as the fundamental law. Hence, when questions arise for determination concerning their true meaning and interpretation, the nature of the case permits a very wide range of discussion based upon historical facts by means of which principles are traced to their source and origin, and their progress and application marked, from time to time, until finally embodied, as they have been, in our written Constitution.

The particular questions presented by this appeal have been illustrated, both at the bar and in the opinion of the court below, by ample materials drawn from this source. We can add little of any value to what has been said upon this feature of the argument in the decision now under review, and we can safely and properly leave that branch of the discussion where it was placed by the learned judge who spoke for the majority in the court below. Assuming, without further argument, that the leading and fundamental principles there stated with respect to individual rights and local self-government are correct,—and there is very little, if any, dispute in this respect between counsel,—it remains to apply them to the provisions of this bill. What has been frequently called the "political tendency of the Constitution" is not always to be found expressed in words, but is to be derived from acknowledged principles of government that existed long before its adoption, and are to be implied from the general language and evident purpose and scope of particular provisions.

The principal objections to the bill are founded upon the provisions of the 1st section, which amends § 3 of the act of 1870, and reads as follows: "Sec. 3. The police board of the city of Albany shall consist of four police commissioners, not more than two of whom shall belong to the same political party or organization, and who shall be chosen and hold office as hereinafter provided. On the 1st Monday after the passage of this act, the common council will meet at 8 o'clock in the evening in the common council chamber and shall proceed to elect four persons, residents and freeholders in the city as such police commissioners, and for the

purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners. The common council shall not transact any other business until the said four police commissioners are elected. The commissioners so appointed shall hold office as such until the 1st day of February, 1898. During the month of January, 1898, and in each and every second year thereafter, the common council shall meet and proceed in like manner to elect four police commissioners, who shall hold office for two years from the 1st day of February following. If a vacancy shall occur in said board of police commissioners otherwise than by expiration of term, it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. No person is eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or the next highest representation in the common council." There are some other provisions of the act which will be referred to hereafter, but this section is the basis of nearly all the constitutional objections which have been urged against the bill. At the date of its passage, on the 30th of April, 1896, and at the time of the adoption of the present Constitution, and for a long time before, the common council was the regularly organized legislative and governing body of the city, composed of nineteen aldermen, elected from the different wards by the electors. There was then, and had been for many years, a board of police commissioners, composed of the mayor and four citizens, nominated by him and confirmed by the common council, and upon this board the government of the police force devolved. It is clear that it was the purpose of the act in question to abolish this board, and to substitute another in its place, and, as will be seen hereafter, to disband the whole police force, and to create a new one. We are not concerned so much with the justice or wisdom of this legislation as we are with the methods through which it was to be carried into execution. The purpose of the legislature was to be attained through a board of police commissioners to be created under the act, and composed of two members from each of the political parties having the highest and the next highest representation in the common council, and the last clause of the section declares in terms that no citizen outside these two political organizations is eligible to the office.

The first objection urged against the validity of the act is that it violates § 1 of art. 1 of the Constitution, which declares that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers;" and also § 1 of art. 13, prescribing the oath to be taken by all officers, and providing that "no other oath, declaration, or test shall be required as a qualification for any office of public trust." At

the expiration of the term of office of the commissioners created by the act, their places are to be filled by the same process, and, in case of a temporary vacancy, it must be filled by the mayor, upon the written recommendation of a majority of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. It is plain that the legislature has taken every possible precaution to exclude for all time to come any person from holding the office, either for a full term or to fill a temporary vacancy, who is not a member of one of the political parties designated in the act. When the validity of such legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the Constitution. The implied restraints of the Constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law. A written Constitution must be interpreted as the paramount law of the land according to its spirit and the intent of its framers, as indicated by its terms. In this sense it is just as obligatory upon the legislature as upon other departments of the government or upon individual citizens. *People, Bolton, v. Albertson*, 55 N. Y. 50.

When the two sections of the Constitution above referred to are read together, and all are read in the light of the historical events and notorious abuses of power which led to their insertion in the Constitution, it cannot, I think, be doubted that they are broad enough in their terms, and that they were in fact intended, to prevent the enactment of laws proscribing any class of citizens as ineligible to hold office by reason of political opinions or party affiliations. The section of the Constitution last cited comprehends more than a mere prohibition of test oaths, such as are familiar to the student of English history. It deprives the legislature not only of all power to exact any other oath, but also any other declaration or test as a qualification for office. That the statute under consideration does prescribe a political test as a qualification, and makes party adhesion a condition, of holding office, cannot well be denied. It not only, in effect, requires the four commissioners to be divided equally between the two political parties, but in terms brands every other citizen, except those who are members of the two parties, as ineligible to hold the office. The courts of this state have not passed upon the validity of a statute containing a disqualifying clause like the one in question, but principles have been established which plainly lead to the conclusion that such enactments are destructive of local self-government and individual rights. That is plainly the result of the discussion in the case of *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 822, in which the principles embodied in these clauses of the Constitution were stated and explained.

In other states, with constitutional restrictions identical in scope and purpose, statutes containing similar provisions to these now un-

that direction, where provisions are found which are antagonistic to any of the constitutional guaranties, is to see if by their excision the main object of the enactment can be preserved. If that object constitutes an evident interference with constitutional rights, if it can only be effectuated through unconstitutional provisions, then the court can do nothing, and must pronounce its condemnation of the statute as a whole. The recent case of *Re New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, furnishes an illustration. There the act was in amendment of various acts, the original of which provided for a single scheme to construct a bridge over the East river. The act, however, contained many provisions of an extraordinary nature, and foreign to that single purpose, which empowered the construction of indefinite extensions by way of approaches, connections with railroad companies, and consolidations with other corporations. It was held that these were void provisions, and, under the rule, separable from those which were lawful, and that what remained was capable of being executed as complete in itself. Here, however, one scheme runs through the act, and towards its accomplishment provisions have been enacted which are interdependent, and without which the scheme fails. The very language of the 1st section makes the birth of a new commission to depend upon a definite and prescribed action being taken, and it is not reasonably conceivable that the legislature would ever have passed this statute without its particular mechanism for the formation of a new police commission from the certain political materials allowed to be used. I quote the language of the present chief judge in *Lorton v. Steele*, 119 N. Y., at page 241, 7 L. R. A. 134: "Where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part." The main purpose of this statute was to bring about the appointment of a new police commission in such a way as that its body will be equally composed from two certain political elements dominated for the time in the common council. We cannot assume that the legislature would have passed this act except as a whole, and therefore it is our duty, for the reasons assigned, to declare it to be unconstitutional and void.

The judgment appealed from should be affirmed, with costs.

O'Brien, J., concurring:

This action was brought by the plaintiffs, who are residents and taxpayers of the city of Albany, to enjoin the common council of that city from proceeding to execute and carry out a statute passed during the last session of the legislature, which, in effect, removes the present police force from office and provides for the organization of a new one. The act is chapter 427 of the Laws of 1896, and by its title and provisions amends chapter 77 of the Laws of 1870, and also amends or repeals various other statutes relating to the municipal government of that city and to the organization and government of the police force therein.

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It is alleged in the complaint that this act is in conflict with the Constitution of the state, and therefore void, and that proceedings on the part of the common council in execution of its various provisions would be illegal official acts, within the meaning of the statute, which should be enjoined by the courts.

On a trial of the issues at special term the action was sustained, and the judgment there pronounced has been affirmed by the appellate division of the same court. The controversy involves important principles concerning the right of local self government in cities and the individual and political rights of the citizen. These questions always open a very wide field of discussion, the materials for which are to be found in abundance in historical and judicial records. The provisions of our Constitution on these subjects, which it is claimed have been violated in the passage of this act, are, as is well known, but the expression in brief and comprehensive language of general principles of remote origin, the development and recognition of which required centuries of discussion and civil strife before they were adopted here as the fundamental law. Hence, when questions arise for determination concerning their true meaning and interpretation, the nature of the case permits a very wide range of discussion based upon historical facts by means of which principles are traced to their source and origin, and their progress and application marked, from time to time, until finally embodied, as they have been, in our written Constitution.

The particular questions presented by this appeal have been illustrated, both at the bar and in the opinion of the court below, by ample materials drawn from this source. We can add little of any value to what has been said upon this feature of the argument in the decision now under review, and we can safely and properly leave that branch of the discussion where it was placed by the learned judge who spoke for the majority in the court below. Assuming, without further argument, that the leading and fundamental principles there stated with respect to individual rights and local self government are correct,—and there is very little, if any, dispute in this respect between counsel,—it remains to apply them to the provisions of this bill. What has been frequently called the "political tendency of the Constitution" is not always to be found expressed in words, but is to be derived from acknowledged principles of government that existed long before its adoption, and are to be implied from the general language and evident purpose and scope of particular provisions.

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the expiration of the term of office of the commissioners created by the act, their places are to be filled by the same process, and, in case of a temporary vacancy, it must be filled by the mayor, upon the written recommendation of a majority of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. It is plain that the legislature has taken every possible precaution to exclude for all time to come any person from holding the office, either for a full term or to fill a temporary vacancy, who is not a member of one of the political parties designated in the act. When the validity of such legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the Constitution. The implied restraints of the Constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law. A written Constitution must be interpreted as the paramount law of the land according to its spirit and the intent of its framers, as indicated by its terms. In this sense it is just as obligatory upon the legislature as upon other departments of the government or upon individual citizens. *People, Bolton, v. Albertson*, 55 N. Y. 50.

When the two sections of the Constitution above referred to are read together, and all are read in the light of the historical events and notorious abuses of power which led to their insertion in the Constitution, it cannot, I think, be doubted that they are broad enough in their terms, and that they were in fact intended, to prevent the enactment of laws proscribing any class of citizens as ineligible to hold office by reason of political opinions or party affiliations. The section of the Constitution last cited comprehends more than a mere prohibition of test oaths, such as are familiar to the student of English history. It deprives the legislature not only of all power to exact any other oath, but also any other declaration or test as a qualification for office. That the statute under consideration does prescribe a political test as a qualification, and makes party adhesion a condition, of holding office, cannot well be denied. It not only, in effect, requires the four commissioners to be divided equally between the two political parties, but in terms brands every other citizen, except those who are members of the two parties, as ineligible to hold the office. The courts of this state have not passed upon the validity of a statute containing a disqualifying clause like the one in question, but principles have been established which plainly lead to the conclusion that such enactments are destructive of local self-government and individual rights. That is plainly the result of the discussion in the case of *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 822, in which the principles embodied in these clauses of the Constitution were stated and explained.

In other states, with constitutional restrictions identical in scope and purpose, statutes containing similar provisions to these now un-

der consideration were held to be void or inoperative. In the case of *Baltimore v. State, Board of Police*, 15 Md. 379, 74 Am. Dec. 572, the court had under consideration a provision of the city charter relating to the police board, which provided "that no Black Republican or indorser or supporter of the Helper Book shall be appointed to any office under said board." The reasoning of the court in that case sustains the conclusion that the judicial department will not give effect to such disqualifications when interposed by the legislature against the right of any citizen to hold office if conferred upon him by the appointing power. The supreme court of Michigan held that a statute providing that the members of a board should be selected in equal numbers from the two political parties represented in the common council was in conflict with a similar provision of the Constitution of that state in that it disqualified all other citizens from holding the office, and prescribed party adhesion or attachment to certain political opinions as a test for holding office in addition to the constitutional oath. *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen. v. Detroit*, 58 Mich. 218, 55 Am. Rep. 675. The same result was declared by the supreme court of Indiana when considering a statute which required positions in the police and fire departments in cities to be filled by selection from the two leading political parties in these cities. *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93. The vice which the courts found in all these statutes was that they prescribed a test based upon political opinions for appointees to office, and disqualified all whose political views did not conform to such test. In these cases it was fairly shown that legislation of this character is in conflict with the letter and spirit of the constitutional provisions referred to, and with the fundamental principles of free government. They can be safely followed in disposing of the same features in this case.

The legislature of this state has no power to enact a law which proscribes any class of citizens as ineligible to hold public office on account of political belief or party affiliations, and consequently, the last clause of the section of the bill in question violates the provisions of the Constitution referred to, and is void. The learned counsel for the defense contends that this provision, if held to be invalid, may be eliminated from the act, and the remainder permitted to stand; but, when that provision is excised, nothing would remain in the bill to require the appointment of adherents of either of the parties named. There would, indeed, be a prohibition against appointing more than two persons from any political party, but nothing whatever to require the appointees to belong to any party. The common council would then be at liberty to make the selections from that class of independent citizens who were not adherents of any party. This, however, would defeat one of the main purposes of the bill. When the several provisions are carefully read together, it is quite manifest that it was the intention to divide the power of the police department and the police force itself equally between the two political parties designated, and the exclusion

of all other persons as ineligible to be members of the board was a necessary means to the accomplishment of that end. The principle of a division of the board and the whole police force equally between the two parties is so firmly imbedded in the act, and so inseparably connected with all of its provisions, that it cannot be omitted without frustrating the fundamental purpose which was in view. When the statute is so reduced as to permit the common council to constitute the board from independent citizens, not members of either party, it would not only fail to embody the main purpose of its enactment, but it could not reasonably be asserted that the legislature would have passed it at all in that form. The purpose of the legislature to constitute a board of police commissioners and a police force equally divided between two political parties is so closely interwoven with all the provisions of the bill that the disqualifying words at the close of the first section cannot be eliminated without essentially changing the scope and operation of the law, and reducing it to a form in which it could not be said that it would have been originally passed. But the essential and operative provisions of this statute are open to still other constitutional objections, which will now be considered without reference to the clause referred to. If these objections are valid, as we think they are, then, obviously, there would remain no basis whatever for the contention that any material part of the act could be saved.

It is admitted that police commissioners are city officers within the meaning of art. 10 of § 2 of the Constitution, which reads as follows: "All city, town, and village officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." The true interpretation, scope, and meaning of this section of the Constitution have been frequently passed upon by this court, and it has been uniformly held that its obvious purpose was to secure to the people of the cities, towns, and villages of the state the right to have the local offices administered by officers selected by themselves. It was designed to protect and give force and effect to the principle of local self-government, which has always been regarded as fundamental in our political institutions, and to be the very essence of every republican form of government. The local government, even in the smallest division of the state, is the preparatory school in which the citizen acquires the rudiments of self-government, and hence these institutions have been justly regarded as the nurseries of civil liberty. *People, Williamson, v. McKinney*, 53 N. Y. 374; *People, Bolton, v. Albertson*, 55 N. Y. 50; *People, Townsend, v. Porter*, 90 N. Y. 68; *People, Crooks, v. Crooks*, 53 N. Y. 648; *People, Fowler, v. Bull*, 48 N. Y. 57, 7 Am. Rep. 302; *People, Le Roy, v. Foley*, 148 N. Y. 683.

In the case of *People, Bolton, v. Albertson, supra*, the meaning of this provision of the Constitution was stated in the following comprehensive language: "The purpose and object of § 2 of art. 10 of the Constitution, as is very

obvious, was to secure to the several recognized civil and political divisions of the state the right of local self-government, by requiring that all county, city, town, and village officers, whose election or appointment was not provided for by the Constitution, save those whose offices might thereafter be created by law, should be elected by the electors of the respective municipalities, or appointed by such authorities thereof as the legislature should designate. As to offices known and in existence at the time of the adoption of the Constitution, this provision is absolute in its prohibition of an appointment by the central government or its authority, or by anybody other than the local electors, or some local authority designated by law. Faithfully observed, and effect given to it in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers without let or hindrance from the state government, and none can be deprived of the rights and franchises thus guaranteed to all. The theory of the Constitution is that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined. This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation." There can be no doubt that this provision of the Constitution secured to the people of the city of Albany the right of choosing or appointing their own local officers without let or hindrance from the state government. The only power that the legislature had with reference to a board of police commissioners in that city was to provide either for their election by the electors or their appointment by such agencies or authority as the people had selected to administer their local affairs. If the statute now before us, either in form or substance, violates these principles, it cannot and ought not to be upheld. It is conceded that the legislature had no power to appoint the police commissioners, and what it cannot do directly it cannot do indirectly. It cannot extend the term of office of a local officer who has been already elected, for the plain reason that for the extended period of time it is virtually an appointment. A constitutional provision cannot be evaded under color of exercising some other general power which the legislature may possess. In the case at bar the common council was designated as the authority to make the appointment of police commissioners, and so far the legislature acted within its powers. But in making the designation it had no power to so bind and restrict

its action as to make that body a mere instrument of its own will. The right of the people to select their local officers cannot be evaded or disregarded by conferring the power of appointment upon some agency of their own selection, coupled with such conditions and restrictions as to make the choice virtually that of the legislature, and not of the people. It needs no argument to show that the Constitution may, in that way, be as effectually violated as if the officers to be appointed had been named in the bill; and therein lies the vicious principle which, as it seems to me, pervades the act in question. The common council of a city, like every other legislative body composed of individual members, acts in its official capacity as a unit through the vote of the majority. While the power to elect or appoint the four police commissioners under the act in question is nominally conferred upon this body or authority, yet the members are, in terms, prohibited from voting for more than two. There is nothing in the bill to prevent the whole body from voting for the first two candidates presented, but, having so voted, their powers are exhausted, and, acting in the ordinary way, only two members of the board could be elected. But the bill was evidently framed with reference to a known political situation, and for the purpose of producing a particular result. It was known that the members of the common council were divided between the two political parties, a majority belonging to one and a minority to the other. How overwhelming in point of numbers the majority may have been, or how insignificant the minority, we cannot know from the record, nor are we concerned with that question. What is more important is the fact, which plainly appears upon the face of the bill, that the minority, however feeble in point of numbers, are given the power to elect half the commissioners while the majority are given the right to elect the other half, and this division and distribution of power is carefully perpetuated for all future time, by other provisions of the bill. Of course, if such a system can be introduced into all the cities, towns, and villages of the state, local self-government must disappear, and government by the majority in the legislature will be substituted in its place. It would be difficult to suggest a contrivance better calculated to undermine and destroy the spirit of civic freedom than a statute enacted by the central authority conferring powers upon a minority equal to those which can be exercised by the majority.

The question is whether the legislature, while professing to confer power upon the common council to appoint four persons to compose a board of police commissioners, can at the same time and in the same breath empower a minority of the body, whether it be composed of one person or more, to appoint half of them. It would seem to be clear that any attempt on the part of the legislature to divide the appointing power into groups or fragments, each acting independent of the other in such a way as to enable a minority to exercise the same power as the majority, and thus, indirectly, to bring about the same result as the legislature itself would desire if it could act directly, is a violation of the spirit and purpose, if not the letter,

proval. We do not decide or intimate anything against the validity of the laws under which such boards exist. When their particular provisions are questioned, or brought regularly before us, it will then be pertinent to inquire whether there is not sufficient warrant within the pale of the Constitution for their organization and existence.

The construction placed by the legislature upon limitations on its powers expressed in the Constitution, while entitled to respectful consideration, can never, of course, be conclusive. The interpretation of the Constitution is confided to the judicial, and not the legislative, department. But the argument in this case in favor of legislative construction loses much of its force by the circumstance that the recent convention to revise the Constitution framed and inserted in that instrument an entirely new provision for constituting election boards on the bipartisan plan. If the argument now made is sound, this provision was unnecessary. But it can scarcely be supposed that such an able and intelligent body, embracing as it did many of the most eminent members of the bar, introduced, debated, and passed an entirely new provision intended to confer upon the legislature a power which it already possessed. It does not follow, however, that laws which merely require the local appointing power to so constitute boards as to be nonpartisan or bipartisan are in conflict with the Constitution. So long as the people have the benefit of the judgment and discretion of the local authority in making the selection from the citizens, it may not be a fatal objection that they are restricted from selecting all the appointees from the same party. So long as the appointment is in fact as well as in form made by the mayor or common council, as the case may be, and the appointing authority is left free to act in its integrity, the mere fact that they may be prohibited from making the choice from one particular class or political party may not invalidate the statute. There is, we think, a distinction between such a statute and that now under consideration, where the local authority is so divided that its action cannot be said to represent the popular will, but rather the choice of the central authority. In any case where the selections have been made, and the persons selected have qualified and assumed the duties of the office, it may be that their official acts would not be void merely because the power under which they were appointed obeyed a statute open to some constitutional objection, in making the selection of the appointees. It is unnecessary, however, to consider or decide such questions until they are properly before us. All we mean to say is that the condemnation of this statute does not necessarily vacate the places or invalidate the official acts of city officers holding under statutes to which attention has been called, and which it is claimed are identical with that now under consideration. *Curtin v. Barton*, 189 N. Y. 505. We are dealing now with the provisions of the bill before us, and with nothing else. Confining the discussion and examination to that alone, we are compelled to hold that, in the particulars pointed out, it is in conflict with the Constitution.

We were nothing decided in the case of *r. Buffalo*, 128 N. Y. 178, 9 L. R. A. 1. A.

579, which tends to sustain the provisions of this bill. That case involved no question which is really pertinent here. The question there was with respect to the power of the legislature to create the state civil service board. Since it was not claimed that they were in any sense city or local officers, the meaning of that provision of the Constitution which secures local self-government to cities was not involved. It was held that the legislature had the power to provide that not more than two of the members should belong to the same political party, but that is not the question here. The law did not require that any of them should be a member of any party, or profess any particular political faith. It proscribed no one and disfranchised no one on account of his political opinions. It simply provided that a state board, the object and purpose of which was to remove the civil service from the conflicts of politics, should not itself be or become a political machine. The bill now under consideration is framed upon widely different principles. It carefully provides that no one but a partisan shall be appointed, or can under any circumstances hold the office. In a board composed of four persons two political parties are each represented by two adherents, and in case of a disagreement, practically certain to occur, the legislature has designated a person to discharge its functions until such time as the members may be able to agree. We think that the plaintiffs were entitled to maintain the action, and that it was not prematurely brought. *Williams v. Boynton*, 147 N. Y. 426; *Flood v. Van Wormer*, Id. 284. The judgment should be affirmed, with costs.

Andrews, Ch. J., and Vann, J., concur in that result on the grounds:

1. That a minority of the common council is not a city authority, within the meaning of § 2 of art. 10 of the Constitution.

2. That the clause prescribing the qualification of the police commissioners is so connected with the purpose of the act and the object in view that it cannot be said that it was not an essential part of the scheme of the act, and may therefore be rejected, leaving the remainder of the act to stand.

Bartlett, J., dissenting:

This appeal presents the question whether chapter 427 of the Laws of 1896, amending existing statutes and repealing others for the purpose of reorganizing the police board and the police force of the city of Albany, is constitutional. The plaintiffs are taxpayers of the city of Albany, who secured a judgment at special term perpetually enjoining the common council of that city from electing or appointing police commissioners under the act in question, upon the ground that it is unconstitutional. The appellate division, third department, having affirmed the judgment, this appeal is taken.

The questions involved were exhaustively discussed by the courts below, and in the appellate division many general legal propositions were debated at great length, and fortified by citations of authority, concerning which there can be no real difference of opinion. It goes without saying that under our form of government the majority are to rule, and that

the principle of local self-government is recognized and protected in the Constitution and statutes of the state. If the act now under review subverts either of these great principles of popular government, it must be declared unconstitutional and void. I shall refrain from discussing the propositions pressed upon the attention of the court involving general principles, and consider only the specific grounds upon which the act is attacked.

Section 1 of the act amends § 8 of chap. 77, Laws of 1870. Among other new provisions are the following: "The police board of the city of Albany shall consist of four police commissioners, not more than two of whom shall belong to the same political party or organization, and who shall be chosen and hold office as hereinafter provided. . . . No person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or next highest representation in the common council." The first quoted sentence, in so far as it limits eligibility, is not in violation of the Constitution, as this court approved similar phraseology in *Rogers v. Buffalo*, 128 N. Y. 173, 9 L. R. A. 579. The second quoted sentence, which practically confines eligibility to members of the two great political parties, cannot, I think, be sustained as a constitutional provision. If this latter sentence can be eliminated from the section where it is found, and still leave the act complete in itself, and capable of enforcement, it disposes of one of the principal objections relied upon by the plaintiffs, and greatly simplifies this discussion. With this unconstitutional provision stricken out, the section would provide that the number of police commissioners should be four, not more than two of whom shall belong to the same political party. In the *Rogers Case*, 128 N. Y. 173, 9 L. R. A. 579, the civil service act was attacked on the ground that the limitation placed upon the governor in appointing commissioners, to the effect that not more than two of the three commissioners should "be adherents of the same party," rendered the act unconstitutional and void, as violating that provision of the Constitution which declares that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or judgment of his peers." Art. 1, § 1. It was also claimed to violate that part of § 6 of art. 1 which declares that no person shall be "deprived of life, liberty, or property without due process of law." Still another ground was urged that the act was in conflict with art. 13 of § 1, as exacting an unlawful test of eligibility for public office. Judge Peckham, in delivering the opinion of the court, refers to the fact that provisions of a similar nature are contained in numerous statutes, the latest being the state railroad commission and the state board of arbitration. While no conclusive argument can be based upon such legislation, it is proper to refer to it as showing the practical construction of the Constitution which has been acquiesced in for many years. A few sentences from Judge Peckham's opinion disclose the precise ground on which this court rested its decision. The opinion, after calling attention to the fact

that the legislation under review was an effort to do away with the "semi barbarous maxim" that "to the victors belong the spoils," and replace it by a system of appointment based solely upon merit, administered by a commission that could not be made up exclusively of the adherents of any one political party, goes on to say: "The appellant bases his argument upon the proposition that every citizen has a right, which is protected by the Constitution, to be regarded as eligible to hold any office, unless the Constitution has itself prescribed certain qualifications for such holding. He then asserts that the statute in question violates this constitutional right." The court, after stating that it was not necessary to pass upon the correctness of this general claim, said: "We think his right to be regarded as eligible to hold office under this statute is fully recognized when he stands on an equal footing with others of his class, all of whom are eligible.

. . . It must be remembered that there is nothing in this statute which compels the appointment of even one member of any political party. It simply prevents the appointment of more than two from such party. . . . The purpose of the provision is, of course, plain. It seeks to secure the appointment of persons who are not all of the same political views, and thus to provide for a representation in the body so appointed, of different and probably conflicting interests in the state. We cannot believe that the section in question does or was intended to operate so as to prevent the execution of such a purpose so carried out." This reasoning applies with equal force to the case at bar, and must be deemed conclusive. The fact that we are dealing now with the police commissioners of a city, and that the *Rogers Case* treats of a state commission, does not affect the situation. The question of the authority conferred upon the common council and its legality is not here considered, but will be dealt with later.

I come, then, to the provision that no person is eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or next highest representation in the common council. The effect of this provision is to exclude from eligibility all persons who do not belong to one or the other of the great political parties of the country. This is the practical disfranchisement of a numerous class of citizens, and violates the Constitution (art. 1, § 1). I do not refer to legislative limitations requiring skilled knowledge in the appointee when the duties of the position call for it, as that situation would present a very different question, even if the Constitution was silent as to the qualifications of the officer. The case at bar presents an instance of the arbitrary and unexplained exclusion of a considerable number of the citizens of Albany from the class eligible to fill the office of police commissioner. No sufficient reason has been suggested for such legislation. In *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322, the court of errors, in construing the penal provisions of an act to suppress dueling, had occasion to discuss this question of arbitrary exclusion from eligibility to office, and uses this language (p. 708): "Eligibility, to office, therefore, be-

longs not exclusively or especially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever, not excluded by the Constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required."

It is further urged on behalf of the plaintiffs that this provision we are considering prescribes a political test, in violation of art. 13 of § 1 of the Constitution. As the provision is void for reasons already stated, it is unnecessary to consider this point in detail, but I am of opinion it is well taken.

We come, then, to the question whether, if this provision is eliminated from the section where it stands, the act will remain complete in itself, and be capable of enforcement. It cannot be assumed that the main object of the amendatory statute was to provide that the police commissioners should belong to one or the other of the great political parties. It is rather to be inferred that the legislature was seeking to remove the board from partisan control, and the general legal presumption is that it intended to enact a constitutional measure. So far as providing for eligibility is concerned, § 1 of the act would be complete and constitutional if permitted to stand with the sole provision that not more than two of the four commissioners should belong to the same political party or organization. The general scope and object of the act would not be in any way impaired by this change. This court has recently reaffirmed the well-settled principle that, where the void provisions of an act are separable from those that are lawful, and that which remains is capable of being executed, it may be treated as constitutional. *Re New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 554. The application of this principle to the case at bar leads to the elimination of the unconstitutional provision, and permits the act to be carried into effect without it.

The next ground of attack upon the act is that certain provisions of § 1 are violative of art. 10 of § 2 of the Constitution, which provides that "all city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct." Section 1 of the act provides: "On the 1st Monday after the passage of this act the common council shall meet at 8 o'clock in the evening in the common council chamber, and shall proceed to elect four persons, residents and freeholders in the city, as such police commissioners, and for the purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners." It

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was undoubtedly the intention of the legislature to designate the common council as a body, to appoint the police commissioners under this act in pursuance of the provisions of the Constitution just quoted. While it does not seem to be seriously questioned that the common council is a city authority under the Constitution, it is insisted that the legislature had no power to direct or restrict its action in the appointment of police commissioners. As the Constitution authorizes the legislature to impose this new duty of appointing the police commissioners upon the common council, it seems reasonable that it should prescribe the details of procedure, provided it does not deprive the appointing authority of the power to act in the premises. Has the common council, in any proper legal sense, been deprived of the power conferred upon it by the act in question? The plaintiffs insist that it has, in several important particulars.

The first point made is that the common council, in this one instance, is deprived of the power to act as a collective official body in the usual manner. This point refers to the provision of § 1, already quoted, requiring the common council to meet at a time and place designated; and further enacts that "for the purposes of such meeting the members attending shall constitute a quorum." The very obvious reason for this provision as to quorum was to secure prompt action, and prevent obstructive tactics on the part of those aldermen who might be opposed to carrying this act into effect. Full notice of this meeting appears on the face of the act, and every alderman was at liberty to take part in the action of the common council, if he saw fit to attend. It was competent for the legislature, "for the purposes of such meeting," to provide for a special quorum in order to compel full attendance and speedy action. It rested wholly with the aldermen to preserve the old quorum. The same line of reasoning justifies the provision that the common council should transact no other business until the police commissioners were elected.

The next point taken against the act is based on the provision of § 1, that each member of the common council shall be entitled to vote for not more than two of the four police commissioners. The argument against the validity of this provision loses much of its force by dropping out of § 1 the unconstitutional provision which limits eligibility to the members of the two great political bodies. We then have an act which provides, with the sanction of this court speaking in the *Rogers Case*, 123 N. Y. 173, 9 L. R. A. 579, that only two of the four police commissioners shall belong to the same political party. If this salutary principle, approved by this court, is to be carried out by appropriate legislation, why may not a member of the common council be restricted in his vote to two of the candidates, in order to secure that result, precisely as the governor was limited to naming but two adherents of any one political party in making his appointment of civil service commissioners with the approval of this court in the *Rogers Case*? If the effort to constitute public boards to some extent nonpartisan or bipartisan by legislation that makes it impossible for all the members to belong to one political party or organization is

commendable, and approved by this court as constitutional, why are not minor provisions in an act calculated to accomplish the desired result not only necessary, but legal? With what propriety or logic can it be said in the case at bar that the common council of the city of Albany, and every member thereof is vested with the indefeasible legal right to vote for all four of the police commissioners, thereby defeating the will of the legislature as constitutionally expressed, and rendering impossible the creation of a nonpartisan board? The legislature has not invaded the right of its constitutional agent to appoint this board. With the act stripped of the provision confining eligibility to members of the two great political parties, the common council is free to select its board of police commissioners from the entire body of freeholders in the city of Albany, subject only to the constitutional restraints imposed by the act in order to secure a nonpartisan board. The appellants have urged the argument of practical construction with great earnestness, and insist that years of legislative interpretation of the Constitution and the practical construction given to a statute by the public officers of the state, and acted upon by the people thereof, are decisive in case of doubt. *People, Williams, v. Dayton*, 55 N. Y. 387, 377; *People v. Home Ins. Co.* 92 N. Y. 337; *People, Einfeld, v. Murray*, 149 N. Y. 387, 83 L. R. A. 344.

I am not able, within the reasonable limits of this dissenting opinion, to examine the numerous statutes and precedents to which we have been referred, although I do not fail to recognize their persuasive force; but, for reasons already stated, I think it was competent for the legislature to provide that each member of the common council should be entitled to vote for not more than two of the police commissioners, and in so doing it did not violate the principle of local self-government, but carried out the bipartisan policy approved by this court.

I will only state my conclusions as to some of the remaining points argued at the bar.

Objection is made to the provision that, if a vacancy shall occur in the board of police commissioners, otherwise than by expiration of term, it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. Unless some mode of procedure is provided to maintain the nonpartisan character of the board in filling vacancies, the purpose of the act in this regard might easily be defeated. Having that end in view, I see no objection to the provision under consideration.

Attack is made on the provision in § 4 of the act that, in case of a failure of the board to appoint a chief of police, then the senior captain of police, on January 1, 1896, shall act as such, and possess all the powers and perform all the duties of the chief of police, and receive the salary of chief of police, until the board shall make an appointment. In case of the failure of the board to appoint the captains or sergeants provided for by this act, then it is the duty of the chief or the acting

chief, "to assign members of the police force to perform such duties until the board shall make such appointment." The plaintiffs claim that when the senior captain is given the power of chief of police he is given new powers and invested with the duties and emoluments of a distinctively new office, in direct hostility to the command of the organic law. This is not the effect of the provision as to the senior captain's duties in case the board failed to appoint a chief of police. No new office is created. The duties of the chief of police are devolved upon the senior captain in a certain emergency, which might arise in a board consisting of four members, if tied, as to the appointment of a chief of police. The senior captain was to act only during an interregnum, if at all, in order to preserve the efficiency of the force in case the police board failed to act promptly for any reason. A provision like this, seeking to guard against a mere possible danger, is in no legal sense an appointment to public office by the legislature. It is no more, in legal effect, than saying that, when a regular officer is disqualified to act in a given case, some other official may discharge his duties on that occasion. *Re Hathaway's Will*, 71 N. Y. 288.

The point is made that the provision that no person shall be eligible to appointment on the police force who is over forty years of age is in violation of the civil service provisions of the Constitution. It is a common practice in military and police organizations not to receive new members who are over a certain specified age. This is supposed to conduce to the efficiency of the force, and any reasonable legislation in this direction is valid.

The other points raised on the briefs have been considered, but will not be discussed. I am clearly of opinion that the act under consideration is constitutional and valid, except as to the clause limiting eligibility to the office of police commissioner to membership in the two great political parties, which should be eliminated therefrom. The judgment appealed from should be reversed, and judgment ordered for defendants in conformity with this opinion.

Martin, J., dissenting:

The only question involved in this case is the constitutionality of chapter 437 of the Laws of 1896. The principal question relates to the validity of § 1 of that act, which amends § 3 of title 12 of chap. 77 of the Laws of 1870. Whether this act was politic or impolitic, wise or unwise, is not to be considered by this court, as the authority to determine those questions is vested in the legislature alone. The power of the legislature to pass such laws as it may, in its discretion, deem proper, and for the best interests of the state, or any division thereof, or of the whole or any portion of its inhabitants, has been conferred upon the senate and assembly, and is absolute and unlimited, unless in conflict with some provision of the Federal or state Constitution. Const. art. 3, § 1. While the people of the state are sovereign and originally possessed the sole power of legislation, yet they have delegated that power to the senate and assembly, except as they are restricted by constitutional limits.

longs not exclusively or especially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever, not excluded by the Constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required."

It is further urged on behalf of the plaintiffs that this provision we are considering prescribes a political test, in violation of art. 13 of § 1 of the Constitution. As the provision is void for reasons already stated, it is unnecessary to consider this point in detail, but I am of opinion it is well taken.

We come, then, to the question whether, if this provision is eliminated from the section where it stands, the act will remain complete in itself, and be capable of enforcement. It cannot be assumed that the main object of the amendatory statute was to provide that the police commissioners should belong to one or the other of the great political parties. It is rather to be inferred that the legislature was seeking to remove the board from partisan control, and the general legal presumption is that it intended to enact a constitutional measure. So far as providing for eligibility is concerned, § 1 of the act would be complete and constitutional if permitted to stand with the sole provision that not more than two of the four commissioners should belong to the same political party or organization. The general scope and object of the act would not be in any way impaired by this change. This court has recently reaffirmed the well-settled principle that, where the void provisions of an act are separable from those that are lawful, and that which remains is capable of being executed, it may be treated as constitutional. *Re New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 554. The application of this principle to the case at bar leads to the elimination of the unconstitutional provision, and permits the act to be carried into effect without it.

The next ground of attack upon the act is that certain provisions of § 1 are violative of art. 10 of § 2 of the Constitution, which provides that "all city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct." Section 1 of the act provides: "On the 1st Monday after the passage of this act the common council shall meet at 8 o'clock in the evening in the common council chamber, and shall proceed to elect four persons, residents and freeholders in the city, as such police commissioners, and for the purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners." It

was undoubtedly the intention of the legislature to designate the common council as a body, to appoint the police commissioners under this act in pursuance of the provisions of the Constitution just quoted. While it does not seem to be seriously questioned that the common council is a city authority under the Constitution, it is insisted that the legislature had no power to direct or restrict its action in the appointment of police commissioners. As the Constitution authorizes the legislature to impose this new duty of appointing the police commissioners upon the common council, it seems reasonable that it should prescribe the details of procedure, provided it does not deprive the appointing authority of the power to act in the premises. Has the common council, in any proper legal sense, been deprived of the power conferred upon it by the act in question? The plaintiff's insist that it has, in several important particulars.

The first point made is that the common council, in this one instance, is deprived of the power to act as a collective official body in the usual manner. This point refers to the provision of § 1, already quoted, requiring the common council to meet at a time and place designated; and further enacts that "for the purposes of such meeting the members attending shall constitute a quorum." The very obvious reason for this provision as to quorum was to secure prompt action, and prevent obstructive tactics on the part of those aldermen who might be opposed to carrying this act into effect. Full notice of this meeting appears on the face of the act, and every alderman was at liberty to take part in the action of the common council, if he saw fit to attend. It was competent for the legislature, "for the purposes of such meeting," to provide for a special quorum in order to compel full attendance and speedy action. It rested wholly with the aldermen to preserve the old quorum. The same line of reasoning justifies the provision that the common council should transact no other business until the police commissioners were elected.

The next point taken against the act is based on the provision of § 1, that each member of the common council shall be entitled to vote for not more than two of the four police commissioners. The argument against the validity of this provision loses much of its force by dropping out of § 1 the unconstitutional provision which limits eligibility to the members of the two great political bodies. We then have an act which provides, with the sanction of this court speaking in the *Rogers Case*, 123 N. Y. 178, 9 L. R. A. 579, that only two of the four police commissioners shall belong to the same political party. If this salutary principle, approved by this court, is to be carried out by appropriate legislation, why may not a member of the common council be restricted in his vote to two of the candidates, in order to secure that result, precisely as the governor was limited to naming but two adherents of any one political party in making his appointment of civil service commissioners with the approval of this court in the *Rogers Case*? If the effort to constitute public boards to some extent nonpartisan or bipartisan by legislation that makes it impossible for all the members to belong to one political party or organization is

two persons for such office. Chapter 515 of the Laws of 1874 related to the election of aldermen in the city of New York, and provided that three should be elected for each ward except the eighth, but that no voter should vote for more than two. The same principle has existed in statutes relating to the appointment of election officers since the organization of our state government, although not protected by any constitutional provision before the amendment of 1894, the obvious purpose of which was to forbid any change in these time-honored laws. The statutes already referred to sufficiently show the course of legislation in this state upon the subject, and render the examination of other statutes quite unnecessary.

If all the various statutes of the state relating to the government of cities which contain provisions involving the principle contained in the statute under consideration are to be held void, it must result in a general derangement of the affairs of all the cities in the state, and lead to boundless confusion in matters relating to their government. "An unconstitutional act is as if it had never been passed by the legislature. It can confer no rights and afford no protection." *Chenango Bridge Co. v. Paige*, 88 N. Y. 178, 190, 38 Am. Rep. 407; *Cooley*, Const. Lim. 188, Endlich, Interpretation of Statutes, § 358. Relying upon the validity of this principle, commissions for the police, fire, and other departments of the various cities have been organized under statutes containing the identical principle contained in this, which must be regarded and treated as invalid if this statute is held void for that reason. If the various statutes under which such commissions have been appointed are invalid, it must necessarily follow that all the appointments made by such commissions are also invalid, and, consequently, all the members of the police force, fire and other departments of such cities, and all officers appointed by these various commissions, are without title to their office, are entitled to no compensation, and may be held liable for many acts they have performed in reliance upon the integrity of the provisions of these various statutes. It is to be presumed that this court will adhere to the principle of the decision in this case, and it must apply to every such city in the state, and be regarded as condemning all such provisions in the various statutes under which they were incorporated or by which they are governed. Hence the question of their validity is a far-reaching one, and is of great importance, involving, as it does, the governmental affairs of nearly every city in the state. Therefore it should not be hastily or inconsiderately held invalid, whatever may have been the purpose which induced the passage of this particular act. Its purpose must be presumed to have been proper, especially in view of the fact that the police and fire commissioners for that city were elected nearly thirty years since, under a statute which included the principle contained in this. Not only is every intendment in favor of the validity of statutes, but no motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the face of and gathered from the law itself. *People, Bolton, v. Albert-*

son, 55 N. Y. 54. Moreover, if the purpose which induced its passage was improper, still the responsibility is not ours, but rests elsewhere. Unless these provisions of the statute are plainly and clearly in substantial conflict with some particular provision of the Constitution, this court should not declare them void. There should be no reasonable doubt of the unconstitutionality of a statute before it should be annulled by judicial action, and all doubtful questions should be resolved in favor of the validity of the act, or, as was said by Allen, J., in *People, Bolton, v. Albertson*, *supra*: "A law which has received the sanction of the legislature and the approval of the executive should only be held void, as repugnant to the Constitution, when the repugnancy is clearly demonstrated."

From 1867 to 1896 the legislature has almost yearly passed statutes involving in some form the general principle contained in the statute under consideration, which have been approved by the executive and acted upon by the different municipalities without dissent or question. As early as 1867 that principle was applied to the election of fire commissioners in the city of Albany, and in 1873 was applied to the election of police commissioners for that city. Thus for nearly thirty years, notwithstanding the frequent changes of officers in the different municipalities, a practical construction has been given to the Constitution, so far as it affects laws containing this principle, to the effect that they are valid, and controlling as to the matters to which they relate. The practical construction given by the legislature to constitutional provisions, for many years acquiesced in and acted upon, unquestioned by the executive and administrative branches of the government, is entitled to controlling weight in its interpretation, and has almost the force of a judicial exposition. *People, Williams, v. Dayton*, 55 N. Y. 367, 378; *People v. Home Ins. Co* 92 N. Y. 328, 337; *Re Washington, S. A. & P. R. Co.* 115 N. Y. 443, 447; *People, Knafeld, v. Murray*, 149 N. Y. 367, 376, 33 L. R. A. 344. As was said by Ruger, Ch. J., in the *Home Ins. Co. Case*, *supra*: "It would now seem too late to raise a question of such importance and fraught with such dangerous consequences to those engaged in the enforcement of the laws." I think, as was in effect said by Andrews, Ch. J., in the *Murray Case*, *supra*, this legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts, and acquiesced in by all departments of the state and municipal governments, is a practical construction of the provision now in question; and this construction ought not now to be disturbed. I had supposed the foregoing to be a well established rule of law, to be applied with the same certainty and uniformity as any other, and not a mere rule of convenience. If this supposition is correct, then I cannot understand why it should have been applied to sustain the excise law, and the various other statutes under consideration in the cases cited, and not in this. If there was ever a case where the principle of practical construction should be applied, manifestly this is one. Every correct principle and proper consideration require it. The confusion, derange-

tions. Therefore, before a law can be declared invalid, it must be found to be in conflict with some provision of the organic law. *People v. Smith, v. Fisher*, 24 Wend. 215, 230; *Cochran v. Van Surday*, 20 Wend. 865, 882, 32 Am. Dec. 570; *Wynehamer v. People*, 13 N. Y. 378, 480; *Cooley, Const. Lim.* 6th ed. 202, 204; *Bank of Chenango v. Brown*, 26 N. Y. 467, 469; *People v. Cannon*, 139 N. Y. 82, 42; *People, McLean, v. Flagg*, 46 N. Y. 401, 404; *Rogers v. Buffalo*, 128 N. Y. 173, 181, 9 L. R. A. 579. The act under consideration, like every other statute, must be upheld, unless it is in plain and substantial conflict with some particular provision or provisions of the Constitution. *People, Rochester v. Briggs*, 50 N. Y. 553, 558; *People v. Gillson*, 109 N. Y. 889, 897; *People, Kemmler, v. Durston*, 119 N. Y. 569, 577, 7 L. R. A. 715; *People, Carter, v. Rice*, 135 N. Y. 484, 16 L. R. A. 886.

The respondents contend that the provisions of this statute which declare that not more than two of the police commissioners shall belong to the same party or organization, that each member of the common council shall be entitled to vote for not more than two of such persons, and that no person is eligible to the office, unless, at the time of his election, he is a member of the political party or organization having the highest or next highest representation in the common council, are in contravention of the Constitution of this state, and consequently void. The general principle contained in these provisions is by no means new. For more than a quarter of a century the current of public opinion and of Federal and state legislation has been in the direction of establishing nonpartisan boards or commissions for the administration of Federal, state, and municipal affairs. Without particularly referring to the various statutes creating boards of commissions for the administration of the affairs of the Federal or state government, but confining our examination to a portion of the cities of the state, we find that in some form or other this principle exists in the statutes regulating the municipal affairs of a majority of them. Thus, in the city of Yonkers, four commissioners of police are appointed by the common council by ballot, and each member present can vote for only two. Laws 1873, chap. 163. In the city of Utica the mayor appoints the police and fire commissioners, two of whom are appointed from each of the two principal political parties of the state. Laws 1874, chap. 314. In the city of Elmira such commissioners are appointed by the common council, and such appointments are required to be so made that the two principal political parties represented in the council shall be equally represented. Laws 1875, chap. 370, title 8, § 103, subd. 2, as amended. The charter of the city of Binghamton requires the mayor to appoint four men commissioners, two from each of the two principal political parties of the state; and when a vacancy occurs that the common council shall appoint a successor in the same manner. Laws 1881, chap. 6, § 1. An act to establish a board of fire commissioners for the city of Rome provides that the mayor shall appoint four commissioners, two of whom shall be selected from each of the two principal

political parties of the state, and at the expiration of the terms of any such commissioner, his successor shall be appointed from the political party to which the former belonged. Laws 1881, chap. 517, §§ 2, 4. The charter of the city of Lockport provides for the appointment of four police commissioners, two of whom shall be members of each of the two principal political parties. Laws 1882, chap. 48. An act to establish a police department of the city of Buffalo provides that the mayor shall appoint two citizens as commissioners of police, one from each of the two principal parties, and that in all appointments thereafter made the nonpartisan character of the board shall be preserved and maintained. Laws 1883, chap. 359, § 2. An act to increase and reorganize the police force in the city of Troy provides that the common council shall appoint two police commissioners of opposite politics, and at the expiration of their term the successor of the two whose terms of office shall expire shall be elected by ballot by the common council, but that no member of the council shall vote for more than one of such commissioners. Laws 1885, chap. 54, § 1. Chapter 79 of the Laws of 1877 provided for the reorganization of the fire department of the city of Syracuse, that such commissioners should be elected, but that no ballot should contain more than one name, and the two persons receiving the highest number of votes should be elected. Chapter 17 of the Laws of 1869 provided for the election of four police commissioners in that city, but declared that no ballot should contain more than two names. Laws 1874, chap. 542. The charter of the city of Syracuse provides for a fire commission, and also for a police commission, and that the commissioners then in office should continue to the expiration of their term, when the mayor is required to appoint as successors to such commissioners persons who shall belong to the same political party as the commissioners whom they are appointed to succeed. The provisions as to fire and police commissioners are identical. Laws 1885, chap. 26, §§ 186, 187, 205, 206. The statute establishing a board of police commissioners for the city of Watertown requires the mayor to appoint four commissioners, two from each of the two principal political parties of the state, and that the successor to any such commissioner shall be a member of the political party to which the commissioner whose office has expired belonged. Laws 1885, chap. 189, § 19. Chapter 255 of the Laws of 1870 provides for the election of four police commissioners for the city of Oswego, but that no ballot shall contain more than two names. Chapter 46 of the Laws of 1879 contains the same provision as to the election of school commissioners for that city. Chapter 197 of the Laws of 1867 provided for filling vacancies in the board of fire commissioners in the city of Albany, and that no ballot should contain more than one name. Chapter 828 of the Laws of 1880 declared that no member of the common council of the city of Troy, in electing police commissioners, should vote for more than one. Chapter 186 of the Laws of 1872 provided for the election of four police commissioners for the city of Albany, but that no voter should be entitled to vote for more than

two persons for such office. Chapter 515 of the Laws of 1874 related to the election of aldermen in the city of New York, and provided that three should be elected for each ward except the eighth, but that no voter should vote for more than two. The same principle has existed in statutes relating to the appointment of election officers since the organization of our state government, although not protected by any constitutional provision before the amendment of 1894, the obvious purpose of which was to forbid any change in these time-honored laws. The statutes already referred to sufficiently show the course of legislation in this state upon the subject, and render the examination of other statutes quite unnecessary.

If all the various statutes of the state relating to the government of cities which contain provisions involving the principle contained in the statute under consideration are to be held void, it must result in a general derangement of the affairs of all the cities in the state, and lead to boundless confusion in matters relating to their government. "An unconstitutional act is as if it had never been passed by the legislature. It can confer no rights and afford no protection." *Chenango Bridge Co. v. Paige*, 88 N. Y. 178, 190, 38 Am. Rep. 407; *Cooley*, Const. Lim. 188, Emdlich, Interpretation of Statutes, § 858. Relying upon the validity of this principle, commissions for the police, fire, and other departments of the various cities have been organized under statutes containing the identical principle contained in this, which must be regarded and treated as invalid if this statute is held void for that reason. If the various statutes under which such commissions have been appointed are invalid, it must necessarily follow that all the appointments made by such commissions are also invalid, and, consequently, all the members of the police force, fire and other departments of such cities, and all officers appointed by these various commissions, are without title to their office, are entitled to no compensation, and may be held liable for many acts they have performed in reliance upon the integrity of the provisions of these various statutes. It is to be presumed that this court will adhere to the principle of the decision in this case, and it must apply to every such city in the state, and be regarded as condemning all such provisions in the various statutes under which they were incorporated or by which they are governed. Hence the question of their validity is a far-reaching one, and is of great importance, involving, as it does, the governmental affairs of nearly every city in the state. Therefore it should not be hastily or inconsiderately held invalid, whatever may have been the purpose which induced the passage of this particular act. Its purpose must be presumed to have been proper, especially in view of the fact that the police and fire commissioners for that city were elected nearly thirty years since, under a statute which included the principle contained in this. Not only is every intendment in favor of the validity of statutes, but no motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the face of and gathered from the law itself. *People, Bolton, v. Albert-*

son, 55 N. Y. 54. Moreover, if the purpose which induced its passage was improper, still the responsibility is not ours, but rests elsewhere. Unless these provisions of the statute are plainly and clearly in substantial conflict with some particular provision of the Constitution, this court should not declare them void. There should be no reasonable doubt of the unconstitutionality of a statute before it should be annulled by judicial action, and all doubtful questions should be resolved in favor of the validity of the act, or, as was said by Allen, J., in *People, Bolton, v. Albertson*, *supra*: "A law which has received the sanction of the legislature and the approval of the executive should only be held void, as repugnant to the Constitution, when the repugnancy is clearly demonstrated."

From 1867 to 1896 the legislature has almost yearly passed statutes involving in some form the general principle contained in the statute under consideration, which have been approved by the executive and acted upon by the different municipalities without dissent or question. As early as 1867 that principle was applied to the election of fire commissioners in the city of Albany, and in 1873 was applied to the election of police commissioners for that city. Thus for nearly thirty years, notwithstanding the frequent changes of officers in the different municipalities, a practical construction has been given to the Constitution, so far as it affects laws containing this principle, to the effect that they are valid, and controlling as to the matters to which they relate. The practical construction given by the legislature to constitutional provisions, for many years acquiesced in and acted upon, unquestioned by the executive and administrative branches of the government, is entitled to controlling weight in its interpretation, and has almost the force of a judicial exposition. *People, Williams, v. Dayton*, 55 N. Y. 367, 378; *People v. Home Ins. Co* 92 N. Y. 828, 387; *Re Washington, S. A. & P. R. Co.* 115 N. Y. 442, 447; *People, Evansfeld, v. Murray*, 149 N. Y. 367, 376, 32 L. R. A. 844. As was said by Ruger, Ch. J., in the *Home Ins. Co. Case*, *supra*: "It would now seem too late to raise a question of such importance and fraught with such dangerous consequences to those engaged in the enforcement of the laws." I think, as was in effect said by Andrews, Ch. J., in the *Murray Case*, *supra*, this legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts, and acquiesced in by all departments of the state and municipal governments, is a practical construction of the provision now in question; and this construction ought not now to be disturbed. I had supposed the foregoing to be a well established rule of law, to be applied with the same certainty and uniformity as any other, and not a mere rule of convenience. If this supposition is correct, then I cannot understand why it should have been applied to sustain the excise law, and the various other statutes under consideration in the cases cited, and not in this. If there was ever a case where the principle of practical construction should be applied, manifestly this is one. Every correct principle and proper consideration require it. The confusion, derange-

ment, and consequent hardship that must follow the condemnation of all these statutes seem to me to demand the application of that principle in this case, if necessary to uphold this and the various other statutes authorizing the organization of commissions for the management and control of the municipal affairs of a majority of the cities of the state. The principle involved in this class of legislation has been expressly approved by this court. In the case of *Rogers v. Buffalo*, 123 N. Y. 178, 9 L. R. A. 579, Judge Peckham, who delivered the opinion of the court in that case, fully discussed the question of improving the public service by means of nonpartisan commissions or boards. He in strong terms commended that principle, and as strongly condemned what he termed the semibarbarous system represented by the maxim that "to the victors belong the spoils." In that opinion all the judges of this court concurred, except Ruger, Ch. J., who concurred in the result. Thus to the wisdom and propriety of this class of legislation this court seems fully committed. If the principle there commended is to be now condemned, and this class of statutes is to be held invalid, we shall take a long step backward. It will constitute a positive retreat from the position that the public affairs of the municipalities of the state should be removed from the influence of partisan politics; and, besides, it will be accompanied by the disastrous consequences already indicated, and demoralize and seriously injure the public service.

The question in the *Rogers Case* arose under the civil service act of 1883, which provided for the appointment of three civil service commissioners, not more than two of whom should be adherents of the same party; and it was held not to be violative of any of the provisions of the state Constitution. We have in that case a direct authority to the effect that the provision of the statute under consideration, which provides that not more than two of the four police commissioners to be appointed shall belong to the same political party or organization, is valid. Indeed, it is conceded by the respondents that, if this provision stood alone, the constitutional objections now urged against it could not be sustained. They, however, insist that the provision which follows, declaring that each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such commissioners, is in conflict with the provisions of the Constitution. The claim now most strongly urged is that under the provisions of § 2 of art. 10 the legislature had the power to select the local authority by which the appointment should be made, but that, having conferred that power upon the common council, it must be regarded as conferring the authority upon that body as such; that it can only act as a collective, official body by the voice of its majority, and that this provision is consequently void. If by this act the legislature had selected the common council as the authority by which such appointment should be made, without any provisions as to the manner in which such commissioners should be elected, it might, perhaps, be that it could have acted only in the manner suggested. But

such is not the case. It provided that in determining who should be elected such commissioners each member of the council should vote for not more than two, the practical effect of which was to carry into execution the provision that no more than two of such commissioners shall belong to the same political party or organization, on the assumption that the members constituting the common council would vote for commissioners who were members of their own party. That the legislature possessed the power to amend the charter of the city of Albany so as to define the duties and prescribe the powers of the common council, and to direct the manner in which it, as the authority of that city, should elect the police commissioners, I have no doubt. It could have provided that there should have been a two-thirds vote, a majority vote, or less. The municipality, the existence of the common council, the duties it shall perform, and all its acts of a governmental character are under the control of the legislature.

Section 1 of article 8 of the Constitution of the state authorizes the legislature to create municipal corporations by general or special acts, and to alter or repeal such acts from time to time. In *People, Rochester, v. Briggs, supra*, Church, Ch. J., said: "A municipal corporation is a part of the governmental machinery of the state, organized, not for the purpose of private gain, like private corporations, but for the purpose of exercising certain functions of government, within a specified locality; and it possesses such powers, and such only, as are conferred upon it by the legislature; and they are to be exercised in such form, mode, and manner, and by such agencies, as the legislature may from time to time prescribe, within the limits of the Constitution. . . . Over all its civil, political, or governmental powers the legislature is, in the nature of things, supreme and without limitation, unless restrained by the Constitution." Dillon, in his work on Municipal Corporations, in treating of the power of the legislature over municipal corporations, says: "Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme, and without limitation, unless the limitation is found in the Constitution of the particular state."

Assuming, then, as we must, that the legislature had the power to provide in what manner the common council should discharge its duties, it had the authority to provide for the election of police commissioners in the manner pointed out by the statute. The effect of this provision was to amend the charter of the city of Albany so far as it related to the manner in which the common council should act. As there is no constitutional provision which in any way prevents the legislature from providing the manner in which that body shall act in the selection of officers, it is quite plain, I think, that this statute is not in conflict with the provision of the Constitution under consideration. It is, however, suggested that under this statute the members of the common council might all vote for only two members of the police commission, and that then their power would be spent, and only two members elected. This suggestion must, I think, be regarded as too speculative and improbable to require dis-

cussion or serious consideration. But, should that condition arise, there would, at most, be a vacancy in the office of two commissioners which might be filled in the manner pointed out in the statute. Moreover, if the statute is simply defective, it by no means follows that the whole statute must be condemned. It may be observed, in passing, that the question whether the police commissioners to be thus appointed were officers of the city within the meaning of the provisions of § 2 of art. 10 may not be entirely free from doubt. *Fire Department of New York v. Atlas S. S. Co.* 106 N. Y. 566.

It has been intimated that, while the legislature possesses the power to select and confer upon the authorities of a city the right to appoint all city officers whose election or appointment is not provided for by the Constitution, yet it has no power to in any way limit that right by providing the method in which such appointments shall be made by the city authorities, or the qualifications which such appointees shall possess. In *People, Nechamens v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, the validity of chapter 602 of the Laws of 1892 was considered by this court, and it was held to be constitutional and valid. By the provisions of that act it was made the duty of the mayor of each of the cities of the state to appoint a board for the examination of plumbers of each city, to consist of five persons; two to be master plumbers of not less than ten years' experience, one to be a journeyman plumber of like experience, and the others to be the chief inspector of plumbing and drainage of the board of health, and the chief engineer having charge of sewers in such city. Thus, by that act the legislature in effect prescribed not only the qualifications which the appointees should possess, but, as to some, practically who should be appointed. It is possible that that decision may be sustained upon the ground that those officers fell within the last sentence of that section of the Constitution which provides that all officers whose office may hereafter be created may be elected or appointed, as the legislature may direct, although not placed on that ground. It seems to me, however, that the doctrine of that case bears upon the question, and tends to sustain the validity of the statute under consideration, so far as this immediate question is concerned.

In the *Rogers Case*, *supra*, it was argued that the civil service act, which was then under examination, was violative of this section of the Constitution. The provisions of that statute required the mayor to prepare certain rules under which the city officers were to be selected, which were to go into effect only when approved by the state civil service commission, and that no officer or clerk should be appointed, and no person should be permitted to enter or be promoted into the classes established, until he had passed the required examination. It was contended that the power conferred upon the public authorities of the city to appoint a street or health inspector of that city was limited by such requirement, and hence the act of 1893 was void, as being in contravention of § 2 of art. 10 of the Constitution. Thus, by that act, the authority to appoint city officers was limited to an extent which re-

quired them to be examined under the provisions of that statute, and under rules to be approved by the civil service commission; but it was held that there was no such limitation upon the rights of the local authorities to appoint such officers as to bring the statute within the condemnation of that provision of the Constitution. It will be remembered that that statute was passed before the amendment to the Constitution.

Again, it is a well-established rule of construction that before a statute should be declared invalid it should appear that it is in plain and substantial conflict with some particular provision of the Constitution. Thus the conflict must not only be plain, but it must be substantial as well. The statute must be affected by the provision of the Constitution relied upon in some substantial and material particular. If that portion of a statute which is relied upon as a basis for its condemnation is not essential to the accomplishment of its general purpose, the statute cannot be said to be in substantial conflict with the Constitution. The fact that a statute may be in conflict with the fundamental law in some slight or unessential particular forms no just basis for its condemnation. In other words, unless the provision of a statute will effect a result which will subvert the object and frustrate the purpose of the Constitution, it should be held valid. "The substance of a thing is the essential or important part; the material thing; that in and for which a thing chiefly exists." See *Substance*, Abbott, Law Dict.; Anderson, Law Dict.; Rapalje & L. Law Dict.

It is manifest from a reading of this statute that the purpose of this provision was merely to carry into effect the former provision that not more than two of the commissioners should belong to the same political party. It was the means devised by the legislature to carry into execution what is conceded to be a valid provision of the statute. The dominant purpose of that provision was to establish for the city of Albany a nonpartisan board of commissioners. Whether the means to secure that result was a provision that each member of the common council should not vote for more than two of such commissioners, or that each member should vote for the four commissioners, only two of whom should belong to the same political party, was at most a mere matter of detail by which to accomplish the chief purpose of the act. If this provision had not been included in the statute, manifestly the latter would have been the plan by which the purpose of the legislature would have been carried into effect. That the statute has provided a different method to accomplish the same purpose is unessential, and the provision cannot be properly said to be one of substance. Indeed, that the aldermen or members of the common council as such were authorities of the city within the meaning of the Constitution, I have no doubt. *People v. Raymond*, 87 N. Y. 428, 431; *People, Sherwood, v. State Bd. of Canvassers*, 129 N. Y. 566, 14 L. R. A. 646.

The respondents also contend that the provision of this statute which declares that no person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization

having the highest or next highest representation in the common council, is void under the provisions of the Constitution of the state. Many of the statutes to which we have already referred contain a similar provision, and hence the doctrine of practical construction is applicable, and this provision may be sustained. Independent of that doctrine, I might be inclined to agree with the contention of the respondents. But I do not deem it necessary to determine the question whether that provision is valid or invalid. If the latter, I am of the opinion that it may be eliminated from the act, and still the apparent and manifest object and purpose of the legislature be effected by the statute as it would then remain. It seems to be well settled that where only a part of a statute is unconstitutional that fact does not authorize the court to declare the remainder void, unless the provisions are so dependent and connected with the object or purpose of the act that it cannot be presumed that the legislature would have passed it without including such void provision. The fact that the legislature may have erred in a matter of detail does not defeat the whole act where, when the unconstitutional portion of the statute is stricken out, that which remains is complete in itself, and capable of being executed in substantial accordance with the apparent legislative intent. *People, Fowler, v. Bull*, 46 N. Y. 57, 69, 7 Am. Rep. 802; *Gordon v. Cornes*, 47 N. Y. 608, 617; *People, Rochester, v. Briggs*, 50 N. Y. 553; *People, Murphy, v. Kelly*, 76 N. Y. 475, 489; *Re Middletown*, 82 N. Y. 196; *Durges v. New York*, 96 N. Y. 477; *People, Angerstein, v. Kenney*, Id. 294; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 184; *Re New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540. An examination of these cases discloses the extent to which this court has proceeded in applying that rule to various statutes when they have contained unconstitutional provisions and still have been upheld as to the remainder. In many of them this court seems to have gone further than is required to sustain the statutes in question. Who can say that there is any such connection or dependence between this provision and the remainder of the statute that it must be presumed that the legislature would not have passed it with this provision eliminated, or, in other words, that it cannot be presumed that it would have passed it omitting that provision, if it had been regarded as invalid? I do not think it can be reasonably doubted that, if the legislature had supposed or understood that this provision was invalid, it would still have passed the statute without it. Nor do I think the other provisions of the statute are so connected with or dependent upon that provision that they cannot be divided without defeating the object and intent of the statute.

As has already been suggested, the controlling purpose of this statute is to provide for the appointment of four police commissioners for the city of Albany, only two of whom should belong to the same political party. If the provision that no person is eligible to the office of police commissioner, unless at the time of his election he is a member of the political party or organization having the highest or the next highest representation in the common council, were entirely blotted out, the statute, as it

would then remain, would obviously carry into effect the fundamental and substantial intent and purpose of the legislature.

The respondents also contend that the provision of the statute for filling vacancies by which the mayor is permitted to appoint commissioners upon the written recommendation of a majority of the members of the council belonging to the same political party or organization as the police commissioner whose office is vacant, is also in conflict with § 2 of art. 10 of the Constitution. Section 5 of art. 10 of the Constitution provides that the legislature shall provide for filling vacancies in office. In *People, Henderson, v. Snedeker*, 14 N. Y. 52, 59, it was said: "The effect of this provision of the Constitution, doubtless, was to confer upon the legislature the power to provide for filling vacancies in a different manner from the existing method in case it should be deemed proper." In the case of *Rogers v. Buffalo*, 123 N. Y. 173, 9 L. R. A. 579, chapter 354 of the Laws of 1888 was under consideration. That statute contained a provision that any vacancy in the position of commissioner should be so filled by the governor, by and with the advice and consent of the senate, as to conform to the conditions for the first selection of such commissioner. The spirit of that provision is practically identical with that contained in the act under consideration; and that case should, I think, be regarded as an authority to the effect that such a provision is valid. I am unable to discover any provision of the Constitution with which this portion of the statute is in conflict. It is simply the means adopted by the legislature to carry into effect and continue the principal purpose of the act that no more than two of the commissioners should at any time belong to the same political party. The latter provision being professedly valid, I think the means provided to continue the condition thus created were also valid.

I am unable to find in the Constitution any provision which renders void that portion of the act which provides that, in case of a failure by the board of police commissioners to appoint the chief of police, the senior captain should act as such until the board should make an appointment. The purpose of this provision clearly was to provide for an emergency that might arise, and thus prevent the city from being without a chief of police until such appointment should be made. Its effect was to confer temporarily upon a city officer added powers, and impose upon him other duties, which he would be required to discharge while the emergency continued. That the legislature possessed the power to amend the charter of the city of Albany so as to provide that in such an emergency one of its officers should discharge other and added duties, I have no doubt. The authority of the legislature over such a municipality has already been considered, and I think it possessed the power to enact the provision under consideration, and that it is valid.

Nor do I think the provisions of § 4 of the act, which provide that no person shall be eligible to appointment as patrolman of the city who is over the age of forty years, violate the provision of § 9 of art. 5 of the Constitution, which declares: "Appointments and promo

tions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made." That provision of the statute would seem to be a proper and useful one, as it is manifest that the office of patrolman is one which requires a degree of activity, vigor, and endurance that does not usually exist in older persons. Moreover, the value of the services of a patrolman increases by experience, and hence the necessity of appointing at the outset young men to that position. The provision seems to be one that is not only proper, but necessary to secure the best service in that department. It is found in many of the charters of the cities in this state, and is not, I think, in conflict with the provision of the Constitution referred to. The purpose of that provision was to secure appointments according to merit and fitness, and not to interfere with proper provisions of the statute in regard to the qualifications that a particular officer should be required to possess. Notwithstanding that provision, I think the legislature still has

the power, when necessary or proper, to provide the qualifications, such as age, residence, business and profession, which a person shall possess to entitle him to be appointed to a particular office.

The only remaining ground upon which it is claimed that this statute is invalid is that it does not strictly comply with the provisions of § 2 of art. 12 of the Constitution which require the insertion after the title of such an act of the words "Passed without the acceptance of the city." The precise words used by the Constitution were not inserted after the title in this act, but the words "Not accepted by the city" were inserted, and were manifestly intended to be in compliance with the requirements of the Constitution. While the language first stated is, in terms, required, still I do not think that the omission to use the precise words mentioned makes a statute invalid when, as in this case, words which are equivalent to those provided for are used. Such a construction of this provision would be too narrow and technical. The words used were within the spirit of the provision, although not within its letter, and were, I think, sufficient.

These considerations lead me irresistibly to the conclusion that the judgment in this action should be reversed, and hence I am unable to concur in the result reached by a majority of the court.

Haight, J., concura.

TENNESSEE SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,

T. J. ROBINSON.

(.....Tenn.....)

1. A presumption that a girl became unconscious before a minister summoned by telegraph could have

reached her does not arise from the averment that she became unconscious after sending the message and died before he arrived, where in the same action it is said that if the telegram had been promptly delivered he would have arrived in time to have administered to her spiritual wants.

2. Mental anguish of a father caused by the failure of a minister to reach his daughter until after she was dead, when he had telegraphed for him because of her desire

NOTE.—Limits for delivery of telegrams.

In *WESTERN UNION TELEGRAPH CO. v. ROBINSON* it was held that a rule of a telegraph company not to deliver messages outside a 1-mile limit cannot be set up to excuse a delay in delivering a message sent to a small town a few miles away, summoning a minister of the gospel to a person near death, when the rule was not known to the sender and was not mentioned by the agent, who received the message about dark, stating that it could be delivered that night. It did not appear that the company enforced this rule or informed the patrons, and the agents did not conform to it, but delivered other messages beyond the limits, and in fact delivered this one, though too late to accomplish its purpose.

Some cases hold that a telegraph company is liable for nondelivery where the addressee lives outside of the free delivery limits, but inside of the city, and the fact of his being out of the limits is not known to the sender, and hold that rules or regulations, unreasonable or unknown, will not be

enforced; also that the company will be held liable where prepayment is made or tendered for special delivery which is not complied with. But the failure to prepay for delivery beyond the free-delivery limits has been held sufficient to exonerate the company. A custom to deliver in a small town near the station beyond the limits has been held to override a printed contract or regulation.

So, a telegraph company was held liable for failure to deliver a message where Ind. Rev. Stat. 1897, § 5513, provided that telegraph companies should be liable for special damages occasioned by failure and negligence in receiving, copying, transmitting, or delivering despatches, and § 5514 provided that said company shall deliver to all persons to whom addressed, on payment of any charges due for the same, if such persons or agents resided within 1 mile of the telegraph station or within the city or town where such station is, and the addressee lived in a city and two squares beyond the 1-mile limit, but it was not known to the sender that he lived beyond the 1-mile limit. The court held that the

for baptism and union with the church, is not without foundation merely because complete church membership could not have been consummated during her life, but may be the basis of a cause of action against the telegraph company.

3. A rule of a telegraph company not to deliver messages outside a 4-mile limit cannot be set up to excuse a delay in delivering a message sent to a small town a few miles away summoning a minister of the gospel to a person near death, when the rule was not known to the sender and was not mentioned by the agent, who received the message about dark, stating that it could be delivered that night.

4. The court can judicially know that a certain town is one of the smaller towns of the state.

5. A verdict for \$500 is not excessive as damages for the mental anguish suffered by a father on account of inexcusable delay in delivering a telegram to a minister of the gospel, calling him to the bedside of a daughter who desired baptism and union with the church, where the result was that he failed to come until after she was dead.

(November 12, 1896.)

prepayment of a special delivery charge is not under all circumstances a prerequisite to the duty to deliver the message in a city or town, and that a rule which would require prepayment by the sender, though ignorant that such a charge would be made or when the amount was undetermined, would be unreasonable and oppressive. The court further held that the contract providing for a special charge to cover the delivery beyond the free delivery limits, and that only the actual costs of service would be collected, did not indicate that prepayment must be made. (The case of *Western U. Telegr. Co. v. Henderson*, *infra*, was not approved.) *Western U. Telegr. Co. v. Moore*, 12 Ind. App. 186.

And a recovery of a penalty was allowed to the sender where the telegram was not delivered to the addressee, who lived within the city limits, although there was an office regulation, unknown to the sender, that an extra charge would be made for delivery over ten blocks, which was this case, and *Mo. Rev. Stat. 1879, § 883*, provided that a telegraph company should transmit without partiality and in good faith under a penalty of \$100 for neglect, for the benefit of the person sending the despatch. The court further held that the receiver could not exonerate the company by a general order forbidding messages to be delivered to his house on Sunday, and further held that an attempt to deliver by telephone was not a compliance with the requirements of law. *Brashears v. Western U. Telegr. Co.* 45 Mo. App. 438.

So, a recovery was allowed where a message was sent in care of a college, and the party resided about a block and a half from the college, and both places were just outside the free delivery limits, but the charges for its delivery were paid and the message which should have been delivered at the college at 9 P. M. was left with a saloon keeper near the college between 10 and 11 o'clock at night, and was not received until about 9 o'clock the next morning. *Western U. Telegr. Co. v. Warren* (Tex. Civ. App.) 36 S. W. 814.

And a recovery was allowed where the addressee lived 6 or 7 miles in the country and beyond the free-delivery limits as shown by the blanks, and the sender offered to pay all extra charges, but the agent said that it was all right and the message should go through without delay, as the company would send it and collect extra charges on delivery; and the agent attempted to make special de-

ERROR to the Circuit Court for Rhea County to review a judgment in favor of plaintiff in an action brought to recover damages for defendant's failure to promptly deliver a telegraph message. *Affirmed.*

The facts are stated in the opinion.

Messrs. V. C. Allen and N. Q. Allen for plaintiff in error.

Messrs. B. G. McKinsie and Burkett, Miller, & Mansfield for defendant in error.

Snodgrass, Ch. J., delivered the opinion of the court:

The defendant in error sued the telegraph company for damages for the negligent failure to transmit and deliver from the town of Evansville a telegram addressed to J. A. Whitner, Dayton, Tennessee. The declaration alleges that on or about August 19, 1895, the plaintiff's minor daughter, Katie, was dangerously sick, and expected to die; that she had professed the Christian religion, and desired to be united with the church of God; and that said Whitner should confer the right of baptism, and admit her into the church of which

livery but could get no one to carry it, without a guarantee, until the next day, and the message was delivered too late. The court held that a rule requiring a deposit for delivery beyond the free-delivery limits was no defense under the circumstances of this case. *Western U. Telegr. Co. v. O'Keefe* (Tex. Civ. App.) 29 S. W. 1137.

So, a telegraph company was held liable where it failed to deliver a message at a point 3 miles from S., and the company was paid for special delivery, although the receiving agent was mistaken as to there being telegraphic communications with S. But there were other stations near, from which it could have been sent, and the company failed to use diligence to inform the sender after it was discovered that there was no office at that place. *Western U. Telegr. Co. v. Hargrove* (Tex. Civ. App.) 36 S. W. 1077.

And a recovery was allowed where a party resided about 17 miles from the office of delivery, being about 3 miles from Post Oak on the road from the delivery office, and a special delivery was guaranteed, and was agreed upon and was not made. Had the messenger been sent to Post Oak he would have ascertained that the addressee was between him and the station and near the road, and it would have been delivered, but instead it was sent by mail to Post Oak, and the sender had forbidden it to be sent by mail and had offered to pay the expense of delivery, and the message was sent on those terms. *Western U. Telegr. Co. v. Drake* (Tex. Civ. App.) 36 S. W. 786.

So, a recovery was allowed for delay in delivering a telegram where the addressee lived beyond the free-delivery limits, as shown in the printed clause on the telegram, but the town was about 1 mile from the depot where the telegraph office was kept, and it had been the custom for years of the company to send messages by hackmen and others to people in the town without extra charges. The company undertook to do so in this instance, and having undertaken to make a delivery it should be held liable notwithstanding the printed clause. *Western U. Telegr. Co. v. Womaok* (Tex. Civ. App.) 29 S. W. 932.

And the company was held liable for failing to promptly deliver a message where the party resided 3 miles from the office, although the printed rule provided: "Messages will be delivered free within the established free-delivery limits of the terminal office. If delivered at a greater distance, a

he was a minister,—the nearest available minister of the said church to the residence of the plaintiff. The message was in the following words:

Evansville, Tenn., 8-19-'95.

To Rev. Whitner, Dayton, Tenn.:

My daughter Katie is dangerously sick. Wants to be baptized. Come to Washington at once. Wire me at Evansville at once.

T. J. Robinson.

This message was delivered to defendant at the town of Evansville, Tennessee, at its receiving office at that point, and charges for its transmission to Dayton paid in advance,—all that was demanded by the agent who received the message. The message was received about dark, the agent receiving it stating that it could be delivered that night, and that he would do his best to get it through. Evansville and Dayton were on the same railroad, and only a few miles apart, and the home of the plaintiff was near Evansville, and in the vicinity of Washington, Tennessee. It appears in evidence that the message was received at Day-

ton about 7:55 P. M. on the night of its transmission; that the messenger boy of the office had left before the telegram was received, and the agent at Dayton made no effort to procure his return, or to secure any other messenger, in order to deliver the message to Rev. Whitner, who, it appears, lived in the town of Dayton, just beyond the corporate limits, but within the improved portion of the place, and a little more than $\frac{1}{2}$ mile from the telegraph office. The message was sent to him the next morning, when he went immediately to Washington, and found the young lady was dead. He reached there about 9 o'clock, and she had been dead about an hour. He stated that he would have gone the night before if he had received the message, and that if he had reached there in time he could have baptized the young lady, and asked her the necessary questions, and could have reported the same to his session, and felt sure she would have been admitted had she lived. The law of the Cumberland Presbyterian Church—his church—required the action of that church session before members could be admitted. The other

special charge will be made to cover the cost of such delivery." The court held that the failure to demand charges for delivery and the attempt to deliver required the company to deliver promptly. *Whittemore v. Western U. Tele. Co.* 71 Fed. Rep. 661.

A telegraph company was held liable where the addressee lived in the suburbs of F. about $\frac{1}{4}$ of a mile from the telegraph station, and the messenger boy did not go to the place where she lived, as some persons informed him that she had moved, and some said that she had not, and the next day the telegram was left with the janitor of a hall, and was received one day too late to arrange for a lecture, and 1 Ind. Rev. Stat. 1876, p. 888, § 1, provided a penalty of \$100 for failure to transmit with impartiality and good faith, and § 3 provided for delivery within 1 mile of the station or within the city or town. *Western U. Tele. Co. v. Gougar*, 84 Ind. 176.

In an action for a penalty for failure to deliver a telegram in due time, the declaration was properly amended so as to show that the person to whom it was addressed resided within the city and within 1 mile of the company's station. *Western U. Tele. Co. v. Smith*, 98 Ga. 685.

In *Western U. Tele. Co. v. Buskirk*, 107 Ind. 549, it was held that the burden of proving that the party to whom a despatch was sent within the free-delivery limits was upon the defendant in an action under Ind. Rev. Stat. 1881, § 4176, providing a penalty for failure to deliver within 1 mile of the station or in the town or city. The excuse for non-delivery rests upon the defendant.

And under 1 Ind. Rev. Stat. 1876, p. 888, which was a similar statute, the same was held to be the rule. *Western U. Tele. Co. v. Lindley*, 62 Ind. 371.

But in *Western U. Tele. Co. v. Henderson*, 89 Ala. 510, it was held that the burden of proving that the addressee lived within the radius of the free-delivery system, where the contract provided for free delivery within the established free-delivery limits of the terminal office, was upon the plaintiff, and no extra compensation was paid or notice given of the distance of the residence from the office. In this case the evidence was conflicting as to whether or not there was a road which brought the distance to less than $\frac{1}{2}$ mile.

Under Ind. Rev. Stat. 1881, § 4177, providing that telegraph companies shall be liable for special damages occasioned by negligence in receiving, trans-

mitting, or delivering despatches, a telegraph company was held liable for failure to deliver a message to a party who lived for six years within 1 mile of the office in a city, although the company made efforts to find him by inquiries at the postoffice and all the hotels, and of persons on the street. *Western U. Tele. Co. v. McKibben*, 114 Ind. 511.

But a telegraph company was not held liable for failure to deliver a message where the party was beyond the free-delivery limits, and nothing was paid for the delivery. A rule establishing the free-delivery limits at $\frac{1}{2}$ mile from the office in cities of less than 5,000 inhabitants was held to be a reasonable rule. *Western U. Tele. Co. v. Trotter*, 55 Ill. App. 659.

And where a party sending a message was an agent of the addressee and had notice that under the rules of the company a message would not be delivered after 5 P. M. away from the office, unless special delivery was paid for, a company was held not liable for not making a special delivery of an answer to the agent in response to his telegram, where special delivery was not paid. *Bierhaus v. Western U. Tele. Co.* 8 Ind. App. 246.

And a telegraph company was held not liable where the action was not brought within the time provided for in the contract. The court further held that the company used due diligence to deliver the message where the person to whom the despatch was sent did not live within the limits in which free delivery under the contract would be made, and nothing was paid for delivery beyond free limit. *Western U. Tele. Co. v. Rains*, 63 Tex. 27.

Ind. Rev. Stat. 1881, § 4176, providing for transmission of despatches with impartiality and good faith and in the order of time in which they are received, and § 4178, providing for the delivery within 1 mile of the delivery station, was held contrary to the Federal Constitution when applied to intercourse between states. In this case the company further claimed that the statute of Iowa to which place the message was sent provided for delivery within 1 mile of the office, but that the party lived at a greater distance. *Western U. Tele. Co. v. Pendleton*, 122 U. S. 847, 30 L. ed. 1187, 1 Inters. Com. Rep. 806, Reversing 95 Ind. 12, 48 Am. Rep. 692.

A telegraph company was held not liable for failure to deliver a telegram to the governor's office under oral instructions given by the party to whom

evidence material to be noticed, in addition to that respecting the mental anguish suffered by the father in consequence of the nonarrival of the minister, was offered by the defendant respecting the custom of its office boy, not very material to be stated, and the fact that it had a rule not to make free delivery beyond $\frac{1}{4}$ mile, this not being very much more material than the other, inasmuch as it seemed to be a rule laid away, and of the existence of which nobody was advised, and particularly the plaintiff, nor does it appear that it was observed or required to be. Inasmuch as the testimony in this case shows no failure to deliver any message received addressed to the residents of Dayton, and, on the contrary, that the agent would frequently make delivery at points further than $\frac{1}{4}$ mile, and sometimes at night, for accommodation, when he thought the message was important. That there was ever any refusal to do so does not appear. On this proof, upon defendant's plea of not guilty, trial being had, verdict and judgment were rendered for \$500, and the defendant appealed in error. Errors assigned are: First. Refusal of the court to charge that, if the proof establishes that Rev. Whitner lived more

than $\frac{1}{4}$ mile from the telegraph office, and that the company had a rule that messages beyond that limit were not to be delivered free of charge, then the company will not be liable for a failure to deliver, unless an arrangement was made with the company to deliver the message in this instance. Second. Because there was no evidence to support the verdict. Third. Because the verdict was excessive. Fourth. Because the court erred in charging the jury as follows: "If the proof should establish that the Reverend Whitner lived more than $\frac{1}{4}$ mile from the defendant's Dayton office, and that the defendant had a rule that they would not deliver messages free outside of $\frac{1}{4}$ -mile limit from the office of destination, then, if the plaintiff, or the agent who sent his telegram, had notice of such rule, it would have been the duty of the plaintiff or his agent to arrange with the defendant for the delivery of the message; and, if they failed to do this, the company would not be liable for any failure to deliver the message outside the $\frac{1}{4}$ -mile limit. On the other hand, if the proof shows that neither the plaintiff nor his agent had knowledge of the existence of such a rule, and the defendant received a message for trans-

it was directed, when the agent telephoned to such office and found that the party was out of the city, and then delivered the despatch promptly at the residence to the wife of the party. *Given v. Western U. Teleg. Co.* 24 Fed. Rep. 112.

In *Clement v. Western U. Teleg. Co.* 137 Mass. 463, where a company was held liable for gross negligence in failing to deliver a message, the addressee lived more than $\frac{1}{4}$ mile from the telegraph office, and there was no evidence as to whether or not any attempt had been made to find the party. The question of distance was not discussed.

Under statutes providing in one section for prompt transmission, and in another section for prompt delivery, if the party to whom it is directed resides in the city or town or within 1 mile from the delivery office, telegraph companies have been held not liable for failing to deliver to nonresidents or transients, but have been held liable under the 1st section where nonresidents have called at the office and the despatch has not been transmitted, and have been held liable where the custom was to deliver.

So, a telegram addressed to a nonresident of the city, "Care of Teachers' Institute" in a city, did not, as required by Ga. act Dec. 20, 1892, providing for a penalty, specify any place within the limits of the city at which the message was to be delivered, where the Teachers' Institute was only a convention, and was holding meetings alternately in two different buildings. *Western U. Teleg. Co. v. Murphey*, 98 Ga. 763.

And a telegraph company was not held liable for failing to deliver a telegram to a transient visitor whose address was not given to the company, even if he was well known in the town. *Ga. Acts 1887, p. 112*, providing a penalty for failure to deliver messages to persons to whom they are addressed who at the time reside within 1 mile of the telegraph office or within the town or city in which the office is, does not apply in such a case. But it was said that the penalty might apply if the address was given. *Moore v. Western U. Teleg. Co.* 87 Ga. 613.

And *Ga. act 1887, § 2*, providing a penalty for failure to deliver despatches to "persons or agents residing within 1 mile of the telegraphic station, or within the city or town in which such station is,"

did not apply to a transient person, although he gave his address in the city limits and the company failed to deliver the message. The 1st section of the act providing for prompt transmission applied, but this message was transmitted promptly. Whether due diligence required the company to go outside of its office to deliver the message was held to be a question for the jury, and to depend in part on the usage of the company. It was said that if the company should go out of its office to deliver for one person it must do so for all. *Western U. Teleg. Co. v. Timmons*, 98 Ga. 345.

But a telegraph company was held liable for a penalty for the nondelivery of a telegram sent to a nonresident at B, who was well known to almost every person at B, and was intimately acquainted with the agent and was boarding at the same hotel with him, and it was the custom of defendant to deliver telegrams to nonresidents, especially during terms of court, and the addressee had himself received such telegrams and was attending court. (The court adopted the rule suggested in *Western U. Teleg. Co. v. Timmons, supra*.) *Western U. Teleg. Co. v. Edwards*, 98 Ga. 757.

And the telegraph company was held liable where it failed to transmit a telegram with due diligence under *Ga. Acts 1887, p. 112, § 1*, providing a penalty for such failure although the party to whom the message was sent did not reside within such limits, as a message should be promptly sent to the office so that it might be called for. So much of the case of *Moore v. Western U. Teleg. Co. supra*, saying the act only applied to those who live in the limits prescribed, must be understood to relate to the failure to deliver only. *Horn v. Western U. Teleg. Co.* 88 Ga. 533.

A telegraph company was held liable for failure to deliver a message called for at the office, although the sendee was a nonresident. *Ga. act Oct. 22, 1887, § 2*, providing a penalty for nondelivery to residents of cities and towns and to persons residing within 1 mile from the office, did not apply, and the plaintiff did not have to bring himself within the terms of that section. The 1st section of the act required transmission for nonresidents as well as others with impartiality and good faith, and with due diligence under a penalty. *Western U. Teleg. Co. v. Mansfield*, 98 Ga. 349. L.T.

mission and delivery without calling attention to such rule, it would have been its duty to use active diligence in delivering it, if the addressee resided within a reasonable distance from the defendant's office."

Taking up these objections, not according to their order, but in the most convenient form for presenting them, we dispose of the question, first, that there is no evidence to sustain the verdict. On this it is insisted by plaintiff in error that the declaration alleges the young lady became unconscious and died before he could have arrived, had the telegram been delivered in time. It is true that the declaration averred that she became unconscious, though it is not stated at what time. It is stated in the same connection, however, that, had the message been promptly and properly transmitted and delivered, the minister would have duly come to Washington, as requested, and have arrived at the home of the plaintiff in ample time to have administered to the spiritual wants and requirements of the plaintiff's daughter, which at least negatives the supposed inference, from the averment of unconsciousness, that it resulted earlier than the minister could have arrived. It was not essential to prove affirmatively, under this declaration, that she did not become unconscious before the minister could have reached her father's home. There is no presumption from the declaration, taken entire, that she did, but, on the contrary, that she did not.

It is next insisted that the daughter's object was to be united with the church, and that, as it appears from the testimony of the minister that she could not have become a member, according to the regulations of that church, until after the meeting for that purpose, therefore, the nonarrival of the minister was immaterial, and that the anguish experienced by the father could not have any foundation on that account. There is nothing in this objection. It was the daughter's desire, which the father knew, to be baptized, and to have the minister do what he could to unite her with the church. What the effect or non-effect as to the actual uniting herself to the church may have been was not the question. She had the right and desire to have the attendance of the minister for this purpose, and the father must necessarily have suffered just as much from the minister's failure to arrive and administer to his daughter what she desired to have done for her consolation and support in the hour of death, as though it would have effectuated a complete church membership. What would have been the effect of it, it is wholly immaterial to consider. The girl desired to do all she could, and the minister testified he would have done all he could, to effectuate her purpose. The anguish of the father in this disappointment could hardly have been less keen than it would have been in consequence of the fact that, after all was done that could be, it might have been supposed necessary that still further action be taken by the church. The suit is not for any damages which resulted from any wrong to the girl, or the failure to accomplish her admission into the church, but the suffering endured by the father because of his disappointment in the failure of the minister to arrive and afford the daughter whatever help

and consolation he could, in her effort to prepare by baptism and other services, which he could render as a minister of God, in her impending dissolution. It may be a matter of doubt what the effect of it all would have been, and whether baptism alone of a repentant believer might not have been sufficient for all practical purposes of accomplishing her desire. This, of course, we cannot decide; but, whether true or not, it is clear that these were things desired with great tenderness and anxiety by the father, and that his anguish would be naturally very great, and that he was not able to have them done because of the defendant's negligence. It cannot be decided that he suffered no pain in consequence of being unable to accomplish any of the things desired because, possibly, he could not have accomplished all.

There is no error in the charge of the court as to the rule about delivery within $\frac{1}{4}$ mile of defendant's office, first, because it does not appear that the public, and still less the plaintiff, had any knowledge of such rule, and it not only does not appear that he was informed of the rule, but on the contrary, that he was advised by the defendant's agent, to whom he delivered the telegram, and to whom he paid all that was asked for its transmission and delivery, that it could be delivered that night. Dayton, we can judicially know, is one of the smaller towns of the state; and, presumably, when the defendant's agent took the message, addressed to a resident of that town, with the statement by him that it could be delivered, and without any inquiry as to distance, or knowledge on the part of the plaintiff and his agent of any rule not to be delivered beyond $\frac{1}{4}$ mile, or suggestion of any such rule by the receiving agent of the company, who received for that proposed transmission and delivery all the compensation it asked, its purpose and contract was to deliver; and the plaintiff was not required to make, or show that he made, further inquiry on the subject. It might be different had the addressee lived in a large city, and probably at a great distance from the telegraph office. Besides, as already stated, it appears in evidence that, though there was a rule of the company that, in towns of the size of Dayton, delivery would be made only within the $\frac{1}{4}$ mile limit, it does not appear that the company required or enforced the observance of this rule, or took any means to inform its patrons of the existence of such rule, and the company's agents did not themselves conform to it, but, on the contrary, delivered messages beyond the limit and, in fact, delivered this one beyond the limit, though too late to accomplish its purpose. A rule merely made, without notice to those who are to be affected by it, and without exaction or conformity to it, and which is not in fact observed by the company itself, cannot, as a protection against liability, be laid away in secret consciousness of the agents of the company, unknown and unobserved, until the occasion arises to apply it on account of liability incurred by failure to deliver, as in this case.

Finally, as to the excessiveness of this verdict. As already stated, it is for \$500. The question as to the excessiveness is not, of course, an original one. addressed to us. We

are not to render the verdict, but merely to control it, as against the passion, the prejudice, the corruption, or unaccountable caprice of the jury. If none of these things appear, or may be inferred, from the extravagance of the verdict or other facts in the record, we do not attempt to control it. Of course, as we have heretofore intimated, in cases of this character, where the damages are for mental anguish purely, extravagant and extraordinary verdicts will be tolerated; yet, within reasonable limits, the discretion which exists in the jury will be controlled by us. In this case we cannot say that the amount given, while in full

and ample consideration, is one evincing passion, prejudice, corruption, or caprice. The negligence of the defendant was gross and inexcusable, and about a matter which the terms of the telegram plainly showed not only permitted no delay, but called for the exercise of a reasonable diligence as a matter of business and a matter of humanity. We are not disposed to encourage negligence of this character by the enforced reduction of verdicts given against it by way of smart money, or as compensatory.

We cannot disturb this judgment on that account, and it is affirmed.

PENNSYLVANIA SUPREME COURT.

Mabel L. BUCHANNAN

SUPREME CONCLAVE IMPROVED
ORDER OF HEPTASOPHS, Appt.

(173 Pa. 468.)

The beneficiary of a certificate of insurance on the life of her father, who is insane or incapable of attending to business, is entitled to notice of his default in paying assessments before a forfeiture can be declared therefor, after she has given notice to the company of his condition and requested a notice of any default on his part so that she might make an effort to pay the assessment if he did not.

(November 11, 1906.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, for Allegheny County in favor of plaintiff in an action brought to enforce payment of a benefit certificate. *Affirmed.*

The facts are stated in the opinion of the lower court in refusing a motion for a new trial.

Messrs. J. A. Langfitt and S. A. Will, for appellant:

There are two methods provided in the laws of benefit societies for suspension on account of nonpayment of assessments. Some require an affirmative act of the subordinate lodge to complete the suspension, and notice of such action to the members. In others the law is self-acting or executory, and requires no affirmative action on part of the subordinate lodge to complete the suspension. If, under the former, a member by some affirmative act is suspended by the lodge, and has notice of such act, and does not exercise the right of appeal secured him by the laws of the order, the action of the lodge, if such lodge has juris-

diction, is final, and cannot be assailed in an action on the certificate after the member's death.

Karcher v. Supreme Lodge K. of H. 187 Mass. 368; *Mulroy v. Supreme Lodge K. of H.* 28 Mo. App. 468; *Hamill v. Supreme Council of R. A.* 152 Pa. 537.

If, however, by the laws of the society mere nonpayment of an assessment operates as a forfeiture, the member elects every time he is called upon to pay an assessment either to pay within the stipulated time or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time.

Rood v. Railway Pass. & F. C. Mut. Ben. Asso. 31 Fed. Rep. 62; *Illinois Masonic Benev. Soc. v. Baldwin*, 86 Ill. 479; *Bacon, Ben. Soc. & Life Ins.* § 885; *Pennsylvania Training School v. Independent Mut. F. Ins. Co.* 127 Pa. 563.

The laws of the defendant provide for the latter method of suspension.

The law being self-executory, the nonpayment of an assessment *ipso facto* works a suspension.

Grand Lodge of Illinois I. O. of M. A. v. Besterfield, 87 Ill. App. 523; *Rood v. Railway Pass. & F. C. Mut. Ben. Asso. supra.*

The laws of defendant relative to notice are sufficient and binding; members are entitled only to the notice contracted for, and no other need be given.

Forse v. Supreme Lodge K. of H. 41 Mo. App. 106; *Weakly v. Northwestern Benev. & Mut. Aid Asso.* 19 Ill. App. 327; *Bacon, Ben. Soc.* § 881; *Supreme Lodge K. of H. v. Johnson*, 78 Ind. 110.

Notice by publication in a newspaper is sufficient when the laws so provide.

Forse v. Supreme Lodge K. of H. supra; *Pennsylvania Training School v. Independent Mut. F. Ins. Co.* 127 Pa. 559; *Borgrafte v. Supreme Lodge K. & L. of H.* 23 Mo. App. 127; *York County Mut. F. Ins. Co. v. Knight*, 48

NOTE.—The question involved in the above case as to the rights of the beneficiary under a policy on the life of an insane person after notifying the insurer of the fact of his insanity seems to be entirely novel.

84 L. R. A.

As to the act of an insane beneficiary who killed the insured, see *Holden v. Ancient Order of U. W.* (Ill.) 81 L. E. A. 67.

Me. 75; Northampton Mut. Live-Stock Ins. Co. v. Stewart, 89 N. J. L. 486.

The mailing of this paper at Baltimore, properly wrapped, stamped, and addressed to Buchanan at Freeport, Pennsylvania, is prima facie evidence that Buchanan received it.

Folsom v. Cook, 115 Pa. 539; **Yoe v. Howard Masonic Mut. Benev. Asso.** 63 Md. 86; **Greenley v. Iowa State Ins. Co.** 50 Iowa, 86; **Northwestern Traveling Men's Asso. v. Schauss**, 148 Ill. 304; **May, Ins.** 582.

The form of the notice was sufficient, and gave the member the necessary information as to assessments, and was the usual notice. Any defects of form merely are immaterial.

Kircher v. Supreme Lodge K. of H. 137 Mass. 368.

Whether properly received or whether received at all or not, could in no wise prevent suspension in case of nonpayment.

Yoe v. Howard Masonic Mut. Benev. Asso., Greeley v. Iowa State Ins. Co., Forse v. Supreme Lodge K. of H., and Northwestern Traveling Men's Asso. v. Schauss, supra; Reichenbach v. Ellerbe, 115 Mo. 588.

Where there is no provision in the contract of insurance, which declares expressly or by necessary implication that sickness, insanity, or other disability shall excuse the nonpayment of an assessment on the day it is due, no relief can be granted against such contingencies.

Hawshaw v. Supreme Lodge K. of H. 29 Fed. Rep. 778; **Carpenter v. Centennial Mut. L. Asso.** 68 Iowa, 453, 56 Am. Rep. 855; **Yoe v. Howard Masonic Mut. Benev. Asso. supra; Kline v. New York Ins. Co.** 104 U. S. 88, 26 L. ed. 662; **Thompson v. Knickerbocker L. Ins. Co.** 104 U. S. 252, 28 L. ed. 765; **Wheeler v. Connecticut Mut. L. Ins. Co.** 82 N. Y. 543, 37 Am. Rep. 594; **Ingram v. Supreme Council A. L. of H.** 14 N. Y. S. R. 600; **Grand Lodge A. O. U. W. v. Jesse**, 50 Ill. App. 101; **Dennis v. Massachusetts Ben. Asso.** 120 N. Y. 496, 9 L. R. A. 189; **Bliss, Life Ins.** § 179; **Smith v. Penn Mut. L. Ins. Co.** 11 W. N. C. 295.

In mutual benefit societies the contract is between the society and the member, and the beneficiary acquires no vested right in the benefit fund which is to accrue upon the death of the member until death takes place.

Niblack, Ben. Soc. & Acci. Ins. § 212.

A beneficiary is without the rule which releases a member from the consequences of an omission to do an act rendered impossible by the omnipotent power.

Niblack, Ben. Soc. & Acci. Ins. § 272; **Howell v. Knickerbocker L. Ins. Co.** 44 N. Y. 276, 4 Am. Rep. 675; **Wheeler v. Connecticut Mut. L. Ins. Co.** 82 N. Y. 543, 37 Am. Rep. 594; **Wendt v. Order of Germania**, 8 N. Y. S. R. 351.

The interest of the plaintiff was like that of a devisee named in the will of a stranger during the lifetime of the testator.

The fact that she may have paid or rather transmitted assessments both prior and subsequent to her being designated as beneficiary vested no interest in her.

May, Ins. § 550; **Niblack, Ben. Soc. & Acci. Ins.** § 267; **Kenyon v. Knights Templar & M. Mut. Aid Asso.** 122 N. Y. 247.

Messrs. Andrew M. Robb and Young & Trent, for appellee:

The proposition is too broad that the members are absolutely bound by whatever law the

society chooses to ordain, but the right is after all solely in the courts to determine, not only the meaning of the laws, but also the reasonableness of the laws.

Bacon, Ben. Soc. §§ 85, 86, ed. 1883; **Ang. & A. Corp.** § 847; **Com. v. St. Patrick's Benev. Soc.** 2 Binn. 441, 4 Am. Dec. 453; **Com., Fischer, v. German Soc.** 15 Pa. 251; **Com. v. Pennsylvania Beneficial Inst.** 2 Serg. & R. 141; **Diligent Fire Co. v. Com.** 75 Pa. 291; **St. Mary's Beneficial Soc. v. Burford**, 70 Pa. 321; **Ecans v. Philadelphia Club**, 50 Pa. 107.

David H. Buchanan was insane during August and September, 1894.

Mabel was his daughter and beneficiary. As his daughter no matter to whom the certificate was payable she had such an interest in her father's welfare that she was entitled to see to it that his certificate should not be forfeited while he was entirely mentally incapable of attending to the payment of the assessments.

As a beneficiary she had such an interest as entitled her to keep the certificate alive, not against her father's voluntary action, but if he were mentally incapable of receiving notice or of paying the assessment.

Bacon, Ben. Soc. § 255; **Helme v. Philadelphia L. Ins. Co.** 61 Pa. 107, 100 Am. Dec. 621.

The law abhors a forfeiture, and therefore he who seeks to enforce it must show that he has been guilty of no unjustifiable or unconscionable conduct.

Helme v. Philadelphia L. Ins. Co. supra; Kister v. Lebanon Mut. Ins. Co. 128 Pa. 567, 5 L. R. A. 646.

If the contention of appellant is correct that notice could only be given to Buchanan that he only could pay the assessment, and he only direct to whom notice could be sent, then the duty resting on Buchanan was a personal one and his insanity would excuse the performance, and the forfeiture could not be insisted on.

Scully v. Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62.

SLAGLE, J., delivered the following opinion in the court of common pleas:

"This was an action upon a benefit certificate issued to D. H. Buchanan, and made payable to the plaintiff, his daughter. A verdict was rendered in favor of plaintiff. A motion for a new trial was made by defendant, for which a number of reasons have been assigned. We think there was sufficient evidence for submission to the jury of the questions of fact, and only two of the reasons assigned need be considered. The fourth assignment is as follows: 'Witnesses for plaintiff having testified that D. H. Buchanan did not, to their knowledge, receive his copy of the Advocate in September, 1894, the court erred in charging the jury that mailing the said Advocate at Baltimore to the proper address of D. H. Buchanan was prima facie evidence that he received it, but that that evidence might be rebutted.' The court did not instruct the jury as stated. It was contended by plaintiff that the notice published in the Advocate was not the notice required by the constitution of the order; that it was a notice addressed to the conclaves, and should have been addressed to the members. The court held that the notice was sufficient in form. It was further contended that there was not suf-

cient evidence of mailing. The court submitted the question to the jury as follows: 'Now, was this placed in the postoffice, properly addressed to Mr. Buchannan at the place of his residence, of which the order had notice upon their records? If so, then notice was given.' Counsel for plaintiff contended that they might show that it had not been received. It would probably have been better to have said that it was immaterial whether it had been received or not, the court having practically instructed the jury that there was no evidence to rebut the presumption that it had been received, and may have fallen into an error in saying: 'However, if, under all the evidence in the case, you are not satisfied that this notice was not properly sent and received, the defendant has not made out a case of suspension.' But this certainly could have done no harm, as the case was submitted to the jury on the question which is the subject of the fifth assignment, as follows: 'The court erred in its charge to the jury in stating that Mabel Buchannan, the plaintiff, had an interest in the benefit certificate sued on, and that she was entitled to notice of the calling of assessments, for the nonpayment of which D. H. Buchannan was suspended, if said D. H. Buchannan was mentally incapable of receiving or of understanding the meaning or effect of said notice, there being no provision in the law of the defendant entitling the plaintiff to any such notice in this case.' This is not in the language of the court, but is substantially correct. There was some evidence of the incapacity of Mr. Buchannan at and before the assessment of September, 1894, was made, and that it continued until his death. It was also in evidence that before the assessment was made Mabel Buchannan, the beneficiary, had written to the financial officer to whom all assessments were payable, referring to her father's condition, stating that he was careless, and liable to neglect them [the assessments]: that she had at various times paid them; and asking, 'If you find Mr. Buchannan won't pay them, please let me know, so that I can make an effort to do so.' In view of this evidence the court instructed the jury that Mabel Buchannan had an interest in that certificate. It is true that it is one that was subject to the voluntary control of her father. Therefore she had certain rights, and, if her father was insane, or incapable of attending to business, she had a right to keep this certificate alive; and, when she notified the proper officer, if she did, of her intention to keep it alive notwithstanding what her father might do, she had a right to do it. If he was capable of acting, no action of hers would keep it alive, because he had the power to destroy her rights at any time. But, if he was incapable of acting, she would have the right to say to this officer of this society, 'My father is not capable of attending to this matter, and I will pay these assessments until he is.' The conclusion of the whole matter was stated as follows: 'Now, if her father was in such actual condition as to make him incapable of acting in this matter, she, as the beneficiary, had a right to pay the assessments, and when she asked to be informed of any assessments that were due I think it was the duty of the officers to notify her before any

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suspension was made; and, if they neglected to do it, then they could not work any suspension of this certificate.' This is the substantial testimony in the case. There is abundant authority for the position of the plaintiff's counsel that where the certificate of a beneficial association provides that a failure to pay any assessment within a certain time shall render it null and void, time is of the essence of the contract, and failure to pay within the time designated renders the certificate null and void; and that, where there is no provision of the contract which declares expressly or by necessary implication that sickness or insanity or similar incapacity shall excuse the payment of any assessment on the day it is due, the courts will not grant relief against such contingency. This is simply to hold that everyone is bound by his contract deliberately made. However, the reasons for this seemingly hard rule are indicated in Bacon, Ben. Soc. § 884, where the author says neither insanity, sickness, nor absence is an excuse for nonpayment of assessments, the payment being an act that can be performed by the member or by some other person. This marks the distinction between this case and those to which he finds the rule to have been applied. The statement of the text is possibly too broad, but certainly anyone related to the member or interested in his estate may come to his relief under such circumstances, and especially when he is named as his beneficiary under his certificate. The beneficiary has an interest in the certificate, and, although it does not become absolute until the death, it is an actually existing interest until annulled under the rules of the order. So long as it remains in force, it belongs to him exclusively. Upon the death of a member it passes to the beneficiary as his own, and not as representative of a member. *Hamill v. Supreme Council of R. A.* 152 Pa. 537.

"If the plaintiff, having knowledge of the assessment, had offered to pay it to the proper officer, there can be no question but that he would be bound to accept it. When the offer was made in advance, good faith required that the beneficiary should have the opportunity to preserve her rights, not against the voluntary act of the member, but as against neglect caused by his inability to act. She was therefore entitled to notice upon proper request made. No notice was given, and it appears from the evidence that neither the plaintiff nor her mother had knowledge of the assessment; and, if plaintiff had actual knowledge of the assessment, it would be fatal to her claim. This gives pertinency to the testimony of the plaintiff and her mother that they did not see or know of the notice by publication. The only other question is as to the party to whom the request for notice was made. Plaintiff's request was sent to the financier of the local conclave. He is the only officer with whom individual members come in contact. To him all assessments are paid, and the order should be bound by his acts. The question in this case seems to be new. We think the law ought to be and is as given to the jury, and a new trial must therefore be refused."

Per Curiam:

We find no error in this record. For rea-

sions given by the learned trial judge in his opinion refusing a new trial, the judgment should not be disturbed.

Judgment affirmed.

HARRISBURG, CARLISLE, & CHAMBERSBURG TURNPIKE ROAD COMPANY, *Appl.*,

v.

HARRISBURG & MECHANICSBURG ELECTRIC RAILWAY COMPANY.

(177 Pa. 555.)

Payment into court of an award of viewers from which an appeal is taken by the property owners is not sufficient to satisfy Const. art. 16, § 8, requiring just compensation to be "paid or secured before the taking, injury, or destruction" of property in eminent domain cases; and therefore the act of May 14, 1889, providing that on such payment into court the right to use the property shall vest in the corporation seeking to take it, and that the money shall remain in court to await the final judgment on appeal, is unconstitutional.

(October 5, 1896.)

A PPEAL by complainant from a decree of the Court of Common Pleas for Cumberland County dissolving an injunction which had been issued to restrain defendant from constructing its road across the road of complainant without making or securing compensation for damages thereby inflicted. *Reversed.*

In order to reach points authorized by its charter it became necessary for defendant to cross complainant's road in the construction of its railway. Complainant, believing that this would render its road unsafe and dangerous to travel, asked an injunction to restrain the railway company from entering upon or crossing its road. A preliminary injunction was granted, which was continued until final hearing, the court stating that it would be dismissed if the railway company would obtain the right to enter upon and occupy the turnpike as provided for under the act of May 14, 1889, § 17. A petition was subsequently presented to the court showing that it was impossible to agree as to damages, and asking that viewers should be appointed. The report of the viewers was confirmed and the damages paid into court. The injunction was then dissolved.

Further facts appear in the opinion.

Messrs. E. B. Watts, E. J. McCune, John Hays, and W. F. Sadler, for appellant:

The act offends against Const. art. 16, § 8. If street railways were invested with the right to take property, the constitutional requirement is that they shall make just compensation for property taken, injured, or destroyed which compensation shall be paid or

secured before such taking, injury, or destruction.

Pusey's Appeal, 83 Pa. 67; *Milloale v. Peason*, 123 Pa. 497; *Hare v. Rice*, 142 Pa. 608.

Until determined by a jury the amount of damages is not known, and a jury is not bound by a bond given to secure them.

Michael v. Crescent Pipe Line Co. 159 Pa. 99.

It is an arbitrary governmental interference with vested rights.

Baggs' Appeal, 43 Pa. 512, 81 Am. Dec. 583.

Acts of assembly arbitrarily interfering with vested rights are unconstitutional.

Grim v. Weissenberg School Dist. 57 Pa. 433,

98 Am. Dec. 237; *Shonk v. Brown*, 61 Pa. 320;

Haley v. Philadelphia, 68 Pa. 45, 8 Am. Rep.

153; *Hegarty's Appeal*, 75 Pa. 503; *Saxton v.*

Mitchell, 78 Pa. 479.

Messrs. A. G. Miller and J. W. Wetzel,

for appellee:

The act of May 14, 1889, by § 17, gives the appellee a right to cross or occupy turnpike roads, and § 14 provides a method of ascertaining and securing compensation.

Lockhart v. Craig Street R. Co. 139 Pa. 419;

Delaware, L. & W. R. Co. v. Wilkes-Barre &

W. S. R. Co. 1 Pa. Dist. R. 637.

Williams, J., delivered the opinion of the court:

There is no room for doubt that the general purpose and character of the act of May 14, 1889, entitled "An Act to Provide for the Incorporation and Government of Street-Railway Companies in This Commonwealth," are within the constitutional powers of the legislature. There may be particular provisions that are not. This appeal challenges the constitutionality of a provision found in the 17th section, and raises a question not heretofore considered. The 8th section of the 16th article of the Constitution was intended to protect private property against the exercise of the right of eminent domain in a harsh or unjust manner. It provides that "just compensation" shall be made to the owner for all property taken, injured, or destroyed by any corporation, "which compensation shall be paid or secured before the taking, injury, or destruction shall be permitted." The machinery by which just compensation may be ascertained has been provided by law, and it includes an appraisal made by viewers appointed by the proper court, an appeal by either party therefrom, and an ascertainment of the amount of the just compensation by a jury upon a trial after the forms of the common law. Security for the payment of the just compensation to which the property owner is entitled must therefore be security for the amount that may be recovered, upon the trial of the appeal from the appraisal, before a jury. This is a plain constitutional requirement, and the legislature can neither dispense with it in whole or in part. The provision of the act of 1889, now complained of, authorizes the corporation, when an appeal has been taken from the award of viewers by the property owner, to pay into court the amount of the unsatisfactory award, and thereupon to take possession of, or proceed to injure or destroy, the property of the appellant. The section declares that the right to build and use the desired crossing over the

NOTE.—See also, as to the constitutional right to have payment made or secured before the taking of property, *Consumers' Gas Trust Co. v. Harless (Ind.)* 15 L. R. A. 506, and *Martin v. Tyler (N. D.)* 25 L. R. A. 533.

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plaintiff's turnpike "shall vest" in the railway company upon the payment into court of the amount of the award, and the money shall remain in court to "await the final judgment on said appeal." If the verdict should be much more than the award the plaintiff has no security for its payment, and may have no means for its collection. The title to the crossing having "vested" when the money was paid into the court, the crossing became a part of the line of the railway, subject to encumbrance by mortgage or otherwise, and subject to alienation. It might well happen that, when a judgment was finally entered on the verdict in favor of the property owner ascertaining the amount of compensation due him, the corporation would be found to be insolvent, the line of railway with all its appurtenances encumbered to its full value, or transferred to a purchaser, and the plaintiff left without security or any responsible party to whom to look for the larger part of his just compensation for the injury sustained by him. This is a result that the constitutional provision was intended to guard against, and would effectually prevent if it was fully enforced. The act of 1889 is unconstitutional in so far as it undertakes to confer an absolute right on the corporation to injure the property of the plaintiff by its crossing, without payment or security for the payment of a just compensation, as it may be finally ascertained upon the disposition of the appeal.

The decree was erroneous, and must be reversed, but it is not necessary that the injunction shall be restored if the defendant will promptly give the security that should have been given before making the crossing. The decree is reversed, and the record remitted, with direction that the injunction be restored unless the defendant corporation shall within ten days after notice of this order give security, to be approved by the court below, for the payment to the plaintiff of such sum as may be found due upon the disposition of the appeal from the award of the appraisers now pending, as the damage sustained by, or the compensation due to, the plaintiff by reason of the crossing of its turnpike road by the railway of the defendant at grade; injunction not to issue if such security be given; costs to be paid by the defendant.

F. BATES, in Trust for Exchange Bank of Titusville, *Appt.*,

H. B. CULLUM.

(177 Pa. 633.)

1. A statute providing that defendants "who shall have become nonresidents of the state" after a cause of action has arisen in the state shall not have the benefit of a statute of limitations, is retrospective,—at least as applied

NOTE.—It seems to be the fact that in the above case a complete defense under the old statute of limitations had arisen before the passage of the new statute, which is held to be retrospective. No distinction seems to have been clearly made between such a case in which the statute had already run, 84 I. R. A.

to the cause of action and residence of the defendant, and covers a case of one who had previously obtained the opening of a judgment to enable him to interpose the statute of limitations.

2. A statute excluding nonrecidents of the state from the benefit of a statute of limitations, when the cause of action arose in the state and the defendant subsequently ceased to be a resident thereof, is not unconstitutional as applied to pre-existing obligations.

(October 5, 1896.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Warren County in favor of defendant in an action to enforce payment of a judgment note upon which judgment had been entered and subsequently opened to permit defendant to set up the defense of the statute of limitations. *Reversed.*

The facts are stated in the opinion.

Messrs. Samuel T. Neill and W. C. Neill, for appellant:

The defendant is not entitled to the benefit of the statute of limitations by reason of his absence from the state.

The provision in the act of July 30, 1842 (1 P. & L. Dig. 2671, pl. 6), applies to defendant.

Murray v. Baker, 16 U. S. 8 Wheat. 545, 4 L. ed. 455; *Bank of Alexandria v. Dyer*, 39 U. S. 14 Pet. 141, 10 L. ed. 391; *Gonder v. Estabrook*, 83 Pa. 374.

The provisions of the act of May 22, 1895, deprived the defendant of the statute of limitations.

This act was constitutional.

8 Am. & Eng. Enc. Law, p. 755; *Grim v. Weissenberg School Dist.* 57 Pa. 493, 98 Am. Dec. 287; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483.

Legislation which merely affects the remedy will apply to pending litigation.

Kille v. Reading Iron Works, 131 Pa. 225; *Lane v. White*, 140 Pa. 99; *Kelber v. Pittsburgh Nat. Flow Co.* 146 Pa. 485.

The act of 1895 does not produce unconstitutional discrimination.

Chemung Canal Bank v. Lowery, 98 U. S. 72, 23 L. ed. 806.

Messrs. W. M. Lindsey, James O. Parmlee, and Edward Lindsey, for appellee:

The tendency of the courts of this state is not to hold such laws as act May 22, 1895, retroactive unless the legislative intention that they shall be so appears unmistakably clear.

Bedford v. Shilling, 4 Serg. & R. 401, 8 Am. Dec. 718; *Ogle v. Somerset & Mt. P. Turnp. Road Co.* 18 Serg. & R. 256; *Allen v. Union Bank*, 5 Whart. 420; *Bechtel v. Cobough*, 10 Serg. & R. 121; *Lefever v. Witmer*, 10 Pa. 505; *Uochlan Twp. Road*, 80 Pa. 156; *Taylor v. Mitchell*, 57 Pa. 209.

Legislation which affects rights will not be construed to be retroactive unless it is declared so in the act; but where it concerns merely the

giving a complete defense, and cases in which the statute of limitations is still running at the time of the change in the law. If the defense under the statute of limitations was complete when the new law was passed, which annulled the defense, it seems to be a clear case of the deprivation of the prop-

mode of procedure it is applied, as of course, to litigation existing at the time of its passage.

Kills v. Reading Iron Works, 184 Pa. 227; *Lane v. White*, 140 Pa. 99; *Palairer's Appeal*, 67 Pa. 494, 5 Am. Rep. 450; *Com. v. Shopp*, 1 Woodw. Dec. 128; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291.

Neither the legislature nor the courts ought to, nor do they consciously, permit themselves to deprive a litigant of his rights without notice; and when the legislature has been so imposed upon as to be induced to pass an act that has that apparent effect the courts ought to interpose between the law and its innocent victim, unless, indeed, overwhelmingly convinced that it was the deliberate intention of the law-making power to change the law, not only for the present and future, but for the past and as in this case take from a litigant, not only a right which he had when his suit began, but one of which he had been assured by the deliberate judgment of this court.

Grim v. Weissenberg School Dist., 57 Pa. 483, 98 Am. Dec. 287; *Bechtol v. Cabaugh*, 10 Serg. & R. 121; *De Chastelluz v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570; *Baggs' Appeal*, 48 Pa. 512, 82 Am. Dec. 583.

The act entirely deprives a class of people of rights heretofore enjoyed under what is at best no more than a notice that hereafter their use of such rights will be regulated, and is a violation of constitutional requirement as to entitling acts.

He Road in Phoenixville, 109 Pa. 44; *Sewickley v. Sholes*, 118 Pa. 165; *Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 484; *Com., Atty. Gen., v. Samuels*, 163 Pa. 288; *Payne v. Coudersport School Dist.*, 168 Pa. 386.

The act of May 22, 1895 (Pub. Laws, 112), offends against § 2 of art. 8 of the Constitution of the United States, which requires that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" and against the 14th Amendment thereof, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Starrett, Ch. J., delivered the opinion of the court:

In June, 1881, judgment was entered against defendant by virtue of a warrant of attorney contained in an unsealed note for \$4,000, payable one day after the date thereof, November 10, 1878. On defendant's application, the court, in January, 1898, made a decree opening the judgment for the purpose of enabling him to interpose the statute of limitations, and awarded an issue in which it is provided that "the judgment note shall stand for a declaration, and defendant shall plead the statute of limitations, and no other plea, within ten days;

the plaintiff on the trial to be at liberty to show any matter in bar of the running of the statute, subject to the usual rules as to notice of special matter." On appeal to this court, the action of the court below, in thus opening the judgment and awarding the issue, was affirmed. *Bates v. Cullum*, 163 Pa. 234. By agreement of the parties, the cause was tried January 27, 1896, by the court without a jury. On the trial, evidence relating to the merits of the claim, and also tending to prove that within a few weeks after the note in question was given defendant left the state of Pennsylvania and ceased to be a resident thereof, and thenceforth continued to reside without the state, etc., was offered by the plaintiff, and received under objection. In connection with the evidence of defendant's nonresidence, etc., he also cited and relied on the act of May 22, 1895 (Pub. Laws, 112), which declares "that in all civil suits and actions in which the cause of action shall have arisen within this state the defendant or defendants in such suit or action, who shall have become nonresidents of the state after such cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitation of actions during the period of such residence without the state." Referring to the evidence that was received under objection, the learned trial judge, in his opinion, says: "All this evidence should have been excluded, and we accordingly now sustain the objection, exclude the evidence from consideration, and seal bill of exceptions for plaintiff. The plaintiff's evidence having been excluded, that offered by the defendant may be treated as withdrawn." As to the act above quoted, he says: "The language of the act before us does not seem to require a retrospective construction; at least not such as to compel us, on ascertaining a fact by the trial of an issue, to enter a different judgment from that which we should have entered had the fact been judicially ascertained at the time of the order awarding the issue." He accordingly held that "no fact appears by which the running of the statute of limitations was prevented," and having found that the note in suit "was due more than six years before the judgment was entered" thereon, he enforced the bar of the statute, and entered judgment for the defendant. Hence this appeal, in which the correctness of the learned judge's rulings are challenged.

If the act, properly construed, is applicable to suits and actions, such as this, in which the cause of action arose in this state prior to the passage of the act of 1895, etc., and is not unconstitutional on that or any other ground, it is impossible to justify the action of the court below in excluding the evidence of defendant's "residence without the state" for more than twenty years as a fact "in bar of the running of the statute." One of the terms of the issue awarded by the court is that on the trial thereof the plaintiff shall "be at liberty to show any matter in bar of the running of the statute." The trial did not take place until

erty without due process of law in violation of the Federal Constitution. That a perfected defense under the statute of limitations is property within the meaning of that constitutional provision is expressly decided in *Normal School Dist. Bd. of Edu.* 34 L. R. A.

v. Blodgett (Ill.) 81 L. R. A. 70. It is also in substance decided in *Kipp v. Elwell* (Minn.) 83 L. R. A. 436, holding that a statute which would reinstate judgments for taxes after they had been fully barred is unconstitutional.

January 27, 1896, more than eight months after the act was passed. All that was adjudicated prior thereto was the authority of the court to open the judgment and award the issue on the terms therein specified. The issue was pending and undetermined when the act went into operation. The learned counsel for defendant in their argument candidly "admit that the weight of authority is in favor of the power of the legislature to repeal and pass laws changing the methods of procedure, and relating solely to the remedy pending litigation;" but they claim "that the peculiar situation of this case" renders those authorities, as well as the act itself, inapplicable. For reasons above suggested, we are unable to see wherein either the act or the authorities referred to are not strictly applicable to the case in hand. The language of the act is clear, specific, and imperative. It applies to "all civil suits and actions in which the cause of action shall have arisen within this state." It affects all defendants "who shall have become nonresidents" "after said cause of action shall have arisen." This language is clearly retrospective, at least as applied to the cause of action and residence of the defendant. Whether

our statute of limitations should or should not continue to run in favor of persons who had abandoned their residence in this state was purely a legislative and not a judicial question. The defendant had no right, in or under the statute, that could interfere with the power of the legislature to declare that he and all others similarly situated should not have the benefit thereof "during the period of" their "residence without the state." As was said in *Campbell v. Holt*, 115 U. S. 628, 29 L. ed. 486: "No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the case when the contract was made." We are of opinion that the act of 1895 is neither unconstitutional nor inapplicable to the facts of this case, and that the learned court erred in holding otherwise, add excluding plaintiff's evidence.

Judgment reversed, and record remitted for further proceedings in accordance with this opinion.

Rehearing denied.

TENNESSEE SUPREME COURT.

CHATTANOOGA ELECTRIC RAILWAY COMPANY, *Appt.*,

v.

Thomas JOHNSON, Admr., etc., of Louisa Johnson, Deceased.

(.....Tenn.....)

1. **Damages for the death of a married woman** cannot include the loss to her minor child where the action is brought by her husband under Mill. & V. Code, § 8130, which provides that a right of action for injuries causing the death of any person shall not abate by reason of the death, but shall pass to his widow, or if none, to his children, or to his personal representative for the benefit of the widow or next of kin, but fails to make any express provision as to the beneficiary in case of the death of a married woman, and leaves the recovery to go to the husband *jure mariti*, as it would have gone at common law but for its rule of abatement.

2. **A surviving husband as such cannot maintain a suit** for the wrongful killing of his wife under Mill. & V. Code, §§ 8130, 8133, preventing the abatement of the suit, although the recovery inures to his benefit, but he must bring the action as administrator.

(*Wilkes, J., dissents.*)

(November 13, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Hamilton County in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

NOTE.—For a decision denying the husband's right of action in a similar case, see *Western U. Teleg. Co. v. McGill* (C. C. App. 8th C.) 21 L. R. A. 518.

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Mr. E. Watkins, for appellant:

The husband alone can maintain an action upon the facts of this case by virtue *jure mariti*.

Tafford v. Adams Exp. Co. 8 Lea, 100; *Hamrico v. Laird*, 10 Yerg. 227; *Tune v. Cooper*, 4 Sneed, 296.

The personal representative has no right of action upon the facts of this case, and the bringing it in that capacity is a material defect not curable by verdict.

Caruthers, *Hist. of a Lawsuit*, Martin's ed. p. 330, ¶ 274; *Anderson v. Read*, 2 Overt. 207, 5 Am. Dec. 661.

The administrator cannot maintain a suit for his own use.

Hagerty v. Hughes, 4 Baxt. 232.

He cannot maintain the suit for the minor child as he has no interest in it.

Tafford v. Adams Exp. Co. supra.

The court erred in not granting motion in arrest of judgment and new trial on the ground that the administrator could not maintain this suit for the benefit of the husband.

Hagerty v. Hughes, supra; Elliott v. Collier, 3 Ark. 537; *Hamrico v. Laird*, and *Tune v. Cooper, supra.*

Mr. T. C. Latimore also for appellant.

Messrs. Daniels & Garvin and Marchbanks & Murray, for appellee:

The first statute was the act of 1851 which provided that the right of action which the deceased would have had had death not ensued should not abate, but should pass to the personal representative for the benefit of the widow and next of kin; and if he declined to bring the action the widow and children might do so in his name.

The construction put by the court upon this statute was that the action could be brought only in the name of the personal representative.

Hall v. Railroad, Thompson, Unreported Cases, 204; *Flatley v. Memphis & O. R. Co.* 9 Heisk. 330; *Eldredge v. Stokes*, 1 Bart. 312.

Thereupon the legislature passed the act of 1871 which amended the act of 1851 so as to allow the action to be prosecuted by the widow, or, if no widow, by the children, and this was in addition to the remedy provided by the act of 1851.

Under this act it has been held that when there are both a personal representative and a widow the action may be maintained in the name of either, the widow having the right to bring the suit in her own name in the first instance.

Webb v. East Tennessee, V. & G. R. Co. 88 Tenn. 119; *Greenlee v. East Tennessee, V. & G. R. Co.* 5 Lea, 418; *Knoxville, O. G. & L. R. Co. v. Acuff*, 93 Tenn. 26; *Holder v. Nashville, U. & St. L. R. Co.* Id. 142.

Under these statutes the decisions of the court were for a time inconsistent upon the question of damages recoverable. It was held that the damages resulting to those for whose benefit the right of action survived was an element of damage for which recovery could be had, in—

Nashville & O. R. Co. v. Prince, 3 Heisk. 580; *Nashville & O. R. Co. v. Stevens*, 9 Heisk. 12; *Collins v. East Tennessee, V. & G. R. Co.* Id. 841.

This was doubted in *Fowlkes v. Nashville & D. R. Co.* 9 Heisk. 839.

And expressly denied in later cases.

Trafford v. Adams Exp. Co. 8 Lea, 96; *Nashville & O. R. Co. v. Smith*, 9 Lea, 470; *Yockley v. King*, 10 Lea, 67; *Chicago, St. L. & N. O. R. Co. v. Pounds*, 11 Lea, 129; *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea, 54; *Louisville & N. R. Co. v. Conley*, 10 Lea, 584.

To obviate this construction the act of 1883 was passed, which provided that the damages resulting to the parties for whose benefit the right of action survives shall be recoverable in the action.

This act in no way changes the mode of suing. The suit must still be prosecuted by the widow or children or by the personal representative.

Loague v. Memphis & O. R. Co. 91 Tenn. 480.

The inclusion of the child will be treated as a mere surplusage, and will not be allowed to defeat the action.

Collins v. East Tennessee, V. & G. R. Co. 9 Heisk. 841.

The suit can be maintained in the name of the husband as administrator of his wife for his benefit as husband.

East Tennessee, V. & G. R. Co. v. Lilly, 90 Tenn. 568; *Webb v. East Tennessee, V. & G. R. Co.* 88 Tenn. 129; *Nashville & O. R. Co. v. Smith*, 9 Lea, 470; *Bream v. Brown*, 5 Coldw. 168.

Beard, J., delivered the opinion of the court:

This suit was instituted by the administrator of Mrs. Johnson to recover damages for the alleged wrongful killing of his intestate by the plaintiff in error. Her surviving husband qualified as administrator, and this action was brought for his own benefit and that of a minor child of the deceased. There were a verdict 84 L. R. A.

and judgment for the defendant in error, from which an appeal has been prayed to this court.

While a number of questions have been made in argument, the only one which will be disposed of in this written opinion is that made upon that part of the charge of the trial judge which imposed a duty upon the jury of ascertaining the damages sustained by the minor child in the loss of the deceased, in the event they found that her death was the result of a wrongful injury received at the hands of the railway company. We think plaintiff in error is right in insisting that the charge, in this respect, was erroneous. In *Bream v. Brown*, 5 Coldw. 168, it was determined that a married woman was within the act of 1850, carried into Mill. & V. Code, §§ 8180, 8181; and, while there the suit was brought by the surviving husband, as administrator of his deceased wife, for the benefit of himself and the minor child of the deceased, yet the only point there argued and decided was that an action could be maintained for the wrongful killing of a deceased wife. In *Trafford v. Adams Exp. Co.* 8 Lea, 96, this court, for the first time, was distinctly called upon to determine who was entitled to the recovery in such an action, where the deceased wife left surviving a husband and next of kin. The question there presented was one of difficulty, owing to the peculiar phraseology of our statutes. The novelty as well as the difficulty of the question invited the careful consideration which it received at the hands of the court, the result of which was an elaborate opinion announcing as a conclusion "that the surviving husband was *jure mariti*, and, to the exclusion of the next of kin, was entitled to the damages" recoverable in such a case. While differing somewhat as to the reasoning of the opinion, all of the members of the court concurred in the holding "that the recovery for a personal injury to the wife which results in death will inure to the benefit of the husband, under the statutory provisions discussed, and that there can be but one recovery in such case;" and that he is entitled to this recovery under the common-law rule of *jure mariti*. It is true, as is argued at the bar, that in that cause there were no children seeking the benefit of a recovery under these Code sections; yet there were next of kin of the deceased wife, who were entitled to the same rights thereunder that children, if any, would have had; so that the rule of survivorship *jure mariti*, which excluded the one, necessarily excluded the other, class. *Trafford v. Adams Exp. Co.* was decided in 1881. In addition to determining this point, that case also settled that the recovery authorized under the statutes then in existence extended only to such injury as the deceased might have had if he or she had survived the injury in question. This decision, thus coming after great fluctuation of judicial opinion as to what were the true elements of damage in such a case, led, no doubt, to the passage of act 1888, chap. 186 (Mill. & V. Code, § 8134), which provided that, when the death is caused by the fault of another, the party suing, if entitled to damages, "shall have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages result-

ing to the parties for whose use and benefit the right of action survives," etc. It is evident that the purpose of this act was not to create a mere class of beneficiaries, but to extend the scope of recovery by allowing not only damages which the deceased might have recovered for his or her own benefit, but also such as resulted from the death to the parties "for whose use and benefit the right of action survived." *Loague v. Memphis & C. R. Co.* 91 Tenn. 458. With this single modification, it left the law of this state, so far as the rights of the surviving husband in such case are concerned, as was announced in *Trafford v. Adams Exp. Co. supra*. Nor has the conclusion reached by the court in that case been seriously called in question since, so far as we are aware, until it was challenged in the present case. On the contrary, our impression is that it has been accepted generally by the profession as a definite settlement of a question that, if not much mooted, at least was open to serious doubt in this state until that time. The rule of *stare decisis*, after this long and general acquiescence in that decision, would, even if doubtful ourselves of its wisdom, induce us to hesitate seriously before reversing it. But we think an examination of the statute in the light of the common law as it stood at the time of its passage abundantly vindicates the holding of the court in that case.

At common law there were two actions which might be maintained for damages resulting from a tortious injury to the wife. One of these could have been prosecuted by the husband, in his own name, and for his exclusive benefit, and that was for the loss of her society, or of her services, or both, as well as for the necessary expenses incurred by him in consequence of the injury inflicted upon her. The other one of these actions was for the injury which the wife sustained, and this was brought in the name of the husband and wife. While the recovery would be in their joint names, yet the husband might, as in the case of any other chose in action, make it his own exclusively, by collecting and appropriating the recovery. Now, it is this latter right of action which is recognized, but is not created, by the statutes of this state. This action of common law would have died with the wife, and it has been the purpose of our legislature to prevent its abatement. The first statutory provision looking to this end is found in an act passed February 1, 1850, which is in these words: "In all and every case where any person shall come to his death by injuries received from another, whether the same were inflicted feloniously or not, for which injuries, in case death had not resulted, an action of damages would lie at law, the personal representative of the person thus killed shall have the right to institute a suit for the damages," etc. This act was carried into the Code of 1858, at §§ 2291 and 2292. Section 2291 of that Code provided as follows: "The right of action which a person who dies of injuries received from another, or whose death is caused from the negligent acts or omissions of another, would have lain against the wrongdoer in case death had not ensued, shall not abate nor be extinguished by his death, but shall pass to his personal representatives, for the benefit of his widow and next of kin, free

from the claims of creditors." This section, as modified by chapter 78 of the Acts of 1871, is § 8130 of Mill. & V. Code. This legislation, as has been observed, did not affect to create a right of action, but recognized one as already existing, and provided that this right of action should not die with the party who was the owner of it. Its purpose was to prevent the abatement which death of the injured party worked at common law. Notwithstanding the peculiar phraseology of § 2291 of the old Code, which restricted the benefit of the recovery in such a case to the "widow and his next of kin," suggesting the ingenious argument that this necessarily excluded from the operations of the statute the case of a married woman dying from a tortious injury, yet this court held in *Bream v. Brown, supra*, that such a case was within the intent of the statute. This holding was based largely, and properly so, upon the use of the comprehensive word "person" ("the right of action which a person who dies," etc.) in the Code, and it was held that this word was sufficient to overcome the apparently restrictive terms already adverted to. Now, following the lead of that case, and altogether in harmony with its reasoning, we think it may be said, it being admitted that a wife is one of the "persons" provided for by that act, it may be safely assumed, in the absence of an express statutory provision disposing of the proceeds of the recovery for the injury resulting in her death, that they will go exactly as they would have gone at common law but for its rule of abatement, and that is to the husband *jure mariti*. It is true, the right to bring this action after death depends entirely upon the statute, and it must be prosecuted exactly as that directs. *Loague v. Memphis & C. R. Co. supra*. It is also true that the proceeds of the recovery in such an action must go according as the statute provides, where it does make such provision. But we have a case where the action is authorized by the Code, and yet where it fails to point out the beneficiary of the recovery. It is a statutory *casus omissus*, and in such a case we know of no other place to turn, with the view of ascertaining this beneficiary, save to the common law; and we think that a sound basis for the conclusion announced in the *Trafford Case*.

It follows from what has been said that the trial judge was in error in instructing the jury to take into consideration the child's relationship to the deceased, and, by necessary implication, telling them to consider its interest in its mother's life; and, as it is impossible for us to say how much of this verdict was intended by the jury for compensation to the child, the case must be *reversed and remanded*.

To meet another objection of plaintiff in error to the form of this action, it may be said that the surviving husband, as such, could not have maintained this suit but that it was essential that he administer. Nor is there anything anomalous in this, as at common law, where a wife died, leaving a husband surviving, before he had reduced to possession a chose in action which belonged to her, "it does not strictly survive to him, but he is entitled to recover the same to his own use, by acting as her administrator." 2 Kent, Com. *135.

Wilkes, J., dissenting:

I cannot concur in the majority opinion. I think the suit is properly brought in the name of the administrator of the deceased wife, but I cannot agree that the husband is entitled to the proceeds, either *jure mariti* or under the statute; not *jure mariti* because without the aid of the statute the husband has no right of recovery in case of the wife's death, whatever may be his rights for an injury to her not resulting in death; and not under the statute because the statute does not so provide. I do not controvert the holding in *Bream v. Brown*, 5 Coldw. 169, in which it was held that the wife is a "person," within the meaning of the statutes providing that actions shall not abate by the death of the "person" who dies from injuries received; and I am of opinion a right of action in case of her death does exist. In that case the suit was brought in the name of her husband as administrator, for the benefit of himself and the minor children of his deceased wife; and it was held that the action was properly brought by the administrator, but the court did not pass upon the question as to whom the proceeds should go to. It did not, however, hold that it was improper to include the children as beneficiaries of the recovery. In *Trafford v. Adams Exp. Co.* 8 Lea, 96, it is said the question of who is entitled to the proceeds of such recovery was settled. In regard to this case it is but true to say that it does not seem to me to rest on any satisfactory basis. The reasoning is all in one direction, while the decision is in another and different direction. In that case there were no children. The suit was brought in the name of the husband, as administrator. The contest over the proceeds was between the husband and the nephews and nieces of the wife as her next of kin. The decision was also prior to the act of 1888, which gives damages, not only for mental and physical suffering, loss of time, and necessary expenses resulting to the deceased, but also damages resulting to the parties for whose use and benefit the right of action survived from the death consequent upon the injury received.

Coming to the consideration of the statute, it is clear that the right to bring the action at all depends on the statute, and beyond the statute no such right exists. *Loague v. Memphis & O. R. Co.* 91 Tenn. 458. It is also clear that, the right being given by the statute, and the remedy provided in the same act, the right can be pursued in no other way. *Flatley v. Memphis, & O. R. Co.* 9 Heisk. 280 *Loague v. Memphis & O. R. Co.* 91 Tenn. 461; *East Tennessee, V. & G. R. Co. v. Lilly*, 90 Tenn. 565. The act (Mill. & V. Code, § 3180) prescribes that the right of action shall pass to the widow, and, in case there is no widow, to the children or to the personal representatives, for the benefit of the widow or next of kin; and § 3183 provides that the damages shall go to the widow or next of kin, free from the claims of creditors, to be distributed as personal property. In order to escape what appears to be, and no doubt was, an omission on the part of the legislature to provide for the case when the wife dies, this court has been disposed to hold that the word "widow" means also "widower," and that both are intended to be provided for. It is probable that this ought to be the law, but I think it cannot be based upon the words

used in the act. If it could, and the widower would have the same rights as the widow under the statute, then he must take it subject to the same limitations. If the widow takes, she takes for herself and his children. If the widower takes, he should take for himself and her children. But I think the legislature has simply failed to make provision when the wife is killed for any recovery for the husband, and that the recovery in such case goes to the wife's children and not to the husband; and certainly this would be so as to the damages recoverable from the death of the wife, as contradistinguished from those accruing to the husband and wife jointly if she had not died. While I think the husband may sue as administrator, he cannot take the recovery *jure mariti*, nor as next of kin, nor as widow, nor as widower, and it should go to the children. I cannot see that, under the statute, the husband's right of action is saved; but, if it is, it is not the right of action for the death of his wife, for that never existed at common law, and could not therefore survive; and in any event the recovery should go to her children, when she has children. *Louisville & N. R. Co. v. Pitt*, 91 Tenn. 93; *East Tennessee, V. & G. R. Co. v. Lilly*, 90 Tenn. 563.

THIRD NATIONAL BANK *et al.*,

v.
DIVINE GROCERY COMPANY *et al.*
Appts.

(..... Tenn.)

1. A provision exempting debts already contracted from the prohibition against transfers of property to preferred creditors is not embraced within the title of Acts 1895, chap. 128, which indicates merely the prohibition of such preferences without anything to show that it permits any preferences.
2. A prohibition of judgments by default is not within the scope of Acts 1895, chap. 128, indicating a prohibition of preferences by "confession of judgment."
3. The right to transfer property in payment of a debt when solvent is within the constitutional protection of property rights, and is violated by Acts 1895, chap. 128, declaring that every transfer of property to preferred creditors, or which "would have that effect," shall be void, without limiting it to cases of insolvency.

(November 12, 1896.)

A PPEAL by defendant from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Hamilton County setting aside certain conveyances

NOTE.—On the constitutional protection of the right of contract, see (as to contracts with employees respecting medium of payment) *Avent-Beattyville Coal Co. v. Com.* (Ky.) 28 L. R. A. 273, and *note*; (as to contracts respecting time of payment of wages) *Re House Bill No. 1230* (Mass.) 28 L. R. A. 344; (as to hours of labor) *note* to *People v. Phylle* (N. Y.) 19 L. R. A. 141; also case of *People v. Harding* (Ill.) 32 L. R. A. 445; (as to contracts with employees generally) *Com. v. Perry* (Mass.) 14 L. R. A. 335, and *note*; (as to contracts generally) *State v. Loomis* (Mo.) 21 L. R. A. 799, and *note*; (as to right to do banking business) *State v. Scougal* (S. D.) 15 L. R. A. 477, and *note*; also *Blaker v. Hood* (Kan.) 24 L. R. A. 854; (as to insurance) *Com. v. Vrooman* (Pa.) 25 L. R. A. 230.

which had been made by the grocery company as in contravention of a state statute. *Reversed.*

The facts are stated in the opinion.

Messrs. Cooke, Swaney, & Cooke, for appellants:

If an act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity.

State, Knight v. McCann, 4 Lea, 1; *Cannon v. Matthes*, 8 Helsk. 518; *Knoxville v. Lewis*, 12 Lea, 132; *Ragio v. State*, 26 Tenn. 275.

This act is so broad and sweeping in its character as to practically deprive a debtor, it makes no difference how much property he may own, of the right of disposing of his property in the payment of his debts, notwithstanding the fact that the debtor may be acting in the utmost good faith and may be ever so solvent, and it utterly destroys the right of a debtor to make contracts with a creditor and dispose of any of his property to the creditor where past indebtedness forms any part of the consideration for the contract.

The right of a debtor to contract with his creditors is one of the most valuable rights, and especially during a time like the present, when property has little if any market value.

The right to dispose of one's property is property, and the destruction of this right renders the act clearly unconstitutional.

Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 12 L. R. A. 70; *Sutton v. State* (Tenn.) 83 L. R. A. 589.

Messrs. Shepherd & Frierson also for appellants.

Messrs. Pritchard & Sizer, for appellees:

This act cannot be held, under any reasonable construction, to embrace more than one subject.

The title of the act does not pretend to purport to make it apply to all cases of insolvency, nor to all the property of debtors. It is not necessary that the title should state the exact scope of the act, but it is only necessary for it to disclose its general purpose.

Powers v. McKenzie, 90 Tenn. 167.

The 8th section of this act does not undertake or pretend to directly authorize preferences; it simply provides that the act shall not apply to conveyances, etc., of a certain class.

Cannon v. Matthes, 8 Helsk. 504; *State, Morrell, v. Fickle*, 3 Lea, 79; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 138; *Illinois C. R. Co. v. Orider*, 91 Tenn. 489; *State v. Yardley*, 95 Tenn. 546.

If it be urged that the act imposes a restriction on one class of citizens, to wit, insolvent debtors, which is not imposed on other members of a community, the answer is that the class legislated upon is a natural and not an arbitrary one.

Democille v. Davidson County, 87 Tenn. 214; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 12 L. R. A. 70; *Illinois C. R. Co. v. Crider, supra*; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796.

The correct criterion by which the validity or invalidity of a general law under the constitutional provision in question is determined is whether it may be extended to any member of the community who may be able to bring himself within its provisions.

Cole Mfg. Co. v. Falls, 90 Tenn. 466.

An act may contain some provisions that are

unconstitutional and others that are valid and unobjectionable; and if when the unconstitutional portion is stricken out that which remains is complete in itself, and capable of being executed wholly independent of that which was rejected, it will be sustained.

Cooley, Const. Lim. 177, 178; *Tillman v. Cooke*, 9 Baxt. 429; *State v. Wilson*, 12 Lea, 246; *Dugger v. Mechanics' & T. Ins. Co. supra*.

The restrictions against preferential sales and transfers of his property by a debtor are not in violation of the constitutional provisions invoked.

Brown v. Smart, 145 U. S. 454, 36 L. ed. 778; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 284; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79; *Dugger v. Mechanics' & T. Ins. Co. supra*; *Black, Interpretation of Laws*, 302.

Messrs. A. W. Gaines and White & Martin also for appellees.

Snodgrass, Ch. J., delivered the opinion of the court:

The bill in this cause was filed by creditors of the Divine Grocery Company to set aside several conveyances, and subject property conveyed for the satisfaction of the complainants' debts. Two of the conveyances were held by the chancellor to have been valid, and from this part of the decree there was no appeal. The other two were declared to be void, as in violation of the assignment act of 1895. Defendant appealed and assigned errors.

The act is contained in chapter 136 of the acts of the general assembly of that session. It was approved May 11, and took effect from the date of its passage, and is found on pages 258 to 260 of the Acts of 1895. It is entitled "An Act to Secure to Creditors a *Pro Rata* Distribution of the Property, Estates, and Assets of Debtors, and to Prevent Debtors from Making Preferences among Creditors by Assignments, Deeds of Trust, Mortgages, Deeds, Sale, Pledge, or by Any Other Form of Transfer or Conveyance, or by Confession of Judgment, and to Repeal Chapter 121 of the Acts of the General Assembly of the State of Tennessee of 1881, Entitled 'An Act to Secure to Creditors an Equal and Just Distribution of the Estates and Assets of Debtors Who Make General Assignments for the Benefit of Their Creditors, and to Prevent the Giving of Preference in Such Assignments, or by Other Conveyances, Confession of Judgment by Default, or Collusion in Contemplation of a General Assignment.'" If this be valid, then certain preferences were given which, according to its provisions, are not permissible, and the decree of the chancellor and of the court of chancery appeals affirming this decree are correct. If it be invalid, there is no objection to the preferences contained in these deeds. And the question, therefore, to be determined, is whether or not the act is constitutional.

The first objection urged is that its title is not broad enough to cover the purposes of the act, and that the act embraces more than one subject, and it therefore violates § 17 of art. 2 of the Constitution of the state, which, among other things, provides that "no bill shall become a law which embraces more than one subject, to be expressed in the title." We proceed, therefore, to analyze the act. to deter-

mine whether it is obnoxious to this constitutional provision. The title of the act we have already quoted, and leaving out so much of it as refers to the repeal of a former law, which, of course, covers no subject other than that repealed, we quote again the abbreviated title: "An Act to Secure to Creditors a *Pro Rata* Distribution of the Property, Estates, and Assets of Debtors, and to Prevent Debtors from Making Preferences among Creditors by Assignments, Deeds of Trust, Mortgages, Deeds, Sale, Pledge, or by Any Other Form of Transfer or Conveyance, or by Confession of Judgment." It will be seen that it is, in general and specific terms, to prevent debtors from making preferences among creditors by assignment, deeds of trust, mortgages, deeds, sale, pledge, or by any other form of transfer or conveyance, or by confession of judgment. It is general, absolute, sweeping, and unconditional to prohibit any preference, without limitation or exception; yet the 8th section of this act provides as follows: "That the provision of the act shall not apply to any assignment, mortgage, confession of judgment, or other conveyance made to pay or secure an indebtedness contracted prior to the passage of this act." Here it is obvious that, under a title of one subject forbidding a preference, an effort is made to legislate by limitation that permits a preference, and is manifestly not in accord with or pursuance of the title of the act, and that the bill embraces this subject and provision for antecedent debt preference, not contemplated in, but in direct antagonism to, the specific terms of its title. We are not here discussing at all the question of the power of the legislature to provide for such preference. We are merely determining the question whether that can be done under a title which specifically and positively forbids any preference. Again, the title of the act is to prevent preferences, among other things, by confession of judgment (only) so far as court proceedings are referred to.

The 8d section provides that any confession of judgment by debtors, or permitting judgment to be taken by default, fixing a lien or encumbrance on any of the debtor's property, estate, or assets, and made for the purpose of giving preference to one or more creditors, or that would so result, shall be held illegal and void, and such preferred creditor or creditors shall only be permitted to share ratably in a distribution of such debtor's assets. Here it is again obvious that a provision had been inserted in the act of a most vital and important character, and without which it is presumed that act would not have been passed, upon a subject not within the title of the act. It is clear that this effort to legislate against the result of a judgment by "default" is entirely beyond the legislation contemplated in the title, as to the effect of a judgment by "confession." They are not synonymous terms, and the express language of the act clearly shows that the legislature did not so understand them. A judgment by confession is one which results from the voluntary agreement of the parties; a judgment taken by default is one resulting either from the fact that a defendant has no defense to make, or does not appear to make it. If a party is sued upon a valid obligation, to which he has no defense,

and consequently attempts to interpose none, a judgment by default may be naturally and properly taken against him. Under this section, it is denied the lien has the effect which would have resulted had he come forward and made a pretended or ineffectual defense. There can be no reason that a debtor should be compelled to make a defense when he has none; and this failure to do so when he has none is quite a different thing, in fact as in law, from voluntarily coming forward and confessing a judgment. In this connection, we are not unaware of the objection which might be suggested that the form of a judgment by default in courts of equity is put as "*pro confesso*," or "for confessed," "as if confessed;" but neither that language nor the effect of such judgment is a judgment by confession. The judgment is taken "as if" or "for" confessed, but is not a judgment confessed by the party. Its terms are not a judgment by confession, and its effect is not such. It is only such judgment as is given a like effect, and hence the expression "*pro confesso*," or "for confessed." The title of the act provided for judgments by confession. The section referred to in fact attempts to legislate the same effect for a judgment by default where there has been no confession by the party, and is therefore beyond the scope and purpose of the title.

The 2d section of the act provides that whenever any assignment, deed of trust, mortgage, deed, sale, or pledge, or any other conveyance or transfer of a part or portion of a debtor's property, estate, or assets, is made for the purpose of preferring one or more creditors, or would have that effect, it shall be illegal and void, and all such property, estate, or assets shall be divided *pro rata* among all of the creditors of said debtor. It is clear that this absolutely prevents the transfer, sale, pledge, or mortgage of all or any part of the property of any debtor, however solvent or insolvent, for the payment of any debt, however large or small, and that it denies him the privilege and power (denies to all solvent debtors, with any amount of property, as well as to all insolvent debtors) to pay all or any part of his indebtedness, large or small, without subjecting him to suit at the instance of other creditors, according to § 5 of the act, to sequester and appropriate his property, and throw him into involuntary bankruptcy, and ruin his business and reputation as a consequence. It must be observed that this act has nothing to do with the question of solvency or the insolvency of debtors, either in this caption, or its general provisions. It is an act to prohibit all debtors from making any preferences, and the terms of the second section, as already shown, are in express and positive prohibition of the disposition of any part of the property of a debtor, however solvent, to the payment of any debt, however small.

The practical effect of this is to compel debtors to dispose of their property for cash, even when perfectly solvent, and appropriate the cash to the debt, rather than exchange the property with the creditor on any advantageous terms which might be offered by the latter.—a result which it is obvious would but produce the greatest oppression, and hamper and hinder the citizen in the ownership and exchange of property, in a way that is absolutely intoler-

able if there be any fundamental law which will prevent. That fundamental law is found in § 8 of art. 1 of the Constitution of the state, which provides that no man shall be taken or imprisoned or dispossessed of his freehold, liberties, or privileges, outlawed or exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land. It is—and correctly—insisted that, while this act does not deprive him absolutely of his property, it takes away from him that element of its value which consists in the right to use and legitimately dispose of it; and here it must not be forgotten that we are not dealing with the question of an insolvent debtor conveying his property, or any part of it, for the purpose of hindering and delaying or defeating creditors; for the act does not stop with a declaration that such disposition, if made for the purpose of preferring one or more creditors, shall be void, but adds that, where it will have that effect, it shall be void. And as any transfer of any part of the property of a debtor, however solvent, to a creditor, in the payment of a debt, has the effect of giving such creditor a preference to that extent, it is manifest that this is a limitation upon the right, for a proper purpose, by a solvent debtor, to convey any part of his property at all, if in doing so he shall satisfy any of his debts.

It was decided in the case of *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 12 L. R. A. 70, that, when the Constitution of this state was framed, the right to own, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance was enjoyed to the fullness and perfection of absolute right, and one of the objects of the Constitution was to protect and preserve this right. To take from property its chief element of value, and to deny to the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken. Of course, we need not repeat again the meaning of the phrase in this connection, "the law of the land." It does not need to be said that the deprivation provided against is not merely that which might result from an act of the legislature undertaking to take the property, or to deprive the citizen of its value, for any purpose. A subsequent constitutional provision (§ 21 of art. 1) provides that no man's particular services shall be demanded or property taken or applied to public use without the consent of his representative, or without just compensation being made therefor. It has been held that private property may be taken for public use under this provision only upon just compensation, but not for private use at all. These general provisions in respect to the right to own property equally protect the right to use, enjoy, exchange, and transmit it, as held in the *Morris Case*, before referred to; and neither can be taken from the citizen by the arbitrary enactment of the legislature. That the citizen can be restrained from any improper use or improper disposition of his property is not doubted, and is, of course, not asserted here; but such is not the effort of this act, or, if the purpose of the legislators was to accomplish this result, they have attempted it by means of legislation beyond their power to adopt. It

was probably not within the contemplation of the legislators in this sweeping way to deprive the solvent debtor of his power to pay debts with property, or to compel him, under such severe penalties, to always pay cash.

But we can judge of the purpose only by the terms employed in the act. The positive provisions of this act will bear no other construction than that put upon it. We are not dealing with it as an act in which the legislators may or may not have meant, or may or may not have intended, that which the act actually shows; nor are we construing it upon any assumption of what its promoters and supporters might assume they intend to do, or desire to do, in the procurement of its passage. We are dealing with what has been in fact done, and we can give it only such construction as it unmistakably requires.

The act is dealt with in argument, and assumed to be, in the general understanding of its supposed purpose, as designed to prevent improper preferences, and therefore to contain only such provisions as would effectuate this laudable object. If such were the act, its policy would be one which we could not disapprove, and, whether disapproved or not, we would be compelled to sustain. But it too frequently occurs that, where an effort has been made to do what the public may understand as the proper thing to be done, it is taken for granted that everything was done which was expected, and nothing more; and the act is approved or disapproved, not for what it actually is, but for what each for himself may suppose it to be, or to have been intended to be. Such a mistaken view seemed to have been taken of the former act which this was intended to repeal, and much antagonism grew up among certain of the profession as to the construction placed upon it by our predecessors and followed out by us in this court,—a construction wholly unwarranted by what the act was assumed to be, but absolutely required in consequence of what it actually was. This act which repealed it had many better features, and had the merit of much more simplicity of detail and less difficulty of construction, but was open to more serious objection in its glaring injustice and inequity, resulting from the nonobservance of the constitutional requirement pointed out. It is the duty of this court to sustain legislative acts when it can, and no more pleasant duty is discharged by the court, while no less pleasant one is imposed than that which compels a determination of their invalidity.

But the Constitution is the first law of the land. It must be conformed to by legislatures and by courts, and, when an act is in violation of its provisions, the duty of declaring it to be such invites no evasion, and admits of none. It is fortunate when acts of this character, which may ultimately affect the largest property interests, may have the question of their constitutionality early determined, particularly in view of the fact that future legislation might be desired. This question is decisive of the controversy in the case. These deeds were not invalid, unless they were invalid under the act of 1895.

It results, therefore, that the decree of the Court of Chancery Appeals must be reversed, and, as to these conveyances, be dismissed, with costs.

CONNECTICUT SUPREME COURT OF ERRORS.

Louisa J. DENNIS, *Appt.*,

v.

Elias M. DENNIS.

(68 Conn. 183.)

1. **Habitual intemperance**, within the meaning of a statute authorizing a divorce for such cause, is not shown by the facts that defendant about once in three weeks became intoxicated during the evening to such an extent that the next morning he did not go as usual to his work, and had continued to do so for two years. If it had not caused loss of his position, nor produced want or suffering in the family.

2. **A woman who authorizes her attorney to employ detectives to watch her husband, whom she suspects of infidelity, for**

the purpose of obtaining evidence which will entitle her to a divorce, and who goes with them at a time appointed to surprise him in a compromising position with a lewd woman employed by them for that purpose, may be found to have known that the woman's movements were governed by them, so as to show connivance on her part which will bar her right to divorce.

3. **The right to a divorce for adultery will be barred** if plaintiff consented to the employment of a person to allure defendant into the offense for which the action is brought.

4. **Courts will use their discretion to defeat any and all attempts to use the forms of the law of divorce to minister to the caprices of the fickle minded, or to the revenges of the disappointed or vindictive, or to the passions of the incontinent.**

NOTE.—*Drunkenness as affecting divorce.*I. *Drunkenness as a ground for divorce.*a. *Provisions for.*b. *What constitutes drunkenness.*c. *Degree of drunkenness authorizing divorce.*d. *Pleadings and proof.*e. *Defenses.*f. *Incidents and effects.*II. *Drunkenness as affecting cruel and inhuman treatment.*a. *Drunkenness as cruelty.*b. *Drunkenness connected with cruelty.*c. *Drunkenness as evidence of cruelty.*III. *Drunkenness as affecting desertion.*I. *Drunkenness as a ground for divorce.*a. *Provisions for.*

Drunkenness, independently of other causes, is not a ground for divorce in England (see *Shutt v. Shutt*, 71 Md. 198); and it is not included in the statutory grounds for divorce in ten of the United States, viz., Maryland, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, Texas, Vermont, Virginia, and West Virginia. The rest have provisions for divorce for habitual drunkenness or intemperance, or continued drunkenness, or habitual drunkenness continued for a designated length of time, some of them requiring the habit to have been contracted after marriage, and in a few the divorce granted is from bed and board only.

Thus, that drunkenness as an independent ground furnishes no cause for divorce in Maryland, is held in *Shutt v. Shutt*, *supra*.

And the same doctrine is stated in Pennsylvania, in *Mason v. Mason*, 131 Pa. 161, and *Bean v. Bean*, 11 Lanc. Bar. 133.

But in *Johnson v. Johnson*, 35 Phila. Leg. Int. 70, it was held that a decree of divorce will not be disturbed on appeal where the evidence established habitual intemperance on the part of the husband.

So, habitual intemperance as a cause for divorce must be continued for one year under the California statute, and a divorce cannot be granted in the absence of a finding of such continuance. *Dunn v. Dunn*, 62 Cal. 173.

And in *Rose v. Rose*, 9 Ark. 507, it was held that to dissolve a marriage on the ground of drunkenness it must be habitual drunkenness existing over a period not less than one year, and must be such as to render the marital state intolerable.

And to warrant a divorce upon the ground of three years of habitual drunkenness, under the New Hampshire statutes, it must appear that the libellant had a legal domicile in the state for the whole of the three years during which the drunk-

ness existed. *Batchelder v. Batchelder*, 14 N. H. 380.

So, the Massachusetts statute makes gross and confirmed habits of intoxication contracted after marriage a ground for divorce. *Blaney v. Blaney*, 126 Mass. 205.

And to make out a cause for divorce upon the ground of habits of intoxication such habits must not only have been gross and confirmed, but they must have been contracted since the marriage, and if they were contracted before the marriage, although not known to the other party until afterwards, there would be no cause for divorce. *Lyster v. Lyster*, 111 Mass. 327.

And in order to warrant a divorce under Mich. Comp. Laws, § 3227, providing therefor when either party thereto becomes an habitual drunkard, the party must have become an habitual drunkard after marriage, unless, perhaps, where his habits have been concealed from the other party's knowledge. *Porritt v. Porritt*, 16 Mich. 140.

And neither the question whether the husband had been guilty of cruel and abusive treatment short of extreme cruelty towards the wife, nor whether he had habits of intoxication, however gross and confirmed, contracted before marriage, is in issue on a libel by a wife against a husband for divorce from bed and board on the ground of extreme cruelty and gross and confirmed habits of intoxication since marriage, and where such libel is dismissed, evidence of cruelty and intoxication prior to the date of such libel is admissible on the subsequent libel brought by the husband against the wife for desertion. *Lyster v. Lyster*, *supra*.

So, proof of a confirmed habit of drunkenness prior to the period defined in Minn. Gen. Stat. 1878, chap. 62, § 4, authorizing divorces for habitual drunkenness for the space of one year immediately preceding the filing of the complaint, is admissible as evidence bearing upon the issue, but the statute cannot be construed to allow a divorce for habitual drunkenness during any period prior to the year immediately preceding such filing. *Reynolds v. Reynolds*, 44 Minn. 132.

And a divorce will not be granted under that act where no evidence is presented on the part of the plaintiff of the drunkenness of the defendant subsequent to her separation from him about a year and a half prior to the commencement of the action, and the defendant's testimony tends to show that for the last half year preceding the commencement of the action he had stopped drinking altogether. *Ibid.*

b. *What constitutes drunkenness.*

The habitual use of, opiates the tendency of which is to render the user careless, reckless, untruthful

(June 25, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for New London County in favor of defendant in an action brought to procure a divorce. *Affirmed.*

The court below made a finding of facts as follows: "(1) The plaintiff and defendant intermarried February 4, 1890, and have one child, the issue of such marriage, a boy four years of age. (2) The plaintiff and defendant were married at Norwich, and since their marriage have lived in New London. (3) For a period of two years prior to the date of the complaint, the defendant was accustomed to use intoxicating liquors more or less. About once in three weeks he became intoxicated, during the

evening, to such an extent that the next morning he did not go as usual to his work at the store where he was employed as a clerk. (4) May 18, 1895, the defendant was caught in a compromising situation with a woman unknown. There was no direct evidence offered of any overt act of adultery. The circumstances, however, were such as to justify the inference that the defendant was then guilty of adultery, and I so find. (5) This woman was one employed by the plaintiff's agents to lure the defendant to the commission of adultery, and to the commission of the particular act of adultery above specified, for the purpose of thereby obtaining evidence upon which a divorce could be secured. The circumstances attending the employment and conduct of this woman were the following: (6) In April, 1895, the plaintiff, being desirous of

and stupid, and to cause physical prostration and undermine and destroy all the objects of the marital relation, does not constitute drunkenness within a provision authorizing a divorce on that ground, that including alcoholic intoxication only. *Dawson v. Dawson*, 23 Mo. App. 169.

Thus, a moderate use of opium, though operating subsequently like intoxicating liquors, is not within the meaning of a statute authorizing divorce for habitual drunkenness. *Barber v. Barber* (Conn.) 14 Law Rep. 375.

And excessive indulgence in the morphine habit is not a ground for divorce under the provisions of Ill. Rev. Stat. chap. 40, § 1, permitting a divorce on the ground of habitual drunkenness. *Youngs v. Youngs*, 130 Ill. 230, 6 L. R. A. 548.

So, that a wife has become a confirmed opium eater to the neglect of her domestic duties does not establish cruelty as a ground for divorce, which must consist of personal violence or a reasonable apprehension thereof. *Holland v. Holland*, 4 Legal Gaz. 372.

Drunkenness is not insanity for which a divorce can be granted under the provisions of a statute giving the court of chancery sole cognizance to decree marriages null and void where either of the parties was at the time insane, though accompanied by circumstances of fraud on the part of the father and friends of the wife to induce the husband to marry. *Eizey v. Eizey*, 1 Houst. (Del.) 308.

c. Degrees of drunkenness authorizing divorce.

Habitual drunkenness within the divorce law consists of the constant indulgence in such stimulants as wine, brandy, and whiskey whereby intoxication is produced,—not the ordinary use, but the habitual use; and the habit should be actual and confirmed, though it need not be continuous or even of daily occurrence. *Mack v. Handy*, 30 La. Ann. 491; *Williams v. Gross*, 43 La. Ann. 568.

To constitute one an habitual drunkard within the meaning of the divorce law it must appear that he drinks to excess so frequently as to constitute a fixed practice or habit. *Walton v. Walton*, 34 Kan. 195.

Habitual intemperance within the divorce law can only refer to the persistent habit of becoming intoxicated from the use of intoxicating drinks, thus rendering the presence of the party in the marriage relation disgusting and unendurable. *Burns v. Burns*, 13 Fla. 369.

Frequent and regular recurrence of excessive indulgence in intoxicating drinks constitutes habitual drunkenness amounting to a ground for divorce. *Golding v. Golding*, 6 Mo. App. 602, Appx.

Habitual intemperance as a ground for divorce consists of the habit of becoming intoxicated from 34 L. R. A.

the use of strong drink, and frequent recurrence of drunkenness proves the habit. *McGill v. McGill*, 19 Fla. 341.

Thus, one is an habitual drunkard within the meaning of the divorce law who indulges in the practice of becoming intoxicated whenever the temptation is presented and the opportunity offered, and cannot resist the temptation to drink to excess whenever he has an opportunity to obtain liquor. *Walton v. Walton*, *supra*; *Magabay v. Magabay*, 35 Mich. 210.

And who makes no vigorous effort to resist and overcome the habit, or whose will has become so enfeebled by indulgence that restraint is impossible. *Magabay v. Magabay*, *supra*.

And one who for a period of two years prior to the beginning of an action for divorce against him was frequently and customarily or habitually given to the excessive use of intoxicating drink, and had during said two years or more lost the power of the will, hy frequent indulgence, to control his appetite for it, is an habitual drunkard within the meaning of the divorce act. *Richards v. Richards*, 19 Ill. App. 465.

So, drunkenness as a ground of divorce, under the Georgia statute, must be habitual, and an allegation in an action therefor that the husband frequently got drunk and had several fits therefrom is not sufficient. *Myrick v. Myrick*, 67 Ga. 771.

And the words "continued drunkenness" for which a divorce is authorized under the Rhode Island statute are used in their ordinary sense, and signify gross and confirmed habits of intoxication. *Gourlay v. Gourlay*, 15 R. I. 706.

And to warrant a divorce upon that ground the proof should be sufficiently clear to convince the court that the respondent's habits of drunkenness were confirmed, and that he was an habitual drunkard. *Ibid*.

And the words "wasting his estate," in Ky. Rev. Stat. 390, authorizing a divorce for confirmed habits of drunkenness on the part of a husband of not less than one year's duration, accompanied with a wasting of his estate without any suitable provision for the maintenance of his wife and children, embrace and apply to a man's health, time, and labor where he has no property, they being necessary to the support of his family; and where by the confirmed habits of drunkenness he wastes his time and injures his health his wife is entitled to a divorce. *McKay v. McKay*, 18 B. Mon. & Shuck v. Shuck, 7 Bush, 306.

So, a divorce in favor of a wife on the ground of cruel treatment and habitual drunkenness is supported by proof that after the marriage he frequently became drunk and at such times would abuse and mistreat her, and that he frequently came home late at night and very drunk, when he

obtaining a divorce from her husband, went to Boston, and there consulted a lawyer, to whom she was recommended by a friend. This lawyer advised her to employ detectives upon her husband for the purpose of obtaining evidence upon which the desired divorce might be secured. She consented, retained him to represent her interests, and left the whole matter, including the procurement of the necessary evidence, in his hands, with full authority to act at his discretion and in such manner as he thought best in the procurement of such evidence, and in the employment and use of detectives therefor as might be necessary. (7) Pursuant to this arrangement and authority, and for the purposes aforesaid, male detectives were employed by said attorney, on behalf of the plaintiff. These came to New London

from Boston, and for a period of two or three weeks shadowed the defendant. At the end of this time the woman above referred to was in like manner employed to act in concert with the other detectives, and by her wiles to entice the defendant into an act of adultery, or into a compromising situation from which the inference of adultery would be drawn, so arranged that his discovery by her associates might be made. (8) She came to New London and began to ply her arts upon the defendant. In the course of a week or ten days she succeeded in making an assignation with the defendant at a house in the city for the following evening, that of May 18, 1895. Her associates having been duly apprised, arrangements were made for the discovery, which was made as planned, by the sudden appearance to the

was boisterous, abusive, and often obscene in the presence of his family, and that on some occasions he had been cruel to her while she was sick. Mack v. Handy, 89 La. Ann. 491.

And proof that a husband is an habitual drunkard, and that he has been guilty of wanton cruelty and gross personal abuse towards his wife, entitles her to a decree of separation under the Louisiana Act of 1848, chap. 57, authorizing a separation on account of habitual intemperance, etc.; but proof of habitual intemperance does not entitle her to a divorce *a vinculo matrimonii* until two years after the decree of separation, as a case of habitual drunkenness under that act must be restricted to the same remedy as the cases with which it is associated. Leake v. Linton, 6 La. Ann. 263.

But to constitute one an habitual drunkard within the meaning of the divorce law he need not be constantly under the influence of intoxicating liquors, and he may be one though there are intervals when he entirely refrains from their use. Walton v. Walton, 34 Kan. 195.

One may be addicted to habitual drunkenness, within the meaning of the divorce law, where he has a fixed habit of frequently getting drunk, though he may not be more often drunk than sober, and though sober for weeks at a time. Brown v. Brown, 38 Ark. 324.

Thus, a fixed habit of drinking to excess to such a degree as to disqualify the person from attending to his business during the principal portion of the time usually devoted to business is habitual intemperance within the divorce law, although the person may during intervals be in a position to attend to his business affairs. Mahone v. Mahone, 19 Cal. 627, 81 Am. Dec. 91.

And repeated acts of drunkenness, followed by occasional spells of sobriety and moderate drinking, when the habit of drinking is so fixed that the temptation to drink cannot be resisted, constitute habitual drunkenness within the divorce law, and where such excesses on the part of the husband are of such a character as to render living with him unsupportable to the wife she is entitled to a decree of separation from bed and board. DeLesdernier v. DeLesdernier, 45 La. Ann. 1384.

And a divorce in favor of a wife on the ground of cruel treatment and habitual intemperance is sustained by evidence that the husband often came home very drunk, and that he frequently staid away until midnight and sometimes all night, and that on some occasions his wife had to undress him and put him to bed, and that he got his bottle filled nearly every morning, and that on several occasions he had been refused whiskey on account of having been drunk, and that he had once been in a condition closely proximating to *mariti a potu*, though no witness states that his intemperance

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had wholly incapacitated him for business. Williams v. Goss, 48 La. Ann. 368.

The reason the law makes habitual drunkenness a ground for divorce, however, is not alone because it disqualifies the party from attending to business, but in part, if not mainly, because it renders him unfit for the duties of the marital relation, and disqualifies him from properly rearing and caring for the children born of the marriage. Richards v. Richards, 19 Ill. App. 465.

And to establish habitual drunkenness within the meaning of the Illinois divorce act it need not be shown that for a continuous period of two years prior to the filing of the bill the defendant had a fixed habit of drinking to excess to such a degree as to disqualify him from attending to his business during the principal portion of the time usually devoted to business, as one may be an habitual drunkard and yet be sober for days and weeks together. *Ibid.*

In Richards v. Richards, *supra*, Mahone v. Mahone, *supra*, was distinguished, the court saying that it is hardly to be presumed that the court in that case intended to hold that there could be no such thing as habitual intemperance or drunkenness unless it was indulged in during the usual business hours of the day.

So a husband who has a persistent habit of becoming intoxicated at his house and while with his family is habitually intemperate within the meaning of the statute authorizing a divorce on that ground, though when abroad in the community transacting business he is not habitually intoxicated or intemperate. McGill v. McGill, 19 Fla. 341.

As to the effect of intoxication abroad but not at home, see McBee v. McBee, 22 Or. 329, *infra*.

And evidence that a husband would become grossly intoxicated three or four times a year for a period of twelve or fifteen years, remaining in that condition from a week to ten days, and that at such times he went or was sent to an asylum for inebriates, and that he could not resist the desire to drink when it came upon him and a single glass of liquor would bring on excessive drinking and gross intoxication, and any undue excitement made him drink, is sufficient to justify a finding that he had contracted such gross and confirmed habits of intoxication as entitled his wife to a divorce under the Massachusetts statute. Blaney v. Blaney, 126 Mass. 205.

And a divorce will be granted against a husband on the ground of habitual drunkenness where it appears that for six or seven years he had been in the habit of getting intoxicated when he went to the village averaging once or twice a week, and that he had been known to be so much under the influence of liquor that he would go to sleep in

defendant in his compromising position at said assignation of two of the detectives, accompanied by the plaintiff, who had come to the scene for the purpose. (9) No evidence of any other act of adultery on the part of the defendant was offered. (10) The plaintiff did not give to her said attorney, or to any of the detectives employed by him, any distinct or specific authority or direction, as distinguished from the general authority hereinbefore set out, to employ said woman for the purposes for which she was employed, or to employ any woman for such purpose, and the plaintiff had no actual personal knowledge that the woman found with her husband was one employed by her agents in the manner in which, or for the purposes for which, she was employed. (11) I find upon the foregoing facts

that the defendant was not, during the two years prior to the date of the complaint, habitually intemperate; and that the act of adultery established by the evidence was one brought about by the connivance and procurement of the plaintiff, acting through her attorneys or agents. By reason of said facts and finding, and in the exercise of the discretion vested in the court in said matter, the plaintiff's complaint was dismissed. (12) Upon the trial the plaintiff claimed that upon the facts the defendant was guilty of habitual intemperance, within the meaning of § 2802 of the General Statutes; and that, the fact of adultery being found, the plaintiff was entitled to a divorce, since the evidence did not establish connivance on the part of the plaintiff within the meaning of the law, and the facts proved were not such

the barn and in the straw stack, and that when intoxicated he was morose and ugly and sometimes brutal and profane and violent, not only against his family but the dumb beasts about his premises, and that he twice broke furniture and dishes and on one occasion used violence against his wife threatening to drive her away with a horse-whip, though there was no evidence that he was ever so drunk that he could not drive his team home and take care of it, and it appeared that he was a good husband and father when sober, and one of the best and most prosperous farmers in the neighborhood. *Berryman v. Berryman*, 59 Mich. 605.

And while occasional drunkenness, especially of a woman, may form parts of the indignities to the other party which would render his condition intolerable and warrant a divorce on that ground, it cannot be held that one act of drunkenness, though accompanied by acts of indecency probably resulting from drunkenness, would make out a case for divorce on the ground of habitual drunkenness for the space of two years. *Kempf v. Kempf*, 34 Mo. 211.

A man may drink occasionally to excess, however, and yet not be an habitual drunkard within the divorce law. *Walton v. Walton*, 34 Kan. 135; *McBee v. McBee*, 22 Or. 329.

And occasional intoxication is not habitual drunkenness which will justify divorce in a woman any more than it is in a man. *Meathe v. Meathe*, 58 Mich. 150.

There must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. *McBee v. McBee*, *supra*.

Thus, a man living in the country who only drank when he happened to come to town, which was generally on business, and then not always to excess, and who seldom carried liquor home, and became grossly drunk on only a few occasions for years, and was a sober man in his family and at home except on such occasions, is not addicted to habitual gross drunkenness within the meaning of the Oregon divorce law. *Ibid*.

And evidence tending to show that on a few occasions a wife had been so much under the influence of liquor as to become noticeable on that account will not justify a divorce for habitual drunkenness in favor of the husband where the evidence of her intoxication comes mostly from him and his relatives, while her neighbors, some of whom were intimate with her, testify that they had never seen her under the influence of liquor and did not know that she drank, and it appears that she managed her household affairs neatly and in order, and that her husband had such confidence in her prudence and economy that he each week handed over to her a stated allowance for housekeeping expenses in—
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creasing it as he prospered in business, leaving the expenditure entirely to her judgment. *Meathe v. Meathe*, *supra*.

See also the principal case supporting this doctrine.

d. Proceedings and proof.

An allegation in an action for divorce for habitual drunkenness in the language of the statute is sufficient without setting forth the acts constituting the habit. *Horne v. Horne*, 1 Tenn. Ch. 259; *Brown v. Brown*, 38 Ark. 324; *Burns v. Burns*, 13 Fla. 399.

As the language of the statute can only refer to the persistent habit of intoxication from the use of strong drinks, thus rendering the presence of the party in the marital relation disgusting and intolerable. *Burns v. Burns*, *supra*.

And the failure to allege that the defendant was disqualified by the use of intoxicating drinks a greater portion of the time from properly attending to business, or that his conduct inflicted mental anguish upon the plaintiff, is not fatal. *Reading v. Reading*, 95 Cal. 4.

And a complaint and finding in an action for divorce upon the ground of habitual intoxication are not defective where they set forth in the language of the Code habitual intemperance to the degree which causes great mental anguish upon the part of the plaintiff, in not stating the extent of such intoxication, and the acts done by the husband while incapacitated tending to cause such mental anguish, and showing that they were reasonably sufficient to bring about such result. *Forney v. Forney*, 80 Cal. 523.

So, an allegation in an action for divorce that the defendant disregarding his duties as a husband toward the plaintiff had been guilty of habitual intemperance is sufficient in the absence of a demurrer on the ground of uncertainty. *Reading v. Reading*, *supra*.

And in *Myrick v. Myrick*, 67 Ga. 771, the court stated as one of its reasons for holding an allegation of drunkenness as a cause for divorce insufficient, that it was not in the language of the statute.

But general testimony that the libelee in a divorce suit is an habitual drunkard is not sufficient to warrant the granting of a divorce; the facts must be given in detail so that the court may judge whether or not they amount to habitual drunkenness. *Batchelder v. Batchelder*, 14 N. H. 380.

And a statement by a witness in an action for divorce upon the ground of habitual drunkenness that the defendant was an habitual drunkard is a statement of a conclusion of law of which the witness is not the judge, and amounts to nothing if the facts shown do not justify the opinion. *Horne v. Horne*, 1 Tenn. Ch. 259.

And evidence of experts and family acquaint-

as to constitute a bar to her complaint. The plaintiff claimed that although there was collusion between the detectives and the woman, yet as the plaintiff had no knowledge of it she was not affected by it, and not thereby barred from obtaining a divorce."

Messrs. Donald G. Perkins and William Belcher, for appellant:

The facts found constituted habitual intemperance within the meaning of the statute.

Standard Dict. *Habitual*; *Com. v. Whitney*, 5 Gray, 86; *Com. v. McNamee*, 112 Mass. 285; 5 Am. & Eng. Enc. Law, p. 807.

The fact that the defendant attended his business quite regularly, and was drunk usually out of business hours, does not prevent it from being habitual intemperance.

Richards v. Richards, 19 Ill. App. 465.

What constitutes habitual intemperance is a question of law.

1 Bishop, Mar. & Div. § 818; *Mayhew v. Mayhew*, 61 Conn. 234.

The remedy for adultery is statutory and the action in its nature civil, and the courts proceed to grant the remedy in accordance with the fixed and established principles of law applicable to it.

Delliber v. Delliber, 9 Conn. 233; *Shaw v. Shaw*, 17 Conn. 193; *Lyon v. Lyon*, 21 Conn. 194; *Steele v. Steele*, 85 Conn. 54.

The connivance relied upon by the defendant as a bar is a question of fact; and the essential element therein is not found by the trial court.

The court has not found that the attorney

ances as to whether the defendant is an habitual drunkard is not admissible. *Golding v. Golding*, 6 Mo. App. 602, Appx.

But proof of gambling by a husband in an action for divorce on the ground of drunkenness is admissible in support of charges of squandering money and debauchery. *Mack v. Handy*, 39 La. Ann. 491.

And evidence of intemperance since the filing of a suit for divorce on that ground is admissible, not to show a substantive cause, but a continuing habit. *Ibid.*

And a divorce on the ground of habitual drunkenness of the husband will not be refused on the ground that the wife's testimony that his habit was acquired after marriage was not corroborated as required by Iowa Code, § 2223, providing that no divorce shall be granted on the testimony of the plaintiff alone, where the facts in the case as detailed by the other witnesses tend to show that the habit did not become habitual until some years after the marriage. *Lewis v. Lewis*, 75 Iowa, 200.

So, in *Crichton v. Crichton*, 73 Wis. 59, a judgment of the trial court denying a divorce was reversed upon the ground that the unimpeached testimony of the three children of the parties in support of the allegation of cruelty and habitual drunkenness created a clear preponderance of evidence against its findings.

The value of negative testimony in a divorce case that witnesses had not seen the defendant in a state of intoxication depends upon their intimacy with him and their intelligence and opportunity to observe, and is a question for the trial court. *Walton v. Walton*, 34 Kan. 196.

And negative evidence by witnesses in such an action that they had never seen the defendant intoxicated, is not sufficient to rebut affirmative evidence of those who testify to having seen him drunk. *Richards v. Richards*, 19 Ill. App. 465.

A decree of a circuit court denying a divorce on the ground of habitual drunkenness of the defendant will not be disturbed on appeal where the evidence in the record is not such that the court can feel entirely confident what decree ought to be made. *McGonegal v. McGonegal*, 46 Mich. 68.

a. Defenses.

A woman who marries a man who is a slave to whiskey and morphine with knowledge of the fact assumes the risk, and will not be granted an absolute divorce because he persists in their use. *Tilton v. Tilton*, 16 Ky. L. Rep. 538.

And the commission of an act of adultery is a bar to a divorce on the ground of habitual drunkenness for more than two years, and a wife sued by her husband for divorce on the ground of habitual drunkenness may recriminate that he has been guilty of adultery. *Ryan v. Ryan*, 9 Mo. 539.

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But the ways of life and habits of speech of the parties to an action for divorce on the ground of drunkenness and cruelty where such parties are unrefined should not be tried by the standard of cultivated people, but by the rules which respectable persons of the same condition of life would substantially acknowledge. *Kline v. Kline*, 50 Mich. 438.

And the fact that a wife was not of the most refined character, and not always truly lady-like in her behavior, and was at times when in anger guilty of profanity, and that she acquiesced somewhat in the drinking habits of her husband and had not remonstrated with him or rebuked him as she ought, furnishes no excuse for his abusing her in his drunken moods, and does not bar her right to a divorce for habitual drunkenness. *Berryman v. Berryman*, 60 Mich. 605.

So, a wife is entitled to a divorce for habitual drunkenness where the husband remains an habitual drunkard for the statutory period though he then ceases to be one, but if she voluntarily continues the marital relation after he so ceases she thereby condones the offense and nullifies her right to a divorce; but where he continues to be an habitual drunkard the offense is continuous, and the wife may break off at any time and establish her right to a divorce. *Moore v. Moore*, 41 Mo. App. 176.

And the fact that a wife of an habitual drunkard continues to live with him after the expiration of the statutory period, hoping to reclaim and reform him, will not debar her from subsequently obtaining a divorce upon the ground of his habitual drunkenness where he persists in his habit. *Ibid.*

And letters from a wife to her husband, from whom she had separated on account of his habitual drunkenness, filled with expressions of love and interest, and disclosing that she looked upon their interests as joint and identical, and containing no intimation that she expected their marriage to be dissolved, do not amount to a condonation of the offense of drunkenness so as to bar her right to proceed for divorce. *Ibid.*

And a meeting between a husband and wife who had separated on account of his habitual drunkenness, and an understanding between them that he was to furnish her a designated sum of money per month and deed her some property and stop drinking, and kind and affectionate letters written to him by her in pursuance of such an agreement, do not amount to a condonation of the offense of habitual drunkenness which will bar her action for divorce, where he fails to carry out the arrangement and continues his habits of intoxication. *Ibid.*

So, a wife who dismisses an action for divorce upon the agreement of her husband to convey certain property to her and to abstain from the use of intoxicating liquor need not, after his breach of

employed the woman, or knew that she was employed; and even though it may be claimed that the authority to him to act in his discretion was broad enough to authorize him to employ a woman for that purpose, still the fact must be found that he did employ the woman or authorize it, otherwise there is a break in the line of authority from the plaintiff.

Quinebaug Bank v. Brewster, 80 Conn. 564; 2 Bishop, Mar. & Div. §§ 6, 7, 9; *Wilson v. Watson*, 154 Mass. 195, 12 L. R. A. 524; *Robbins v. Robbins*, 140 Mass. 581, 54 Am. Rep. 488.

Messrs. Brandegee, Noyes, & Brandegee, for appellee:

Habitual intemperance is a "condition" founded upon facts, evidenced solely by testimony, and in each individual case to be deter-

mined by the trial court upon the evidence before it.

In the case of *Trumpy v. Trumpy*, 48 Conn. 278, this court refused to review a decision of the trial judge upon this precise question.

Connivance of the attorney was a bar to the principals obtaining a divorce, procured by means of such connivance.

We claim it to be contrary to public policy that a divorce should be granted in this state upon the testimony of sneaks and panders for a marital offense brought about by their own criminal conduct, and while acting as agents and attorneys of the petitioner.

Divorce in this state is not a matter of right, but of grace.

It cannot be had by the procurement or consent of the parties; it is only granted upon such

the promise to abstain from the habit of drunkenness, convey back the property in order to give her a standing in court in a subsequent action for divorce upon the same ground. *Lewis v. Lewis*, 75 Iowa, 200.

And where such agreement is reduced to writing, but the agreement to abstain was inadvertently omitted, such agreement should be regarded as part of the settlement; and where he subsequently breaks his promise to abstain, parol evidence is admissible in a new action for divorce upon the same ground to show the real condition of the agreement and that such agreement was not a bar to the new action. *Ibid*.

1. Incidents and effects.

The court in granting a divorce exercises a discretion in awarding the custody of minor children having regard to the condition and fitness of the parents and the interests of the children, the power being reserved to alter or modify its decree in this respect, and it will interfere for the due protection and education of children, with the ordinary rights of parents as natural guardians, where the father is guilty of gross ill treatment or cruelty or in a constant habit of drunkenness, or otherwise acts in a manner injurious to their moral interests. *McGill v. McGill*, 19 Fla. 841.

And a decree of divorce against a wife on the charge of habitual drunkenness, awarding to her the care, custody, nurture, and education of two minor children, will not be reversed on appeal where they were of the age which especially demands a mother's care, unless it affirmatively appears in the record that there was no evidence of the unfitness of the father to take charge of them, and it will be assumed that if the mother's habits of drunkenness are continued and the father should appear to be a proper person to have charge of them the court would modify its order and give him the custody after they had passed the age demanding a mother's care. *Brandon v. Bradon*, 14 Kan. 342.

So, a woman is entitled to dower under the Maine Act of 1838, chap. 342, providing for a divorce from her husband on the ground that he had become a confirmed habitual drunkard, but the statute has no retroactive effect. *Curtis v. Hobart*, 41 Me. 280.

And where at the time of the marriage the wife has a stock in trade which by the joint industry of herself and her husband is increased, the stock thus created is community property, but on the separation of the property between them on suit for divorce by the wife for habitual drunkenness of the husband, it is chargeable with the value of the stock which she had on hand at the time of the marriage. *Werner v. Kelly*, 9 La. Ann. 60.

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II. Drunkenness as affecting cruel and inhuman treatment.

a. Drunkenness as cruelty.

Drunkenness is not by itself sufficient to entitle a party to a divorce upon the ground of cruelty and inhuman treatment. *Anonymous*, 17 Abb. N. C. 221; *Mason v. Mason*, 1 Bdw. Ch. 278.

And the mere unhappiness of an ill-assorted marriage, or the destruction of domestic comfort by the vice of drunkenness, is not sufficient to warrant a judicial separation on that ground. *Hudson v. Hudson*, 3 Swab. & T. 314, 38 L. J. Mat. N. S. 5, 9 Jur. N. S. 1802, 9 L. T. N. S. 579, 12 Week. Rep. 216.

And adulterous conduct which falls short of actual adultery, and excessive drinking which does not amount to habitual intemperance within the divorce law, do not constitute a cause of action for divorce for extreme cruelty, as in a legal sense extreme cruelty must be something different from any other cause for divorce, and constitute a separate and distinct cause of action. *Haskell v. Haskell*, 54 Cal. 203.

So, drunkenness, though accompanied by acts of considerable violence, is not a ground for a decree of judicial separation,—especially where the real ground for an application is that the husband wishes to get rid of a drunken wife. *Scott v. Scott*, 29 L. J. Mat. N. S. 64.

And a party to a marriage is not obliged to suffer two years of extreme and repeated cruelty before obtaining a divorce for that cause because the cruelty is caused by habitual intemperance and the statute provides for divorce on the ground of habitual drunkenness for the space of two years. *Harman v. Harman*, 16 Ill. 85.

So, drunkenness, though repeated, cannot be considered as warranting a divorce on the ground of indignities rendering the condition of the injured party intolerable, where the statute also provides for divorce on the ground of habitual drunkenness for two years. *Kempf v. Kempf*, 34 Mo. 211.

And excessively vicious conduct on the part of a wife which will warrant a divorce within the meaning of the statute is not established by proof that she had become addicted to the habit of occasional intoxication, and of family broils and coarse, revolting language on her part upon these occasions, and that she had on several occasions offered personal violence to her husband while intoxicated when he interfered between her and his mother, and of reprehensible methods resorted to by her to procure liquor to gratify her thirst. *Shutt v. Shutt*, 71 Md. 193.

b. Drunkenness connected with cruelty.

The right of a wife to relief is not affected by the fact that conduct on the part of her husband entitling her to a divorce for cruelty of treatment

terms, by such courts, and upon such considerations, as the state sees fit.

It is the legal dissolution of that status which is begun, continued, and ended solely under the supervision of the state.

The language of our statute was intended to reserve to the court a "sound discretion" to withhold a divorce, even in a case proved, where public policy is opposed to its being granted.

Dutcher v. Dutcher, 89 Wis. 651; *Trumpy v. Trumpy*, *supra*; *Morrison v. Morrison*, 186 Mass. 810; *Sparhawk v. Sparhawk*, 120 Mass. 392; *Hunt v. Hunt*, 72 N. Y. 228, 28 Am. Rep. 129; *Sewall v. Sewall*, 122 Mass. 161, 23 Am. Rep. 299.

The exercise of such discretion, unless

was the result of intemperance. *Bowie v. Bowie*, 3 Md. Ch. 51; *McVickar v. McVickar*, 48 N. J. Eq. 490.

Unless the wife was induced to consent to the habitual drunkenness. *McVickar v. McVickar*, *supra*.

In *McVickar v. McVickar*, *supra*, *Laing v. Laing*, 21 N. J. Eq. 248, *infra*, was distinguished, the court saying that it is a question of degree to be determined upon the facts of each case, and that in its opinion acts of cruelty so often repeated as in this case would have induced the chancellor if they had existed in that case to have granted a divorce.

The fact that the cruelty of a husband towards his wife which will justify a divorce was caused by a frenzy of intoxication is no mitigation of the offense where habitual drunkenness is itself a sufficient ground for divorce. *Lee v. Lee*, 3 Wash. 236.

And acts, language, or conduct which would amount to cruelty within the meaning of the statute providing for divorce on that ground would be aggravated and not excused by intoxication,—especially if it were excessive and habitual. *Camp v. Camp*, 18 Tex. 523, *dictum*.

So, acts of violence by a husband toward his wife considered in the aggregate and in connection with other misconduct, such as drunkenness, may be sufficient to warrant a dissolution of the marriage on the ground of cruelty, though each act of violence taken alone might not constitute cruelty. *Power v. Power*, 11 Jur. N. S. 800, 4 Swab. & T. 178, 24 L. J. Mat. N. S. 187, 18 Week. Rep. 1113.

And cruelty upon the part of a husband towards an amiable and inoffensive wife while drunk is a ground for divorce, though he was good natured and kind when sober and pleased. *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. Dec. 52.

And intemperance on the part of a wife which entirely deprives her of power to control her passions and puts her in such a state of mind that she is in the habit of assaulting her husband, is a ground for a judicial separation in his favor, where their difficulties were the consequence, and not the cause, of her intemperance. *White v. White*, 1 Swab. & T. 562, 6 Jur. N. S. 23, 1 L. T. N. S. 197.

And see also *Mack v. Handy*, *Leake v. Linton*, and *Williams v. Goss*, *supra*, I. c.

But a wife is not entitled to divorce and alimony on the ground of barbarous and inhuman treatment endangering her life because the husband's conversations and deportment were not always characterized by the delicacy and tenderness which might be expected of a prudent and affectionate husband, and during occasional paroxysms of passion produced or aggravated by the use of ardent spirits he was sometimes vulgar, profane, and boisterous. *Bogges v. Bogges*, 4 Dana, 808.

And the use of abusive language to a wife by a husband, and habits of constant intoxication, do not amount to legal cruelty. *C— v. C—*, 28 Eng. L. & Eq. 608.

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plainly and palpably abused, will not be reviewed by this court.

Chapman v. Loomis, 86 Conn. 460.

Andrews, Ch. J., delivered the opinion of the court:

Habitual intemperance, as a cause for which a divorce might be granted, was first named in this state by a statute enacted in 1843, where it was coupled with intolerable cruelty. Precisely what constitutes habitual intemperance, within the meaning of that statute, it is not easy to define. It may, however, be safely assumed that the purpose of the act was not primarily to promote temperance or to reform the offender, but to preserve the peace, comfort, safety, happiness, and prosperity of the

And habits of profanity upon the part of a husband towards his wife furnish no ground for a divorce, though when taken in connection with indulgence in habits of intoxication they may be considered as giving color to his conduct. *Powers v. Powers*, 20 Neb. 529.

So, habitual drunkenness accompanied by annoyances and extraordinary conduct on the part of a husband does not constitute cruelty justifying a divorce where he is not charged with acts of violence or with having threatened violence. *Brown v. Brown*, L. R. 1 Prob. & Div. 44.

And ill-treatment of a wife by a husband during spells of inebriation and proceeding from it will not justify a divorce in the absence of evidence of a fixed purpose on his part to treat her amiss, or that he no longer entertained affection for her. *Brown v. Brown*, 38 Ark. 324.

And a single blow given in a fit of passion or in a drunken spree when reason was dethroned but subsequently repented of does not amount to extreme cruelty warranting a divorce, and would not amount to it in many situations and circumstances of life even if repeated several times in the course of a few years. *Laing v. Laing*, 21 N. J. Eq. 248.

Nor is a charge of cruelty of treatment by a wife of her husband in the sense of bodily harm or serious danger to his health supported by proof that she had acquired habits of intoxication, and of occasional outbreaks of passion and violence, but that such outbreaks never occurred except when she was under the influence of drink and without self-control, and that the only personal violence offered occurred on two or three occasions when he interposed between her and his mother who lived in the house with them. *Shutt v. Shutt*, 71 Md. 193.

Nor will a divorce in favor of a husband against his wife for adultery be denied on account of the cruelty of the husband where the wife's drunken habits were the cause of the husband's violence. *Pearman v. Pearman*, 1 Swab. & T. 601, 29 L. J. Mat. N. S. 54, 8 Week. Rep. 274.

So, that a husband had become almost a habitual drunkard for a few months, and that he neglected to provide for his wife and family, do not constitute cruel and inhuman treatment for which a divorce can be had. *Camp v. Camp*, 18 Tex. 523.

And occasional sallies of passion or rudeness of language and conduct tending to wound the moral and mental feelings caused by indulgence in intoxicating liquors or other causes, does not amount to legal cruelty within the meaning of the divorce law, so long as bodily harm is not threatened and there is nothing to create serious apprehension of personal injury or danger. *Mason v. Mason*, 1 Edw. Ch. 278.

And see also *Holland v. Holland*, *supra*, I. b. Mere intemperance in a husband's habits, harshness of manner, and indecency of conduct are not

nonoffending party, and of the family of which they are together the members and parents. In a note upon this statute, left by the late Chief Justice Church, he said: "The habitual use of intoxicating liquor, though producing excitement, will not justify a divorce. The habit must be so gross as to produce suffering or want in the family to a degree which cannot be reasonably borne." We are not aware that any court in this state has attempted to define these words. The expression is one of those terms which, like the expression "intolerable cruelty," often arise in the law, and which cannot well be defined in advance. They must be applied by the prior to cases as they arise, by inclusion or exclusion, and the existence of the condition in question decided as a matter of fact. The language of the stat-

utes in other states, by which the use of spirituous liquors is made a cause for divorce, is so divergent as to afford but little aid in the construction of our own. In California it has been held that a fixed habit of drinking to excess, to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, is such "habitual intemperance" as is made a ground of divorce. *Mahone v. Mahone*, 19 Cal. 626, 81 Am. Dec. 91. "Habitual intemperance" is a condition, and when any person gets into that condition he is said to be "habitually intemperate." These latter words are frequently used in policies of insurance, and in various cases arising on such policies these words have been the subject of judicial discussion. In the case of *Northwestern*

*ufficient to warrant a divorce for cruelty; there must be something more than mere injury to a person's sensibility or sense of delicacy. *Waskam v. Waskam*, 31 Miss. 154.

Though the propensity to drink to intoxication is not of itself a ground for separation, however if the consequences of intoxication produce bodily injury or endanger the wife's personal safety the court will interfere. *Mason v. Mason*, *supra*.

And bodily injury inflicted on a wife by her husband while suffering from attacks of delirium tremens is a sufficient ground for judicial separation where the court is satisfied that though the acute disorder may have subsided, the wife could not cohabit with him without incurring great peril of a renewal of such bodily injury. *Marsh v. Marsh*, 28 L. J. Mat. N. S. 12, 1 Swab. & T. 312, 5 Jur. N. S. 46.

And a decree for alimony will be made where it appears that the husband had for several years indulged in the use of intoxicating liquors to such an extent as to have produced repeated attacks of delirium tremens during which he became very violent by reason of which the wife had been compelled on one occasion to go to a neighbor's house, remaining all night, and upon her return he assaulted her with a stick and kicked at her, conducting himself in a violent manner, where she swears that she was apprehensive of further illtreatment, though this was the first instance in which he had ever struck her. *Rodman v. Rodman*, 20 Grant, Ch. (U. C.) 423.

So, the fact that a husband had become very intemperate and while under the influence of liquor treated his wife in a cruel and barbarous manner, sometimes ejecting her from his premises and at other times using toward her the most vulgar and offensive language and making false accusations against her, entitles the wife to a divorce upon the ground of inhuman treatment. *Allen v. Allen*, 31 Mo. 479.

And that a man had been in the habit of becoming intoxicated at frequent intervals and so remaining for a period of several days together, during which he was extremely abusive and insulting to his wife, accusing her of infidelity without cause, and frequently threatening her with violence, and on one occasion violently assaulting her, and several times endeavoring to commit suicide, justifies a decree of divorce on the ground of cruelty. *Lee v. Lee*, 3 Wash. 226.

And evidence that the defendant was habitually intoxicated and was quarrelsome and profane and dangerous while in that condition, and that he had used profane and abusive language towards his wife and threatened to inflict personal violence upon her, and had endeavored to execute his threats by chasing her and attempting to strike her with a chair, and had on several occasions kicked her, establishes a case of legal cruelty which will entitle her to a divorce. *Hughes v. Hughes*, 19 Ala. 307.

And a complaint in such an action charging the defendant with habitual intoxication and violence resulting therefrom as evidenced by threats and abuse, and alleging his use of abusive language towards his wife compelling her through fear to seek safety in quitting his presence, and threats of personal violence such as would endanger her personal safety, and specifying particular instances of misconduct, is sufficient to entitle the plaintiff to relief. *Ibid*.

So, proof that a husband drank at times to excess, and sometimes took from ten to fifteen drinks a day, and that his conduct seemed affected by the use of liquor, and that when under the influence of liquor he was boisterous, quarrelsome, oppressive, and at least disgustingly unpleasant, and that he indulged in habits of profanity and would walk the floor and flourish his cane and act as though he would strike his wife, and that she would sometimes sit up all night thinking he would kill her before morning, justifies a divorce for extreme cruelty under the Nebraska statute. *Powers v. Powers*, 20 Neb. 529.

And evidence that a husband was in a state of almost constant intoxication so gross as to be at times unfitted for labor, and that what little he earned went in part for drink, and that his wife was often left without the commonest necessities of life, and that he habitually found fault with her and called her foul names and charged her publicly with the commission of criminal acts and consorting with other men, and frequently threatened personal violence, and on one occasion actually attempted and did to some extent accomplish it, drawing a razor and threatened to cut her into mince-meat, and shoving her off of the porch, justifies a divorce on the ground of indignities to the person rendering her condition intolerable and her life burdensome. *Mason v. Mason*, 121 Pa. 161.

So, where a husband becomes frequently drunk and while in that condition chokes his wife and grossly accuses her of unchastity and locks her up and threatens to smash her head with a brick, she is entitled to a divorce on the ground of inhuman treatment endangering her life. *Wheeler v. Wheeler*, 53 Iowa, 511, 35 Am. Rep. 240.

And evidence tending to show that the defendant in a divorce case was an habitual drunkard and when intoxicated was violent, profane, and grossly indecent in his language and conduct, and that he frequently applied violent epithets to his wife and daughters and threatened to kill them and on several occasions pushed her about in anger, is sufficient to show a cause of cruelty and inhuman treatment which will warrant a divorce. *Crichton v. Crichton*, 73 Wis. 59.

Mut. L. Ins. Co. v. Muskegon Nat. Bank, 13 U. S. 501-505, 80 L. ed. 1100-1102, the Supreme Court of the United States, by Justice Miller, said: "The whole case turned, so far as the jury was concerned, upon the true definitions of the words 'habitually intemperate.' . . . We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, and as the observation and experience of one man on that subject are as good as those of another of equal capacity and opportunities, their true meaning and significance would seem to be a question addressed rather to the jury than to the court. While there may be on the one hand such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a

condition of habitual intemperance, or, on the other hand, such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them." The case of *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 850, 28 L. ed. 1055, was on a policy of this kind. The court below had instructed the jury that if the habits of the insured "in the usual, ordinary, and everyday routine of his life were temperate," he was not "intemperate," within the meaning of the policy, although he had "had an attack of delirium tremens resulting from an exceptional indulgence;" and this instruction was sustained.

And evidence that a husband had contracted irregular and intemperate habits, and that on a trivial dispute he threw hot brandy and water in his wife's face, and that he struck her upon her refusal to clean his boots, and cut her hand by forcibly taking a knife away from her, and that he pulled her down stairs and injured her ankle and threw a jug full of water at her which cut her fingers, and that he had frequently thrown cold water over her,—justifies a decree dissolving the marriage. *Waddell v. Waddell*, 2 Swab. & T. 584.

And in *Wachholz v. Wachholz*, 75 Wis. 377, it was held that where a husband had for three years given himself up to dissipation and neglecting his family and business and spent much of his time in saloons, and had squandered a large amount of money, and had acquired a thirst for drink, and his temper had become soured, and he often treated his wife unkindly and swore at her and twice struck her in anger, and financial ruin was imminent, and she felt with good reason that she could no longer live with him, she is entitled to a divorce for cruelty and inhuman treatment.

So, in *Clutch v. Clutch*, 1 N. J. Eq. 474, where the husband was proved to be an intemperate and grossly abusive man, and that in one instance he turned his wife and children out of doors compelling her to take refuge in her father's house, and in another he forcibly turned her out of doors, and frequently refused to provide for them the common necessities of life, and she exhibited marks and bruises upon her person which she represented to be the effect of his violence, a decree of separation for the term of three years was granted upon the theory that the case was not one of the most aggravated character, and that there might be hope of reformation and reconciliation.

a. Drunkenness as evidence of cruelty.

Though habits of intoxication on the part of a husband do not form sufficient ground for a decree of separation or alimony in favor of the wife, they are material to be considered in connection with other objectionable acts on his part as tending to show a greater liability of a recurrence of ill-treatment than if he were sober. *Rodman v. Rodman*, 20 Grant, Ch. (U. C.) 428.

And evidence of the drunkenness of a husband, in connection with evidence of personal violence or threats by him, may be considered on application of the wife for a divorce on the ground of extreme and repeated cruelty, as tending to explain the nature and character of the violence and threats. *Coursey v. Coursey*, 60 Ill. 126; *Harman v. Harman*, 16 Ill. 85.

And habits of profanity on the part of a husband, though furnishing no ground for divorce, may be taken into consideration in connection with habits

of intoxication, as giving color to his conduct. *Powers v. Powers*, 20 Neb. 529.

III. Drunkenness as affecting desertion.

Where a husband continues his habits of intoxication to the extent of rendering it unsafe for his wife to live with him for the statutory period authorizing a divorce for desertion after her separation from him on that account, she is entitled to a divorce upon the ground of desertion. *McVickar v. McVickar*, 46 N. J. Eq. 490.

And drunkenness which disqualifies a husband to discharge his marital duties or obligations, as, for instance, which compels the wife to leave him, constitutes a degree of cruelty in itself which if continued for a great length of time, as for three years, in analogy to the time prescribed by the statute for abandonment, would warrant a divorce on that ground. *Camp v. Camp*, 18 Tex. 522, *dictum*.

So, a woman who was compelled to separate from her husband because of his drunkenness and his neglect to furnish her and her child with the means of support, and returned to her father in another state where she remained for the statutory period, is entitled to a divorce under the New Hampshire statute upon the ground that he has willingly absented himself from her for three years together without making suitable provision for her support. *James v. James*, 55 N. H. 266.

And habits of intoxication so gross and confirmed as to render a continuance of cohabitation unendurable might justify the wife in separating from the husband in Massachusetts, although for want of proof that such habits had been contracted since marriage or of cruel treatment they would not amount to one of the statutory causes of divorce. *Lyster v. Lyster*, 111 Mass. 337.

But intemperance and improvidence on the part of a husband, on account of which his wife refuses to live with him, do not render the separation a desertion by the husband within the meaning of the divorce law. *Plimley v. Plimley*, 35 N. J. Eq. 18; *Laing v. Laing*, 21 N. J. Eq. 248.

Nor does it amount to extreme cruelty that would justify a divorce *a mensa et thoro*. *Laing v. Laing*, *supra*.

But where a husband, from whom his wife has separated because of his habits of intoxication making it unsafe for her to live with him, so far reforms as to render it reasonably safe for her to resume cohabitation, it is his duty to seek her out and manifest his reformation, and if he fails to do so and voluntarily prolongs the separation for the statutory period after his reformation, the wife being ignorant of the change, he is guilty of desertion which will warrant a divorce on that ground. *McVickar v. McVickar*, *supra*. F. H. B.

The finding in this case shows that the defendant, "about once in three weeks, became intoxicated, during the evening, to such an extent that the next morning he did not go as usual to his work at the store where he was employed as a clerk," and had continued to do so for a period of two years. While this condition of the defendant very likely caused annoyance and vexation to the plaintiff, and possibly grief and humiliation, it does not appear to have occasioned any loss of position to the defendant, or any trouble between him and his employer, nor does it appear to have been so gross or so long continued as to have produced want or suffering in the family. We fail to see in this case that the superior court committed any error in law in this respect.

The trial court held that the act of adultery proved was one brought about by the connivance and procurement of the plaintiff, acting through her attorneys or agents. The appellant strenuously insists that this finding is not supported by the evidence. Connivance is the corrupt consenting of a married party to that conduct of the other of which afterwards complaint is made. It bars the right of divorce because no injury is received; for what a person has consented to, he cannot set up as an injury. Connivance is a thing of the intent resting in the mind. It is the consenting. But the connivance may be the passive permitting of the adultery or other misconduct, as well as the active procuring of its commission. If the mind consents, that is connivance. *Ross v. Ross*, L. R. 1 Prob. & Div. 784; *Pierce v. Pierce*, 8 Pick. 299, 15 Am. Dec. 210. The connivance of the plaintiff is established as a fact upon evidence to the admission of which no objection was made, and we suppose this to be a conclusion which this court cannot revise. The argument of the appellant is founded on that part of the finding which says that "the plaintiff did not give to her said attorney, or to any of the detectives employed by him, any direct or specific authority or direction, as distinguished from the general authority hereinbefore set out, to employ said woman for the purposes for which she was employed, or to employ any woman for such purpose, and the plaintiff had no actual personal knowledge that the woman found with her husband was one employed by her agents, in the manner in which, or for the purposes for which, she was employed." The argument is that this finding is inconsistent with the conclusion to which the court came, because it shows, as she claims, that her mind never consented to the adultery of her husband. This argument cannot be maintained, in view of the other facts of the case. Connivance can usually be proved only by proving facts from which, with their circumstances, it may be inferred. From the finding before us it appears that the plaintiff had suspected her husband of infidelity, although she did not suspect any particular woman. She was desirous of obtaining a divorce. She consulted an attorney in Boston, who advised her to employ detectives to watch her husband. She authorized that attorney to employ such detectives for that purpose as he saw fit, to procure such evidence as in his judgment was necessary, giving him full authority in the premises. Detectives were employed by him, and sent from Boston

to New London. Among other things done by this attorney and the detectives he hired, a lewd woman was employed to lure the defendant by her wiles into an act of adultery, or into a compromising situation from which the inference of adultery would be drawn, so arranged that his discovery would be made. This lewd woman came to New London, commenced her practices on the defendant, succeeded in attracting his attention, and in drawing him into the precise sort of an act for which she was employed. During the progress of her efforts the plaintiff was informed by the detectives that her husband had been seen with a woman at night in the streets of the city, and on the night arranged for the discovery she went with the detectives to the room where the defendant and the lewd woman were together. There was sufficient to justify the superior court in finding that the plaintiff must have known that the movements of this lewd woman were in some way governed by the detectives who she knew had been employed by her attorney, and who gave her the information which they did, by which she was enabled to confront her husband while in that woman's company. Soon thereafter the plaintiff caused her petition for a divorce to be brought, praying for a divorce based on the act she had so discovered. Her conduct then and ever since might well be deemed to cast a reflex light on her knowledge of the purposes for which the detectives were employed, and her consent to the artifices which they practiced. These are the facts and circumstances from which the trial court held that the plaintiff was barred of all right to have a divorce for the acts of adultery she had proved. In the light of the authorities we have cited, we think the decision of the court on this part of the case should not be disturbed. *Morrison v. Morrison*, 136 Mass. 810; *Myers v. Myers*, 41 Barb. 114; *Hedden v. Hedden*, 21 N. J. Eq. 61; *Austin v. Austin*, 10 Conn. 221; *Cairns v. Cairns*, 109 Mass. 406; *Masten v. Masten*, 15 N. H. 159; *Gower v. Gower*, L. R. 2 Prob. & Div. 428. In this last case it was held that, "if a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery brings about an act of adultery, the husband cannot obtain a decree of dissolution [of the marriage] on the ground of such adultery, although he may not have directed or authorized his agent to bring it about." The petitioner admitted that he had employed one Williams to watch the respondent, and to obtain evidence of her adultery, but denied that he had ever instigated Williams to induce her to commit adultery, or sanctioned his taking any step with that view. The evidence showed that the act of adultery on which the petitioner relied had been brought about by the contrivance of Williams. In deciding the case the judge ordinary said: "I think it quite possible that he [the petitioner] did not tell Williams to do what Williams appears to have done; but, at the same time, he never warned him not to do what a man of his class and character would be likely to do. The very first thing which would occur to such a man, if evidence were not forthcoming, would be to make an occasion which should furnish

that evidence. In that point of view the petitioner is responsible for the act of his agent. But I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this court for an act of adultery brought about by his own agent." Other cases supporting the same doctrine are *Williamson v. Williamson*, L. R. 7 Prob. Div. 76; *Hawkins v. Hawkins*, L. R. 10 Prob. Div. 177; *Heyes v. Heyes*, L. R. 13 Prob. Div. 11.

The state makes itself a party to all marriages, in that it requires the marriage contract to be entered into before officers designated by itself, and with certain formalities which it has prescribed. This state does this, not alone that children may be born and properly reared, but that the parties to the marriage may themselves be the better citizens; it being in accordance with the experience of all mankind that human beings are happier, and are better citizens and better disposed towards the state, when married and surrounded by the ties of a family and with children, than when they remain unmarried. The state desires good citizens. It regulates divorce procedure in its own interest. A divorce cannot be had except in that court which the state authorizes, and for those causes only, and with those formalities, which it has by statute prescribed. As the state favors marriages for the reasons stated, so the state does not favor divorces, and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better

citizens, separate, than if compelled to remain together. The state allows divorces, not as a punishment to the offending party nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted. *Seeley's Appeal*, 56 Conn. 302, 206. The forms of the law of divorce should never be allowed to minister to the caprices of fickle-minded persons, or to the revenges of the disappointed or vindictive, and least of all to the passions of the incontinent. Nor under any circumstances should they be used in fraud of the statute allowing divorces, nor of the court. To the end that any and all attempts to use the forms of the law of divorce for any of the purposes indicated, shall be discovered and defeated, all courts possessing divorce jurisdiction are vested with a discretion. A wise discretion should always be exercised in administering the law of divorce, lest its spirit be disobeyed by a too narrow adherence to its letter. "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Chief Justice Marshall, in *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 868, 6 L. ed. 204, 234.

There is no error.

The other Judges concur.

GEORGIA SUPREME COURT.

SAVANNAH, FLORIDA, & WESTERN RAILWAY COMPANY, *Pf. in Err.*,

v.

John J. WALLER *et al.*

(97 Ga. 164.)

***1. Mere permission by, or implied license from, a railway company for children to enter its yard for the purpose of carrying meals to their fathers, there being a perfectly safe way for the children to pass and repass without going under freight cars standing upon tracks in the yard, will not subject the company to liability for injuries caused to one of these children by pushing upon him a car under which he had suddenly gone for the purpose of getting a ball which had been thrown there, but for the throwing of which the company was in no way responsible; and it not appearing that the company's servants by whom the car was put in**

*Headnotes by LUMPKIN, J.

motion knew, had reason to know, or were in a position to discover that the child was under it at the time.

2. The sudden throwing of the ball, the child's being attracted thereby, and his rapidly following it under the car, all together, constituted an emergency which the company could not reasonably have anticipated or guarded against; and consequently the unexpected catastrophe which resulted from the movement of the car at the very moment when the child was exposed to danger was a mere casualty or accident, for which the company should not be held liable.

3. Where, by permission of its officers, the yard of a railroad company, where its trains are constantly drilling, is frequented at a given hour daily by young children, who come there on lawful business, such permission, when acted upon regularly for a number of years, is at least notice to the company of the probable presence of such children at such place at such hour, and, in the running and drilling of its cars during

NOTE.—For liability of a railroad company to licensees on its premises, see also *Norfolk & W. R. Co. v. Wheeler* (Va.) 29 L. R. A. 825; *Barney v. Hannibal & St. J. R. Co.* (Mo.) 26 L. R. A. 847.
34 L. R. A.

For liability as to turntables injuring children, see *Fort Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781, and note; also *Walsh v. Fitchburg R. Co.* (N. Y.) 27 L. R. A. 724.

the time when they are usually present, the company is bound to exercise such care as would afford reasonable protection to any of such children as, happening to be upon the yard, might have casually strayed, or by some object been allured, upon one of its tracks; and the measure of precaution so to be taken is to be estimated with reference to the apparent peril of the position, coupled with the capacity of the child to know and appreciate its danger, and the absence, or probable absence, of such discretion as would enable it to take proper measures for its own protection.

4. Where, in an action against a railroad company for damages for personal injuries inflicted, it appears that in switching its cars a train of the company was run backward through its yard at a time during the day when, with permission of the officers of the company, young children, not of sufficient discretion to take precautionary measures for their own safety, were accustomed to assemble there, and that one of such children, running under a stationary car to get a ball which had been thrown there, was run over and injured in consequence of this car being suddenly put in motion by the backing train coming in contact with it, and where it further appears that no lookout was stationed upon the rear of said backward-moving train, or elsewhere thereon, so as to command a view of its movements, and give notice to those in charge of the engine of danger to one of such children who may have either casually strayed upon the track, or who might by any means have been allured thereon; and where it further appears that no other equivalent precautionary measures were taken to prevent injuries which might have been probably thus inflicted,—a verdict of the jury finding against the defendant upon the question of negligence, and awarding damages for the injury, is supported by the evidence, and is not contrary to law.

(*Atkinson, J., dissents from propositions 1 and 2, and writes propositions 3 and 4.*)

(August 16, 1896.)

ERROR to the City Court for Savannah in an action to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts as stated in the official report were as follows:

The plaintiff, a boy of seven years and nine months, was caught under a moving car of the railroad company, and his right leg was so crushed as to render necessary an amputation just below the knee. His father was employed by the company as a laborer in repairing cars, his place of work at the time being in the company's yard in the city of Savannah, on the other side of the track where the injury occurred from that where his home was situated. For about a month the plaintiff had been bringing his father's dinner, and was accustomed to go across the track for this purpose. This practice by plaintiff and others was known to the company and the time allowed for dinner (thirty minutes) did not admit of the father's going to his home for the same. On the day in question, about 1 o'clock, the plaintiff had carried the dinner and was returning. At the same time three employees of the company, other than his father, were engaged in throwing and catching a ball from either side of the

track where the injury occurred. As plaintiff approached, walking on the space between two tracks, the ball was thrown towards one of the men, who failed to catch it, and it bounced upon a cross-tie, and [went under the end of the last of a number of freight cars standing still upon the track. One of the men said to plaintiff, "Sonny, get that ball." He thereupon ran for it, and it seems that some negro boys were running for it at the same time. Plaintiff went upon the track, and then under the end of the car, putting his foot upon the brake beam, and reaching for the ball. While in this situation the standing cars were struck at the other end of the train by a number of other cars pushed by the company's engine for the purpose of making a coupling. They rolled 20 or more feet, and plaintiff was knocked down two or three times in the effort to escape, and succeeded in doing so only with the loss of his leg. He brought suit for damages, and obtained a verdict against the company for \$4,000. The company excepted to the overruling of its general demurrer to the declaration, to the denial of a nonsuit, and to the refusal of a new trial.

Messrs. Erwin, Du Bignon, & Chisholm for plaintiff in error.

Mr. William W. Gordon, Jr., for defendants in error:

The duty that the law imposed upon the defendant may be determined by the character under which the plaintiff came upon defendant's premises, which was either as trespasser, *i. e.*, bare licensee, or licensee by inducement or implied invitation.

Bigelow, Torts, ed. 1878, 288, § 7; Nichols v. Washington, O. & W. R. Co. 83 Va. 99.

If a trespasser, the defendant should have had a rule, and enforced it, excluding children from its premises.

Beach, Contrib. Neg. § 47, p. 148; Vanderbeek v. Hendry, 84 N. J. L. 467; Whittaker v. Delaware & H. Canal Co. 126 N. Y. 544.

If a trespasser or bare licensee the facts alleged show negligence amounting to gross carelessness, whereas the diligence due trespassers is sometimes stated to be but ordinary care.

Gunn v. Ohio River R. Co. 36 W. Va. 165; Brown v. Hannibal & St. J. R. Co. 50 Mo. 461, 11 Am. Rep. 420; Macon & W. R. Co. v. Davis, 18 Ga. 684; Central R. & Bkg. Co. v. Denson, 84 Ga. 774; Central R. Co. v. Brinson, 70 Ga. 251.

The plaintiff was a licensee by implied invitation upon the premises of defendant.

Harrison v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11; 1 Washb. Real. Prop. 662, ¶ 898; Beck v. Carter, 68 N. Y. 288, 23 Am. Rep. 175; 1 Addison, Torts, ed. 1878, § 229, p. 255; Louisville, N. O. & T. R. Co. v. Hirsch, 69 Miss. 126.

The plaintiff did not act merely for his own convenience and pleasure, and the defendant is liable for those coming on his land for business permitted by him.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 378, 87 Am. Dec. 644; Carleton v. Franconia Iron & S. Co. 99 Mass. 216; Rhodes v. Georgia R. & Bkg. Co. 84 Ga. 826.

When a person enters the premises of another by invitation, express or implied, or

merely by permission, the law imposes upon the owner the duty of ordinary care.

Emery v. Minneapolis Industrial Exposition, 56 Minn. 460.

The plaintiff was where he had a right to be when the danger first appeared.

Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 160; *Galloway v. Chicago, M. & St. P. R. Co.* 56 Minn. 346, 23 L. R. A. 442.

The plaintiff's attention was naturally and justifiably withdrawn for the moment from the danger or cause of danger.

Smith v. Central R. & Bkg. Co. 82 Ga. 805; *Vickers v. Atlanta & W. P. R. Co.* 64 Ga. 306; *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 877; *Barrett v. Southern P. R. Co.* 91 Cal. 296.

The defendant's presence on the track ought to have been anticipated.

Smith v. Savannah, F. & W. R. Co. 84 Ga. 688; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11.

There was diligence due the public using the track lengthwise.

Virginia Midland R. Co. v. White, 84 Va. 498; *Texas & P. R. Co. v. Watkins* (Tex. Civ. App.) 26 S. W. 760.

There was diligence due the dinner boys crossing.

Yakum v. Mettasch (Tex. Civ. App.) 26 S. W. 129; *Swift v. Staten Island Rapid Transit R. Co.* 128 N. Y. 645; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512.

Diligence due the community is due an individual of the community who suffers special injury.

Siak v. Crump, 112 Ind. 504.

The defendant owed the duty of reasonable outlook.

Whalen v. Chicago & N. W. R. Co. 75 Wis. 654; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 8 Am. Rep. 628; *Robinson v. Cone*, 22 Vt. 218, 54 Am. Dec. 67; *Central R. & Bkg. Co. v. Warren*, 84 Ga. 332.

The plaintiff, even on a private way, had the legal right if his progress were arrested to diverge from the path and upon the track where there was another path.

1 Addison, Torts, § 229, p. 255; *Nichols v. Washington, O. & W. R. Co.* 83 Va. 99.

The bell should have been rung or other signal given of the approach of the train and engine.

Swift v. Staten Island Rapid Transit R. Co. 128 N. Y. 645; *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 877; *Byrne v. New York C. & H. R. R. Co. supra*; *Beisiegel v. New York C. R. Co.* 84 N. Y. 622, 90 Am. Dec. 741; *Louisville & N. R. Co. v. Morris*, 14 Ky. L. Rep. 466; *Hinkle v. Richmond & D. R. Co.* 109 N. C. 472; *Chicago, R. I. & P. R. Co. v. Sharp*, 63 Fed. Rep. 532; *Atlanta & W. P. R. Co. v. Wyly*, 65 Ga. 120; *Central R. & Bkg. Co. v. Denson*, 84 Ga. 774.

There should have been a switchman or trainman at the rear of the train to give warning.

Fox v. Chicago, St. P. & K. C. R. Co. 86 Iowa, 368, 17 L. R. A. 289; *Virginia Midland R. Co. v. White*, and *Kay v. Pennsylvania R. Co. supra*; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485.

The owner of land over which a private way

runs, while not responsible to a bare licensee for the ordinary risks of the place where the license is to be enjoyed, is liable for anything existing there in the nature of a snare or trap.

Nichols v. Washington, O. & W. R. Co. supra; *Beach, Contrib. Neg.* § 17, p. 55; 1 Addison, Torts, §§ 226, 227, pp. 251, 252; *Beck v. Carter*, 68 N. Y. 292, 23 Am. Rep. 175; *Birg v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 26; *Morrow v. Sweeney*, 10 Ind. App. 626; *Toomey v. Sanborn*, 146 Mass. 28; *Atlanta Cotton-Sea Oil Mills v. Coffey*, 80 Ga. 145.

The rule that a trespasser cannot recover does not apply where from the neighborhood and exposed condition children are likely to be attracted and injured.

Beach, Contrib. Neg. § 47, p. 145, § 70, pp. 212, 213; *Deering, Neg.* § 818; *Wynn v. City & S. R. Co.* 91 Ga. 344; *Lynch v. Nardin*, 1 Q. B. 29; *Clark v. Chambers, L. R.* 3 Q. B. Div. 327; *Stout City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Evansich v. Gulf, O. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Barrett v. Southern P. Co.* 91 Cal. 296; *Kaffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 893; *Kansas C. R. Co. v. Fitzsimmons*, 23 Kan. 690; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637.

It may be left to the jury to infer that the defendant knew, what was a matter of common knowledge (and also recognized by law), that a child is indiscreet and will be tempted to go about or upon dangerous machinery, and will be attracted by anything in motion, especially a ball, to go to places against the danger of which its immature judgment interposes no warning or defense.

Deering, Neg. § 25; *Linnahan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Barrett v. Southern P. Co. supra*; *Siak v. Crump*, 112 Ind. 504; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 8 Am. Rep. 630; *Wynn v. City & S. R. Co. supra*.

A snare or trap may be defined as anything that "draws the victim into danger by natural instinct which it cannot resist."

Kaffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 895.

There was negligence in the operation and management of the cars and the premises at the place where the plaintiff was injured.

Folsom v. Lewis, 85 Ga. 146.

Although the men playing ball might not have been acting technically within the scope of their employment, yet it was the duty of the foreman of the yard or other proper officer to have stopped such a dangerous pastime.

Redding v. South Carolina R. Co. 3 S. C. N. S. 1, 16 Am. Rep. 681; *Jackson v. Second Ave. R. Co.* 47 N. Y. 274, 7 Am. Rep. 498.

The owner of land is liable for the obstruction of a private way by the act of a third party.

1 Addison, Torts, § 229, p. 254; *Corby v. Hill*, 4 C. B. N. S. 556; *Clark v. Chambers, L. R.* 3 Q. B. Div. 327.

The owner is also liable for failure to guard properly a dangerous place.

4 Am. & Eng. Enc. Law, p. 45, note 2; 14 Am. & Eng. Enc. Law, p. 807, note; *Post v. Stockwell*, 44 Hun, 28; *Toomey v. Sanborn*, 146 Mass. 28; *Morrow v. Sweeney*, 10 Ind. App. 626; *Pastene v. Adams*, 49 Cal. 87.

The road is liable both for the defective condition of its premises and the improper management of its trains.

Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 Am. Rep. 628; *Harriman v. Pittsburgh, U. & St. L. R. Co.* 45 Ohio St. 11.

And there can be two or more "conditions," "causes," contributing to the same result.

Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 275; *Lane v. Atlantic Works*, 111 Mass. 139; *Isbell v. New York & N. H. R. Co.* 27 Conn. 410, 71 Am. Dec. 78; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356.

An inquiry into the remote and proximate cause would be idle when the same party controls both.

Baumer v. Chicago, R. I. & P. R. Co. 87 Iowa, 488; *Kraut v. Frankford & S. P. City Pass. R. Co.* 160 Pa. 327; *Rauch v. Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Inland & S. Coasting Co. v. Tolson*, 189 U. S. 551, 85 L. ed. 270.

Due care for its safety is all that the law requires of a child.

1 Addison, Torts, p. 576, note 1; *Western & A. R. Co. v. Young*, 81 Ga. 897.

Due care is measured by the child's age, capacity, surroundings, and circumstances accompanying the accident.

Bridger v. Asheville & S. R. Co. 27 S. C. 456; *Wynn v. City & S. R. Co.* 91 Ga. 344; *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Munn v. Reed*, 4 Allen, 481; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810; *Lynch v. Nurdin*, 1 Q. B. 29; *Macon & W. R. Co. v. Davis*, 18 Ga. 686; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; 4 Am. & Eng. Enc. Law, p. 45, note 2; *Harriman v. Pittsburgh, C. & St. L. R. Co. supra*; *Bryan v. Macon*, 91 Ga. 530; *Reed v. Madison*, 88 Wis. 171, 17 L. R. A. 783; *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 820.

Lumpkin, J., delivered the opinion of the court:

The nature of this case may be gathered from the recitals in the headnotes; there being no substantial conflict, in so far as they relate to the facts, between the one announced by a majority of the court, and those in which Justice Atkinson expresses his dissent to the judgment rendered. We differed, however, in applying the law to the facts.

Unless the railway company was negligent relatively to the child who was injured, he was not entitled to recover. It was not, as to him, negligent unless it violated some duty which it owed to him with reference to the particular act by which the injury was occasioned. It cannot be denied that a railway company has an undoubted right to shift and move freight cars at its pleasure upon the tracks in its yard, nor that, under ordinary circumstances, it would be under no obligation to keep a watch upon the movement of these cars for the purpose of preventing an injury to a child, or any other person, who might casually happen to be upon one of the tracks when a car was set in motion. It is insisted, however, that as the plaintiff was one of a large number of children who were permitted by the company to enter its yard for the purpose of carrying meals to their fathers, who were employees in 84 L. R. A.

the service of the company, and that as it was known to the company these children were likely to be in the yard at or about the dinner hour and would probably go under the standing cars, it owed to them a duty of seeing to it that such cars were not suddenly put in motion so as to endanger their lives or limbs. We do not think that the mere permission by the company for these children to enter its yard for the purpose stated carried with it, under all conceivable circumstances, a duty so sweeping as this; there being a perfectly safe way for the children to pass and repass, while in the yard, without going upon the tracks where cars were standing, and no occasion for their going under the cars at all. Certainly the invitation by the company to the children, if the above-mentioned permission or license may properly be so termed, did not contemplate that they should go under or so near to these cars as to become in danger. But it is said the company might have foreseen that because of their indiscretion and want of judgment, arising from their tender years, these children were liable to exceed the license they actually had, and that the company ought, accordingly, to have taken the proper precautions to insure their safety in case they should do so. Granting that this would be true, if the injury to the plaintiff had happened while things were going on in the usual and ordinary way in the company's yard, we feel constrained to hold that this particular injury was at last the result of a mere casualty. Conceding, for the sake of argument, that the company was under a duty, in the usual course of its business in its yard, to see that a car was not put in motion while one of these children was under it, or just in front of it, it would then have to take the chances of becoming liable for an injury resulting in this way. But we do not think the company was under the burden of taking all the chances of what occurred in the present case. It had nothing to do with the throwing of the ball. It could not foresee or prevent the ball's going under the car, or anticipate that the child would be attracted by it and would rapidly follow it. It does not appear that the servants of the company by whom the car was put in motion actually knew, had reason to know, or were in a position to discover, that the child was under the car at the time it received the impetus which sent it forward. Indeed, the engineer handling the locomotive attached to the train of cars which came in contact with the standing car was a considerable distance from the latter when the train struck it. Taking all the facts together, the chief justice and the writer are of the opinion that they constituted an emergency not reasonably to be anticipated, and that the unexpected catastrophe resulting from the movement of the car at the precise moment when the plaintiff was exposed to danger should be treated as a mere accident. The particular combination of circumstances by which his injury was occasioned would very rarely exist. Just such a thing as this would not probably occur once in ten years, though hundreds of children should during that period enter the company's yard for the purpose above mentioned. It cannot, we are quite sure, be fairly insisted that, to guard against and prevent a

calamity of this kind, any higher or greater degree of diligence should be required of the company than ordinary diligence. There is no rule of law, nor any precedent, which, in our opinion, would justify a court in holding that the company, in view of its relations to the plaintiff, under all the circumstances disclosed by the evidence, was bound to exercise more than ordinary care for his safety. Assuming the correctness of this position, it follows that if, in order to make the company liable, the rule of extraordinary diligence must be put upon it, there could be no lawful recovery. We are satisfied that nothing short of "that extreme care and caution which very prudent and thoughtful persons" would have exercised under like circumstances could have enabled the company to foresee, guard against, and prevent all the different occurrences from which the injury resulted. In our opinion, it was not less careful as to the protection and safety of the plaintiff than persons of ordinary prudence would have been. It seems clear, at any rate, that it was at least as prudent in this respect as the child's own father. We do not mean to even intimate that if the latter had been negligent his negligence would have been imputable to the child. The idea we intend to convey is that the same facts which show ordinary diligence on the father's part are available to show a like degree of diligence on the part of the company, and we think the evidence in this case establishes that degree of diligence as to both. This being so, the company did not violate any duty it owed the plaintiff, and consequently should not have been held liable. As requiring it to exercise for his protection extraordinary diligence would be exacting from it a higher degree of care and prudence than the law imposes upon it, its failure to observe such diligence, if such was the fact, was not, relatively to the plaintiff, negligence at all, and could not, therefore, be the basis of a recovery in his favor. We have given this case much thought and deliberation, and our conclusion is that under the evidence the verdict cannot be supported upon legal principles and ought to be set aside.

Judgment reversed.

Atkinson, J., dissenting:

Aside from the facts stated in the official report, it is only necessary to refer to what, in the treatment of the questions made in this cause, both by the majority and myself, is an accepted fact; and that is that the plaintiff, at the time of the infliction of the injuries complained of, was a child of too tender years to be chargeable with negligence on his own account. This admission obviates a discussion in justification of the finding of the jury in so far as it found that fact in his favor. Dealing with him as a person wholly irresponsible, and chargeable with no measure of diligence for his own safety, we are to consider what are the relative rights of the person injured, and the relative duties of the defendant company. It may be stated, as fundamental, that under the provisions of the Code a railroad company, in the running and operating of its trains, at all times, at all places, owes to all persons at least the duty of ordinary care. This is a necessary deduction from the Code provision which

from the proof of injury raises a presumption of negligence, and places upon the company the burden of proving ordinary care; for if the duty was not imposed by statute the presumption could not arise. Just what amount of vigilance constitutes ordinary care is necessarily a question of fact, and cannot, in the nature of things, be measured by any standard which in advance can be prescribed by law, and hence such are questions to be determined by a jury. So far as this particular case is concerned, it would make no difference whether this child was a licensee or not; whether he was in the position where he was injured by permission of the company or not. Being of too tender years to be chargeable with negligence, he was wanting in capacity to become a wilful trespasser, and therefore is to be judged by the same rules as would apply to any animate, though irrational object injured under like circumstances? Let us suppose that, instead of being a human being, he had been an ordinary domestic animal, and being injured, the owner had brought suit to recover; what would it have been necessary for him to prove? It would have been necessary only to prove ownership, value, injury. In order to rebut the presumption, it would have been necessary for the defendant company to show that its servants were in the exercise of ordinary care, and this has been frequently held to involve proof that its servants were on the lookout; that in that respect they were not negligent; that they did not see, and could not have seen, the animal injured, in time to prevent the injury; and that after the danger became apparent they used all ordinary and reasonable means to prevent the catastrophe. It would be no reply to the action to say that the animal had no right to be at the point injured; for it has been held by this court, even in those districts where it is unlawful for animals to run at large, the duty of the company to take precautions to prevent injury to them is not thereby lessened. So with the child injured in the present case. As to one of his mental capacity, it would be no reply to say that he had no right to be where he was injured. Being irresponsible, he was under no duty to look out for his own safety; and therefore the company could not avoid a recovery by showing that he was negligent, but only by showing that its servants at the time of the injury were in the exercise of ordinary care. In the present case, however, not only was the person injured not a trespasser, but he was in the dangerous position of walking along its tracks by permission of the railroad authorities, and was injured at a time during the day when the company must have known from experience and observation extending over many years, that many children of his tender age were wont to be at that place, and exposed constantly to the very dangers into which, in consequence of their youth, they were likely to be allured; and yet when, under these circumstances, one of them is injured, and the company offers no excuse by way of evidence showing diligence upon its part, it is said that to require proof such as would be necessary to shield it if the action were for injuries to an animal is to impose upon it the duty of extraordinary care. No diligence at all was shown

upon the part of the defendant company, and yet, in the face of the statute imposing upon it the burden of proof in such cases, it is held that no recovery could be had. Upon the principle of the *Turn-Table Cases*, which are familiar to the profession, I am content to rest my individual judgment that the law of the case was with the plaintiff. The facts the

jury found with him; and upon these two propositions it is, with the greatest deference for the opinion of my learned brethren, earnestly submitted that the judgment of the trial court, approving the finding of the jury and denying a new trial, should be permitted to stand.

ILLINOIS SUPREME COURT.

Maggie SHEFFER, *Appt.*,

v.

Charles L. WILLOUGHBY *et al.*

(168 ILL. 51A.)

1. A person injured by eating unwholesome food at a public restaurant must, in order to recover damages from the person keeping the restaurant, establish carelessness or negligence on his part.
2. Proof by one injured by eating unwholesome food at a public restaurant of the fact of eating the food and of consequent sickness is not sufficient to make a prima facie case in his favor against the restaurant keeper, nor to shift the burden upon the latter to establish due care.

(November 9, 1896.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants in an action brought to recover damages for injuries alleged to have been caused by unwholesome food negligently furnished by defendants to plaintiff. *Affirmed.*

Statement by Craig, J.:

This was an action on the case brought by appellant against appellees to recover damages for injuries resulting to the appellant from eating an oyster stew served by appellees in their restaurant in Chicago on the 5th day of February, 1891. It was alleged in the declaration that the defendants were the proprietors of a public restaurant known as the "Boston Oyster House," furnishing to patrons, among other things, oyster stews; that on the 5th of February, 1891, they received the plaintiff as a guest and patron, and furnished to her a certain dish of food, known as an "oyster stew," for a certain charge paid by plaintiff, and it then became the duty of the defendants to carefully prepare the stew, of healthy and wholesome material, yet the defendants, disregarding their duty in this behalf, did carelessly, negligently, and unskillfully, and though the carelessness, negligence, and unskillfulness and default of the defendants and their serv-

ants, and for want of due care and attention to their duty, prepare and deliver to the plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, but deleterious, dangerous, and, poisonous; that the plaintiff, though using all due care, and without fault, then and there ate the stew, and immediately thereafter, and as the immediate and direct consequence thereof, and of said negligence and carelessness of the defendants, became and was poisoned and became sick, and was sick, and suffered terrible bodily injury, and endured great physical and mental pain, and became permanently injured, and was obliged to and did lay out and expend large sums of money in endeavoring to get healed, and claiming damages. It appears from the evidence introduced by plaintiff that on the morning of February 5, 1895, plaintiff being then in good health, accompanied by her friend Mrs. Thompson, left her home in Chicago, and spent the forenoon in shopping, and about 12 o'clock entered the restaurant of the defendants. Each ordered a stew; Mrs. Thompson eating hers; the plaintiff eating, according to her testimony, only the broth of her stew. While eating the oysters, Mrs. Thompson observed a peculiar taste in her mouth,— as she described it, "a brassy taste." This was observed soon after beginning to eat, and again about the time of finishing. Some oysters being left in the plaintiff's dish the ladies observed that they were green, and called the attention of the waiter to the fact. He insisted, however, that the oysters were all right. After finishing their meal, they paid for the oysters and left the restaurant. As soon as they got on the steps, Mrs. Thompson began to feel sick, and both went across the street to a physician's office. Before leaving the restaurant they wrapped two of the oysters in a piece of paper, and showed them to the doctor. At the doctor's office plaintiff was taken sick and was in great agony and pain. She had burning sensation and hot feeling; was sick and faint. An emetic was given to each, and they remained in the office some time; Mrs. Thompson becoming materially better; Mrs. Sheffer improving so that they were able to start home. On the street car, going home, plaintiff was taken worse. She was bloated, and her clothes had

NOTE.—As to implied warranty on sale of articles of food, see note to *McQuaid v. Ross* (Wis.) 22 L. R. A. on page 195.
34 L. R. A.

As to the liability of a vendor in cases of tort for sale of unwholesome food, see *Craft v. Parker* (Mich.) 21 L. R. A. 189, and note.

to be opened. She was removed to the platform of the car, and then to a drug store. After remaining in the drug store for some time, she was removed to her home, at State and Thirty-Seventh streets, where, from her sickness, she was confined to her bed for some three weeks. The evidence tends to show that she has never recovered from her sickness. It also appeared that from eight to nine hundred oyster stews were served in the restaurant during the noon hour. At the close of plaintiff's evidence, the court, at the request of the defendants, instructed the jury to return a verdict in favor of the defendants, and it is claimed that the court erred in giving this instruction.

Mr. Edwin F. Abbott, for appellant:

There is an implied warranty of the soundness and wholesomeness of provisions prepared for immediate consumption.

Wiedeman v. Keller, 58 Ill. App. 382; *Hoover v. Peters*, 18 Mich. 51; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Moses v. Mead*, 1 Denio 388, 43 Am. Dec. 676; 5 Bacon, Abr. 232; *Devine v. McCormick*, 50 Barb. 116.

Where the causes which produce the injury are under the management of the defendants, and, in the ordinary course of things, the injury would not have been suffered, the defendants are prima facie liable.

16 Am. & Eng. Enc. Law, p. 449: *Budd v. United Carriage Co.* 25 Or. 514, 27 L. R. A. 279; *Scott v. London & St. K. Docks Co.* 8 Hurlst. & C. 596.

On grounds of public policy innkeepers are prima facie liable for losses which happen to the goods of guests. On the same principle, and for the greater reason that life and health are more valuable than property, restaurant keepers should be prima facie held liable for injury sustained by reason of their guests eating improper food furnished by the inn-keeper.

McCaif v. Hess, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 303, 63 Am. Dec. 369; 11 Am. & Eng. Enc. Law, p. 449.

Messrs. Duncan & Gilbert for appellees.

Craig, J., delivered the opinion of the court:

Whether the plaintiff became sick from eating the oyster stew at the defendants' restaurant was a question for the jury, and while the evidence produced by plaintiff that eight or nine hundred persons were served with oyster stews at the same time and place, none of whom became sick, would seem to be a strong circumstance tending to establish that the plaintiff's sickness was attributable to other causes, yet we are inclined to the opinion that, if plaintiff had made out her case in other respects, it would have been the duty of the court to submit this question to the jury. It will be observed that the plaintiff, in her declaration, averred that the defendants, as restaurant keepers, served plaintiff with oysters, and "carelessly negligently, and unskillfully, and through carelessness," did "deliver to the plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, but deleterious, dangerous, and poisonous," etc., whereby plaintiff became sick. This was, no doubt, regarded by the

plaintiff as a material averment; and it was a material averment, one upon which the right of recovery of plaintiff rested; and, unless the evidence fairly tended to establish negligence on the part of the defendants, plaintiff could not recover. But it is said in the argument that innkeepers are prima facie liable for losses which happen to the goods of their guests, and, on the same principle, restaurant keepers should be prima facie liable for injury resulting from unwholesome food furnished by them. The law is well settled that the keepers of public inns are required to safely keep the property of their guests, and in case such property is lost the innkeeper can only relieve himself from liability by proving that the loss occurred without any fault on his part, or that the loss occurred through the fault of his guest; and the burden of proof to exonerate the innkeeper is upon himself, for the reason that the law, in the first instance, will attribute the loss to his default. *Johnson v. Richardson*, 17 Ill. 304, 63 Am. Dec. 369.

As respects the goods of a guest, which he takes with him when he stops at an inn, the innkeeper is practically an insurer; and, where an action is brought to recover for goods lost, the guest is only required to show the existence of the relation of innkeeper and guest, and the loss, to authorize a recovery. But as a food served at a restaurant, such as oysters, ice cream, and the like, we are not aware that a similar rule establishing liability ever existed. There is no similarity between the two cases, and the principle that governs one does not apply to the other. If a person keeping a public restaurant fails to exercise ordinary care in furnishing food to his patrons, and damages result, he would be liable, if his business be conducted in a careless or negligent manner, and through such negligent a patron is injured. But, where an action is brought to recover damages, the burden is upon the person bringing the action to establish carelessness or negligence.

Plaintiff claims that, having proved that she ate the oyster broth at the defendants' restaurant, and in consequence became sick, her case is made out, or at least the burden of proof is shifted on the defendants. If this rule was adopted, the plaintiff would be relieved from proving the most important element of her declaration, the negligence of defendants, which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct in principle, nor has it been sustained, so far as we are advised, by any respectable authority. *Wiedeman v. Keller*, 58 Ill. App. 382,—a case cited by appellant, was one where the plaintiff brought an action against a retail dealer in meats to recover damages resulting from eating pork containing trichinae, sold to him by the dealer. In deciding the case the court held that when a vendor of provisions has no notice of, and cannot, by the exercise of reasonable or ordinary care, ascertain, the unwholesome or unsound condition, there is no implied warranty of the soundness of provisions not prepared or manufactured by such

vendor. Here there is no pretense that the defendants manufactured either the oysters or the milk, the two ingredients of the oyster stew, and, under the rule laid down in the case cited, there could be no liability. Plaintiff has cited *Van Bracklin v. Fonda*, 12 Johns. 467, 7 Am. Dec. 889, as authority. But that was an action brought against a person for selling a quarter of beef as good and sound, when it was bad and unwholesome; but it was proved that the vendor knew when he sold the beef that it was diseased, and, while the rule laid down in that case is proper under the facts, it has no application to this case. Here the

plaintiff called but one witness to prove negligence or carelessness on the part of the defendants, and, upon an examination of the evidence of the witness, it will be found that the evidence, when fairly considered, does not tend to show that the defendants were guilty of any negligence or carelessness.

As the plaintiff failed to introduce any evidence tending to prove the most material averment of her declaration, the instruction of the court to find for the defendants was correct.

The judgment of the Appellate Court will be affirmed.

IOWA SUPREME COURT.

George D. ROSS

v.

HAWKEYE INSURANCE COMPANY,
Appt.

(.....Iowa.....)

1. **The unconstitutionality of a statute cannot be set up for the first time on appeal as a ground of attack on instructions which were given on other issues.**
2. **Notice by a registered letter, provided for by Laws 1880, chap. 210, § 2 in case of notice precedent to forfeiture of insurance policies, is completed by due registration of the letter at the office from which it is to be sent.**
3. **A letter is not registered, so as to complete service of notice by registered letter, where such service is authorized, until it is numbered as required by the postal laws and regulations, although the postmaster has received it properly addressed and given a receipt therefor**

(January 16, 1896.)

A PPEAL by defendant from a judgment of the District Court for Shelby County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Statement by Given, Ch. J.:

Action to recover upon a policy of insurance against loss by fire. Plaintiff alleges that the merchandise and fixtures insured were destroyed by fire on or about the 1st day of July, 1889. Defendant answered, admitting the policy, that the fire damaged some of the insured property, and denying that the fire occurred on the 1st day of July, 1889. That the policy sued on was issued in consideration of a promissory note of the plaintiff in words and figures as follows:

\$60.00. Des Moines, Iowa, April 1, 1889.

On the 1st day of July, 1889, for value re-

ceived, I promise to pay the Hawkeye Insurance Company, at their office in the city of Des Moines, Iowa, sixty dollars, with interest at the rate of 8 per cent per annum from date, being premium for insurance, under policy No. 192,542. And it is hereby agreed that, if this note is not paid at maturity, the whole amount of premium of said policy shall be considered as earned and payable, and the policy shall be null and void; and the company shall not be liable for any loss or damage that may occur to the property insured while this note shall be overdue and unpaid; and if this note remains unpaid for the period of sixty days after maturity, then I agree to pay said company the further sum of 10 per cent on the amount due as fees for collecting the same.

George D. Ross,

P. O. Address, Harlan,
County of Shelby, Iowa.

That said policy was made and accepted on the conditions therein, one of which is to the effect that a failure to pay said premium note at maturity "shall immediately terminate all liability of this company under this policy, and the company shall not in any case be liable for any loss or damage that may occur at a time when any such note or notes, or any instalment therein, or any part thereof, shall be overdue and unpaid." Defendant avers that on the 1st day of June, 1889, it served on the plaintiff a notice in writing, by inclosing it in a registered letter addressed to plaintiff at Harlan, Iowa, the postoffice address named in the policy, notifying him that said note would be due on the 1st day of July, 1889, demanding payment and stating that "unless such payment is made within thirty days from service of this notice your policy will be suspended." The notice also called attention to the conditions in the policy and note, stating that if the note was not paid when due the policy would become suspended. Defendant alleged that the note fell due July 1, 1889, and, being overdue and unpaid the policy was suspended, and

NOTE.—The above decision as to when a letter is registered so as to become a notice by registered letter is a novel one.

For misdelivery of registered letter, see *Joelyn v. King* (Neb.) 4 L. R. A. 457.

84 L. R. A.

For illustrations of presumption from mailing papers, see *Pennypacker v. Capital Ins. Co.* (Iowa) 8 L. R. A. 236, and *Marston v. Bigelow* (Mass.) 5 L. R. A. 42.

defendant was not liable thereon for the alleged loss. Plaintiff in reply denies that the defendant served said notice on him on the 1st day of June, 1889. A further issue was joined by amendment to the answer and reply that need not be noticed. The cause was tried to a jury, and a verdict and judgment in favor of the plaintiff. Defendant appeals.

Mr. George R. Sanderson, with Messrs. D. O. Stuart and Charles McKenzie, for appellant:

This law is unconstitutional within the inhibition of the 14th Amendment to the Constitution of the United States, which forbids any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. It also violates art. I, §§ 1 and 6, and art. 3, § 80, of our state Constitution.

The appellant has the right to frame its contract and to be bound only by the general laws forbidding those immoral and illegal.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585; *Adam Smith, Wealth of Nations*, bk. 1, chap. 10; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117; *Godcharles v. Wigman*, 113 Pa. 481; *State v. Loomis*, 21 L. R. A. 789, 115 Mo. 307; *State v. Goodwill*, 6 L. R. A. 621, 38 W. Va. 179; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Fraser v. People*, 16 L. R. A. 492, 141 Ill. 171; *Ramsey v. People*, 17 L. R. A. 853, 142 Ill. 380; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 325; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *Carew v. Rutherford*, 106 Mass. 14, 9 Am. Rep. 287; *U. S. Const.* art. 14; *Colo. Const.* art. 2, 25; *Cooley, Const. Lim.* 6th ed. 431; *East Kingston v. Towle*, 48 N. H. 65; *San Mateo County v. Southern P. R. Co.* 13 Fed. Rep. 145; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395; *Graves v. Northern P. R. Co.* 5 Mont. 556, 51 Am. Rep. 81; *Dacres v. Oregon R. & Nav. Co.* 1 Wash. 525; *Wadsworth v. Union P. R. Co.* 23 L. R. A. 812, 18 Colo. 600.

While under its reserved power a state may place additional burdens and restrictions upon the corporations of its creation, these must be subject to the constitutional limitations and be imposed by general and equal laws.

Braceville Coal Co. v. People, 22 L. R. A. 840, 147 Ill. 66.

The articles of incorporation of the appellant constitute a contract between the incorporators (*Morawetz, Priv. Corp.* ¶ 1047), and this contract cannot be altered, nor the rights of the incorporations thereunder be taken away.

Sinking Fund Cases, 99 U. S. 737-766, 25 L. ed. 508-518; *Ferguson v. Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604; *Cook, Stock & Stockholders*, 495; *Taylor, Priv. Corp.* 449, 450; *Zabriske v. Hackensack & N. Y. R. Co.* 18 N. J. Eq. 178, 90 Am. Dec. 617; *Cooley, Const. Lim.* 4th ed. p. 284; *Hasbrouck v. Milwaukee*, 18 Wis. 42, 80 Am. Dec. 718; *Marshall v. Sullivan*, 61 Ill. 218; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Cairo & St. L. R. Co. v.* 34 L. R. A.

Sparta, 77 Ill. 505; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

This act applies only to insurance companies, and has no reference to individual insurers, not incorporated or associated. They have all the rights which are circumscribed and limited by this act.

The pleadings and facts remaining unchanged, it follows conclusively that this appeal must be ruled by the law announced by the court upon the first appeal.

Adams County v. Burlington & M. R. Co. 55 Iowa, 94; *Simplot v. Dubuque*, 56 Iowa, 639; *Minnesota Lumber Oil Co. v. Montague*, 65 Iowa, 68; *Drake v. Chicago, R. I. & P. R. Co.* 70 Iowa, 59; *Habeck v. Chicago & N. W. R. Co.* 72 Iowa, 197; *Haffner v. Brownell*, 75 Iowa, 842; *Burlington, O. R. & N. R. Co. v. Dey*, 89 Iowa, 13.

The insurance company must know when service is effected in order that the calculation of short rates may be correct. Under the construction placed upon this statute in the instructions complained of, it would be almost impossible to compute short rates accurately. Surely the law will not put upon a party the risks incident to improper calculations when the errors are attributable to the law itself.

Time begins to run when the notice is mailed. That is a fact, definite, easy of ascertainment, about which no mistake is likely to occur, and proof of which is abundant, direct, and satisfactory.

But if service is dependent upon proof of when a certain number is affixed to the letter difficulties appear which, at times become almost insurmountable.

Ross v. Hawkeye Ins. Co. 83 Iowa, 586; *Holbrook Bros. v. Mill Owner's Mut. Ins. Co.* 86 Iowa, 255.

Messrs. Smith & Callison, for appellee:

The question of constitutionality is raised for the first time in the supreme court. The court will not consider it.

Iowa Homestead Co. v. Duncomb, 51 Iowa, 535; *Garland v. Whalebau*, 20 Iowa, 271; *McGregor v. Gardner*, 16 Iowa, 588; *Goodnow v. Plumb*, 67 Iowa, 661; *Edwards v. Cogro*, 71 Iowa, 296.

Before a letter can be "registered" it must be given to the postmaster for registration, and when registered by him, and not before, is it ready for mailing as a registered letter—ready for transmission through the mails.

Holbrook Bros. v. Mill Owners' Mut. Ins. Co. 86 Iowa, 255.

Given, Ch. J., delivered the opinion of the court:

1. The evidence shows without conflict that the loss occurred on July 2, 1889, and the court so instructed the jury. The premium note fell due on July 1, 1889, and was unpaid at the time of the fire, wherefore appellant claims that the policy was, by reason of said condition therein, and in the note, and the service of said note, suspended at the time of the loss. Appellant's first contention in argument is that §§ 1, 2, chapter 210, Laws 1880, providing that such policies shall not be declared forfeited or suspended for nonpayment of premium until after thirty days' notice is given, is unconstitutional. It is entirely clear

from the record that this question was not raised in or presented to the district court. Appellant does not present the question either in the pleadings, motion for verdict, or instructions asked. On the former appeal, and on both trials below, the defense that the policy was suspended at the time of the loss was grounded on the alleged compliance with said chapter 210.

The constitutionality of said act is first questioned in the assignment of errors. Appellant concedes that this question was not presented to the district court, but insists that it may be presented in this court for the first time as reasons why the instructions complained of are not correct. The instructions were given upon the issues claimed by the parties, and upon which they tried and submitted the case, and they will not be heard to insist upon any different issues on appeal. In law actions, this court sits as a court of review only, and will not consider questions that were not presented to the trial court. *Iowa Homestead Co. v. Duncombe*, 51 Iowa, 525; *Garland v. Wholebau*, 20 Iowa, 271; *McGregor v. Gardner*, 16 Iowa, 538; *Goodnow v. Plumb*, 67 Iowa, 661; *Edwards v. Cosgro*, 71 Iowa, 296; *Laverty v. Woodyard*, 16 Iowa, 5; *Lower v. Lower*, 46 Iowa, 525; *Hoyt v. Hoyt*, 68 Iowa, 703; *Benjamin v. Shea*, 83 Iowa, 392.

2. On the former appeal (83 Iowa, 586), the question presented was upon an instruction to the effect that the service of the notice by registered letter was not completed "until, by due course of mail, for registered matter, it should be received at the office of its destination." This court held that the service of such a notice is completed when the letter is properly addressed and registered at the postoffice. It was not held, as claimed by appellant, "that the notice was served when the letter was mailed." Section 2 of said chapter 210 provides that such notice may be served by registered letter, addressed to the assured at his postoffice address named in or on said policy. This court said that "in such a case the service is complete when the acts specified as constituting the service are done." Registering the letter is one of the acts specified, and is necessary to constitute a complete service. Appellant insists, and correctly so, that the ruling on the former appeal is the law of this case. The learned district judge, so viewing the law and the former opinion of this court, instructed the jury that registration of the letter was necessary to a completed service, and submitted the question whether said letter was

registered on June 1, 1889. The court further instructed that "under the laws, rules, and regulations of the postoffice department, after a receipt has been given therefor and the letter has been numbered, the letter becomes registered." After reciting the undisputed facts, that the defendant had on June 1, 1889, delivered the notice in question to the postmaster at Des Moines, properly addressed and stamped for registry, and procured from him a proper receipt therefor, the court instructed as follows: "The only question for you to determine, as to this defense is as to whether the registry was completed by assigning to said letter its number and indorsing the same on the letter. All other things necessary to a complete registration of said letter on June 1, 1889, are shown by the uncontroverted evidence. You must determine from the evidence whether its registry number was indorsed on said letter, June 1, 1889, or not." On the former appeal we were not called upon to decide, and did not decide, what constituted the registration of a letter. The instructions are in harmony with the laws, rules, and regulations of the postoffice department as shown in the evidence. It is true that, under the authority of § 1053 of the Postal Laws and Regulations, the postmaster at Des Moines was using "other than standard registration forms." Instead of the slip receipt provided for by postal laws and regulations, receipts were given to appellant, and to certain other companies, for letters deposited for registration, in a separate book for each company. This related solely to the manner of receipting for the letters, and did not in any way change the requirements as to registration. Section 1056 of said Laws, Rules, and Regulations is as follows: "After a receipt has been given, therefore, and the matter has been numbered as prescribed in the preceding sections, the letter or parcel becomes registered and must be guarded with the utmost care." We have seen that service of such notice by registered letter is not complete until the letter, properly addressed, is registered, and that it is not registered until numbered as required. The question whether this letter was registered on the 1st day of July, 1889, was submitted to the jury, and it found, as under the evidence it was warranted in doing, that the letter was not registered until after that day.

The judgment of the District Court is affirmed.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

John S. ZEILER, *Appt.*,

v.

CENTRAL RAILWAY COMPANY, Im-
pleaded, etc.

(.....Md.)

1. The indefinite postponement of the consideration of an ordinance to authorize a certain company to lay railway tracks in specified streets does not prevent the subsequent passage at the same session of another ordinance granting the same company the right to lay tracks on streets many of which are the same as were named in the prior ordinance, but containing new provisions as to the connection of the new tracks with an existing system, and various other provisions for a more efficient protection of the public interest, although a rule of procedure prohibits action during the session on the "same subject" after a question has been indefinitely postponed.
2. The two thirds of the members of a branch of a municipal government, which are required by a rule of procedure in order to dispense with one of the regular readings of a proposed ordinance, need not be two thirds of all the members of the body, but only two thirds of the members voting, if they are not less than a majority, and the majority constitutes a quorum.

(November 12, 1896.)

A PPEAL by plaintiff from a decree of the Circuit Court of Baltimore City dismissing a bill filed to restrain defendants from permitting the tracks of the defendant railway company to be laid on certain streets in the city of Baltimore. *Affirmed.*

The facts are stated in the opinion.

Messrs. John N. Steele, John E. Semmes, and Francis K. Carey for appellant.

Messrs. T. Wallis Blakistone and George Blakistone, for appellee Central Railway Company:

If a vote of two thirds of the members present is, in the eye of the law, to be considered as the vote of two thirds of the members of the branch, of course the motion was carried.

Morton v. Comptroller General, 4 S. C. N. S. 463, 468.

It is not necessary to the validity of an ordinance, or an act of the legislature, that the rules of parliamentary law, nor even the special rules of the body which enacts them, should be strictly followed.

Smith, Elementary Law, § 81, p. 68; 1 *Whart. Ev.* 3d ed. § 290; *Com. v. Lancaster*, 5 *Watts*, 155; *McDonald v. State*, 80 *Wis.* 411; *Kilgore v. Magee*, 85 *Pa.* 412; *Harwood v. Wentworth*, 162 *U. S.* 562, 40 *L. ed.* 1073; *St. Louis & S. F. R. Co. v. Gill*, 54 *Ark.* 105, 11 *L. R. A.* 452; *McGraw v. Whitson*, 69 *Iowa*, 348; *Speer v. Allegheny & M. Pt. Road Co.* 22 *Pa.* 378; *Fouke v. Fleming*, 18 *Md.* 418; *Annapolis v.*

Harwood, 82 *Md.* 478, 8 *Am. Rep.* 161; *Green v. Weller*, 33 *Miss.* 686.

Messrs. Thomas G. Hayes and Thomas I. Elliott for the other appellees.

Page, J., delivered the opinion of the court:

The appellant contends that the ordinance mentioned in the bill of complaint is null and void, because (1) it did not pass the first branch in conformity with law, because it was put upon its passage before it had been read twice upon two separate days, as required by the ninth joint standing rule, then in full force and unsuspended; and (2) it did not pass either branch legally because the question as to authorizing the Central Railway Company to extend its railway "over almost all of the streets named in the ordinance" had been indefinitely postponed in the second branch at the same session of the council, and, under the twentieth joint standing rule, the same subject could not be again considered at such session, by amendment or otherwise. These propositions involve the consideration of two questions: First, were the rules of procedure violated as stated? And, second, if they were, did such violation, under all the circumstances of the case, operate to render the ordinance null and void?

It is contended that the indefinite postponement of the "question as to authorizing it [the Central Railway Company] to extend its railway over almost all of the streets named in the ordinance [mentioned in the bill], including Wolf street," precluded the possibility, under the rules, of passing the ordinance under consideration. The facts are these: On the 18th of May, 1896, the joint standing committee reported favorably, to the second branch, two ordinances,—one entitled "An ordinance to authorize the Central Railway Company to lay its tracks on Wolf street, Aliceanna street, and certain other streets in the city of Baltimore" (this will be hereafter referred to as the "Wolf street ordinance"); the other, "An ordinance to authorize the Central Railway Company to lay its tracks on E. Lexington street in the city of Baltimore" (this will be referred to as the "Lexington street ordinance"). On the same day both were read and laid over, under the rule. On the 25th of May the Wolf street ordinance was put upon its second reading. After several amendments were offered and voted on, it was moved and adopted that "the further consideration of the report and ordinance be indefinitely postponed." On the 8th of June the Lexington street ordinance, having passed its second reading, came up again, the question then being upon its passage; and it was amended by striking out all of the ordinance, as reported by the committee, after the words at the end of the first section, and inserting those provisions which the appellant contends are in fact the same subject as the Wolf street ordinance. The rule alleged to have been

NOTE.—The above decision on the effect of an indefinite postponement of an ordinance seems to be a novel one.

As to the number necessary to carry a measure 34 *J. R. A.*

upon a vote, see *Lawrence v. Ingersoll* (Tenn.) 6 *L. R. A.* 306, and *note*; also *State, Walden, v. Vancord* (Ind.) 15 *L. R. A.* 632.

thereby violated is as follows: "Rule 20. When a question shall have been indefinitely postponed, the same subject, whether originating in this or received from the other branch, shall not be acted on again, or reconsidered during the session." From the bare reading of this rule, it is clear that the indefinite postponement of a question precludes the further consideration of the subject to which the question must be referred, during the entire session, whether it originated in the one branch or the other. What, then, was the subject under consideration, upon which the vote of postponement operated? It certainly needs no argument to show that no single feature of the Wolf street ordinance can be separated from its context, and be properly regarded as the "subject" under consideration. It is true that each item in the ordinance demanded of the members, as watchful guardians of the public welfare, a careful scrutiny. Whether the Central Company should be the donee of the franchise, whether the tracks ought to be permitted on each street named, the terms and conditions upon which the privileges were to be granted, and many other matters, demanded the careful attention of the council. But none of these, taken separately, can properly be regarded as the "subject" postponed. Such a construction would be too narrow, and would preclude the council from considering any other measure that contained any one or more of these features. Such new measure might be highly beneficial to the public, and, taken in its entirety, wholly free from the objections of the original ordinance; and yet, if it contained any feature common to both measures, the rule would have the effect of rendering the council wholly powerless. We think a more correct construction of this rule is that which prevents further action upon a subject or scheme which is substantially the same as that contained in the postponed ordinance. Now, is the scheme of the Wolf street ordinance substantially the same as that of the Lexington street ordinance? The donee of the franchise, it is true, in both is the same; also the mode of propulsion; and many of the streets in the one are mentioned in the other. But, in its entirety, the scheme of the Lexington street ordinance is wholly different from that contained in the Wolf street ordinance. The Wolf street ordinance authorized tracks from Aliceanna street to North avenue, along the streets named; but there is no provision requiring the company to connect the new tracks with its present system, or to furnish an outlet for its passengers, on a single fare, to the center of the city. Without such provisions, the new tracks would be but a local concern, and persons using the new road could go no further than over its limits, unless by transferring and paying an additional fare. On the other hand, by the Lexington street ordinance the company was required to lay its double tracks down Lexington street to Gay, and connect its present system, by a single track, with the new system of tracks; and, having thus provided for a continuous road, permission was granted to lay tracks on other streets, opened and to be opened and paved. Moreover, there was a more efficient protection of the public interests, in the requirements for gutter plates

and grooved rails. There are other features by which the two bills may be distinguished, but what we have said is quite sufficient, we think, to substantially differentiate the two measures. Neither in respect to the privileges conferred on the company, nor in the methods by which the safety, convenience, and general interests of the public are protected, nor in the essential features of the two schemes, are the two bills alike. They present two entirely different propositions, having, it is true, some features in common, but, in their substance and entirety, wholly dissimilar. We are of opinion, therefore, that there was no violation of the twentieth rule in the passage of the ordinance in question.

Having thus passed the second branch, the Lexington street ordinance, amended as we have stated, came up for consideration in the first branch on the 8th day of June. "Mr. Allison moved a suspension of the rules to obtain a second reading." The yeas and nays were called for, and fourteen members voted in the affirmative, and six in the negative, whereupon it was announced that, "two thirds of the members having voted in the affirmative, the motion was declared adopted." The appellants contend that this decision was in violation of the ninth standing rule, which is as follows; "Rule 9. Every ordinance or joint resolution, before being put on its passage, whether originating in this, or received from the other branch, shall have two readings on two separate days, unless two thirds of the members of the branch shall by a vote otherwise direct; but simple resolutions of inquiry, etc., may at once be put on their passage." It is insisted that the "two thirds" here mentioned means two thirds of all the members of the branch (that is, in this case, two thirds of twenty-two members); and, if this be correct, the motion to suspend failed to receive the requisite vote. Attention is also called to rule 15, to show—First, the rule cannot be "suspended;" and, second, there is a distinction to be made between "members of the branch" and "members present," which can only be satisfied by construing the former term to mean "all the members of the branch." Rule 15 is as follows: "No standing rule of the branch shall be rescinded or changed without the assent of three fourths of the members of the branch, and after one day's notice shall have been given; but any standing rule may be suspended, upon the assent of three fourths of the members present except rule 9." But we do not deem it important to determine here what was meant by the use of these different terms,—whether, by the words "members present," it was intended to include all who were actually present, as distinguished from those voting. The question now before us must be determined by the proper meaning to be placed upon the words "members of the branch," as used in the ninth rule. It is now well settled that in all cases a majority of a legislative body is a quorum, entitled to act for the whole body, except the power that creates it has otherwise directed. In *United States v. Ballin*, 144 U. S. 6, 36 L. ed. 825, the court said: "When a quorum is present the act of the majority of the quorum is the act of the body. This has been the rule for all time, ex-

cept so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations." There is no act of the state of Maryland that prescribes what number shall constitute a quorum of either of the two branches of the city council. That is determined by the common law, which fixes the "majority as the legal body;" and, under the authority granted by the legislature, to "settle their rules of procedure," there exists no power in either branch, or both, to fix a greater number. *Heiskell v. Baltimore*, 65 Md. 125, 57 Am. Rep. 808. In that case the court defined a quorum to be "that number of the body which, when assembled in their proper place, will enable them to transact their proper business; or, in other words, that number that makes a lawful body, and gives them the power to pass a law or ordinance." It would therefore seem to follow from this that when "a branch," or "the members of a branch," are the words used, with nothing to qualify them, and in the absence of a clear intent to the contrary, they must be taken to mean that "number of the body that makes a lawful body." To construe the words "two thirds of the members of the branch," as used in the ninth rule, to mean two thirds of all the members, would be to fix a meaning upon them that would deprive the majority of their legal power to act. It would amount to declaring that a majority, constituting the lawful body, intended, by a rule of procedure, to take away from itself, under certain circumstances, the power it rightfully has, to do the work it was assembled to do. We think, therefore, it would be anomalous to hold that, while a majority is competent to do business, a rule made under a power to settle the "mode and manner" of conducting the business should be construed in such a manner as to take away from it the power to do business at all, under certain circumstances. "Two thirds of the members of the branch," we are of opinion, means two thirds of the members voting, not being less than a majority, and not two thirds of all the members. This view is fully sustained by authority. In the case of *State v. McBride*, 4 Mo. 808, 29 Am. Dec. 636, the question was upon the adoption of an amendment of the Constitution. "Two thirds of each house" was the vote necessary to ratify it. The question to be solved was, What was the meaning of the word "house," as used in the Constitution? Did it mean all the members elected, or did it mean any number sufficient to constitute a quorum? The court held that, the "most common meaning of the word being the number of members sufficient to constitute a quorum to do business," a vote of two thirds of those voting, being a quorum, was sufficient. So, where the constitutional provision was

84 L. R. A.

that the legislature shall pass no act of incorporation unless with the assent of at least two thirds of each house, it was held the word "house" meant members present and doing business, being a quorum. *Southworth v. Palmyra & J. R. Co.* 2 Mich. 287. This case is cited, apparently with approval, in *Cooley*, Const. Lim. 141 (marg.); *Warnock v. Lafayette*, 4 La. Ann. 419. In the case of *Green v. Weiler*, 83 Miss. 700, it was held that in matters connected with the organization of a body, the preservation of order, and the transaction of its ordinary business of legislation, the word "house" is synonymous with "quorum" or "majority." The Constitution of South Carolina (art. 9, § 7) provides that no law to create a public debt shall take effect until it has been passed "by a vote of two thirds of the members of each branch of the general assembly," etc. In construing this provision the supreme court of that state, in the case of *Morlon v. Comptroller General*, 4 S. C. N. S. 463, after stating that the Constitution fixed the quorum to be a majority, proceeded as follows: "It [a quorum] is indeed, for all legal purposes, as much the body to which it appertains as if all the component parts were present. When, therefore, either branch of the general assembly is spoken of, in the absence of a clear intent to the contrary, the quorum of such body must be understood as intended. It would follow that provisions ascertaining the mode in which the body should divide, in order to complete action in any given case, whether by a mere majority, or by a still greater proportion, must be interpreted primarily as applicable to the body as legally organized at the time such action is taken. If the rule is the mere majority rule, then a majority of the quorum present and acting is intended; if the rule is that of two thirds, then two thirds of such quorum must concur, for effective action." The motion made was for "a suspension of the rules in order to obtain a second reading." This we think was passed by a two-thirds vote, and was sufficient to put the ordinance on its second reading. It is true, rule 15 makes no provision for the suspension of rule 9, but rule 9 itself provides, substantially, that the branch, by a two-thirds vote, may direct when the ordinance or joint resolution may be read. The motion, therefore, while it may possibly be ineffective to work a suspension of rule 9, is quite sufficient to indicate a direction to put the ordinance on its second reading at once.

It follows from what we have said that, in our opinion, there have been no violations of the rules of the council, and it therefore is not important to this case to consider what, if there had been such violations, the effect would have been upon the validity of the ordinance in question.

Decree affirmed.

MISSISSIPPI SUPREME COURT

W. P. RATLIFF, *Appt.*,

v.

Ambus BEALE.

(.....Miss.)

Nontaxable property cannot be sold for the payment of a poll tax under Const. § 243, which makes said tax "a lien only upon taxable property," as this section is a part of the article on franchise, and is intended to be a clog upon the franchise more than a means of revenue.

(November 30, 1896.)

A PPEAL by defendant from a decree of the Chancery Court for Hinds County in favor of complainant in a proceeding brought to enjoin defendant from selling certain exempt property for the collection of a tax. *Affirmed.*

The facts are stated in the opinion.

Mr. Wiley N. Nash, Attorney General, for appellant.

Mr. J. A. P. Campbell, also for appellant:

It is not to be charged that the convention falsely pretended to be aiding common schools, when at the same time it was scheming to prevent this aid by providing against the collection of the poll tax, that it professed a purpose to aid the common schools, but this was a mere pretense, and the poll tax was not to be enforced as to the very large majority of those subject to it.

Will it be believed that the provision ("said tax to be a lien only upon taxable property") is really the result of design, and part of a carefully concerted scheme to exclude negroes from voting, and yet that it is at the mercy of a legislature, when it is known that the convention refused to commit to the legislature any power over the franchise article, and refused to commit to the legislature the matter of establishing and maintaining common schools?

For a long time it had been provided by statute in force when the Constitution was made, that "taxes assessed shall be a lien upon and bind the property assessed from the 1st day of February," etc., and, if an intelligent design can be attributed to the making of the clause in question, it must have been in view of this, and to limit this lien or charge to taxable property.

If it was the purpose of the convention to free nontaxable property from liability for poll taxes in civil proceedings, why was it not so said? Why employ an equivocal expression? Why leave the matter in doubt?

If schools are to be aided, the poll tax is to be collected, and, if nontaxable property is not liable, the tax is a sham and delusion, for probably nine tenths of those liable to poll tax will escape payment.

Let the constitutional convention be rescued from the reproach of deception and double dealing; let the term "lien" have its ordinary meaning, well established in our jurisprudence; let the poll tax be collected in aid of the common schools, and let reliance be placed on other means of excluding negroes, without exempting them from the personal tax levied by the Constitution itself for its darling scheme of common schools.

A lien is a tie that binds property—such hold upon it that it cannot be disposed of except subject to the claim.

Anderson, Law Dict.; *Anderson v. State*, 23 Miss. 459; *Morgan v. Campbell*, 89 U. S. 22 Wall. 890, 23 L. ed. 798.

We copied from Massachusetts Constitution. Was that to exclude negroes, or was the denial of the right to vote in case of nonpayment a means of enforcing payment, in order to aid schools?

That would be puerile as a remedy for the evils of an unsatisfactory body of electors. Let the negro feel an interest in elections, and he will as surely pay his taxes as he will raise money to go to a circus, and, if he did not, campaign funds would pay for him, if his vote was looked to.

The provision requiring the legislature to appropriate enough to supply the failure of the poll tax to maintain schools four months each year would never have become part of the Constitution but for the imposition of the poll tax, and the promise that that would supply a large part of the means to maintain the schools the required time.

Messrs. Frank Johnston, S. S. Calhoun, and Lowry & Jayne, for appellee:

Property which is by law exempt from taxation cannot, under the provisions of § 243, art. 13, of the state Constitution on the elective franchise, be subjected to the payment of the poll tax.

The insertion of the word "only" by the convention indicates the purpose clearly to exempt the nontaxable property.

The word "lien" is used in the Constitution in the same sense as the terms "charge," "subjected to," "answerable for," and the like, and this is in accordance with the correct and technical definition of the word "lien."

Sullivan v. Portland & K. R. Co. 4 Cliff. 225; *Hardy v. Norfolk Mfg. Co.* 80 Va. 418; 2 Bouvier, Law Dict. p. 47; 8 Parsons, Cont. p. 284; 18 Am. & Eng. Enc. Law, pp. 575, 608; *Ridgely v. Iglehart*, 8 Bland, Ch. 540; *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. 249; *Anderson v. State*, 23 Miss. 459.

A lien exists in any case merely as a means to an end, and is solely for the purpose of securing payment of a debt out of the particular property.

A lien is the qualified right which may be

NOTE.—A judicial construction of a constitutional provision to make it accomplish an ulterior purpose not indicated by its language is uncommon, if not anomalous. Such a construction is made in the above case. A constitutional provision imposing a poll tax is held best effectuated by the nonpayment of the tax.

As to poll taxes generally, see *note* to *Short v. State* (Md.) 29 L. R. A. 404.

exercised in a given case over the property of another, though it is neither a *jus ad rem* nor a *jus in re*.

Where a statute gave priority of payment to the taxes levied by it, a lien was not thereby created, and a bona fide sale of the property before it was attached for the taxes, and before the lien was acquired by the levy, defeated the priority of payment.

Stewart v. Flowers, 44 Miss. 518, 7 Am. Rep. 707; *Foute v. Fairman*, 48 Miss. 536; 8 Parsons, Cont. p. 275; *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 7 L. ed. 189.

An execution lien is required on particular property by the delivery of an execution to the sheriff and its levy on the property.

Buckner v. Pipes, 56 Miss. 366.

The Constitution declares that there shall be no right to a satisfaction out of nontaxable property for the poll tax.

It cannot be said, from the nature of the thing, that the power exists to levy upon and sell the property, while the power or right of creating a lien upon it is denied by the Constitution.

The intention of the framers of the Constitution appears clearly to be to exempt the nontaxable property from the payment of the poll tax, and to leave as the only penalty for the nonpayment of the tax the loss of the elective franchise to those not paying this tax.

The purpose of the Constitution is to exonerate the exempt property from the poll tax, and thus leave that large class of voters who own only nontaxable property the option to pay the poll tax, or to lose the elective franchise as the penalty for the failure to pay said tax.

The Constitution declares, by § 241, that no criminal proceedings may be had to enforce the collection of this tax.

After placing the nontaxable property beyond the reach of a levy for the poll tax, the Constitution cut off the only other mode by which the legislature might make the payment of the poll tax compulsory as to this class of voters, and thus left them the option of not paying the poll tax as an inducement for them not to vote.

The convention placed § 243 in the Constitution as an important part of the suffrage scheme provided by that instrument, and as such it must be construed and enforced.

The percentage of illiteracy among the negroes is decreasing each year, and in the course of a few years, under the operation of the educational limitation on the suffrage alone, there will probably be an actual majority of negro voters in the state. But if the poll-tax limitation remains, with the option on the part of the negro to save his \$2 and waive his right to vote, in other words with the requirement of paying \$2 for the privilege of voting, a white majority will be secured to the state, if not permanently, certainly for a long series of years.

This honorable court, the guardian of the Constitution, and the final arbiter of the rights and liberties of the citizen, will uphold and preserve in its integrity a constitutional safeguard which was conceived and brought forth in a spirit of patriotism and mutual concessions, and which has brought to the people of this state the blessings of peace and repose, in 34 L. R. A.

place of the disorders and dangers that formerly attended the operation of unlimited suffrage.

There was no concealment of the purpose of the convention to make the payment of the poll tax a condition of the suffrage.

If the poll tax was not to be a condition of the suffrage, and if its payment was not to be made in effect optional by the poorer classes who owned no taxable property, in other words if the contention of the appellee is not correct, then the following questions are incapable of any reasonable and intelligent solution. Why should the convention have levied a poll tax at all and fixed its amount? This is a subject of ordinary legislation, and not one of the functions of a Constitution.

Why should the convention have refused to allow the provision to stand, making the payment of the poll tax compulsory? Why tie the hands of the legislature in this subject if the purpose was simply confined to the collection of a poll tax *per se*?

Why should the Constitution have declared that no criminal proceedings should be had for the collection of the poll tax?

Why should the Constitution provide that a poll tax should be a lien on one class of property and that it should not be a lien upon or bind another class of property?

Why should it declare that the legislature could not charge it upon or make it a lien on exempt property? And that it might be a lien on nonexempt property?

That the legislature in collecting the poll tax, and as a convenient mode of collecting it, might make it a lien in advance on taxable property.

But that the legislature may not make it a lien in advance on exempt property, as a means of collecting the tax, but may provide for a lien by a levy or distress.

That the legislature may not create a lien. But that the tax collector is left free to get a lien by a levy.

That the poll tax is to be collected out of any property. But that in collecting out of exempt property, no lien can be created, in aid of its collection.

Cooper, Ch. J., delivered the opinion of the court:

The appellant, the sheriff and tax collector of Hinds county, seized an article of household furniture, which is by law exempt from taxation, to cover the payment of a poll tax due by the appellee. The appellee thereupon sued out a writ of injunction to restrain the sale of or further proceeding against said property, and, on final hearing, the injunction was made perpetual. From that decree, the tax collector appeals.

There are no controverted facts in the case. It is admitted that the tax is due and unpaid, and that the proceeding is in all respects regular if the property seized by the officer was subject to be taken and sold for the tax. The question involved is whether nontaxable property may be sold for the payment of poll taxes, and the solution of this question rests upon construction of § 243 of our Constitution, which is as follows: "A uniform poll tax of

§3, to be used in aid of the common schools, and for no other purpose, is hereby imposed upon every male inhabitant of this state between the ages of twenty-one and sixty years, except persons who are deaf and dumb or blind, or who are maimed by loss of hand or foot; said tax to be a lien only upon taxable property. The board of supervisors of any county may, for the purpose of aiding the common schools in that county, increase the poll tax in said county, but in no case shall the entire poll tax exceed in any one year \$3 on each poll. No criminal proceedings shall be allowed to enforce the collection of the poll tax." The question is, What is meant by that part of this section which declares that "said tax to be a lien only upon taxable property?" and this is determinable by the inquiry in what sense the word "lien" is employed. For the tax collector it is contended that the word was used to designate that right or condition created and fixed by our then-existing statutes, by which a charge or lien was given to the state and its counties upon all property assessed for taxes, which lien took relation back to the 1st day of February of the year in which the property was assessed and the tax levied, and by virtue of which the property, into whosesoever hands it might come, was liable to seizure and sale. This statutory lien, it is correctly argued, did not render the property in the hands of the owner to whom it was assessed liable to seizure for taxes, for this liability arose from the facts of his ownership and the assessment of the property and the levy of the taxes thereon. And so it is contended that the purpose of the constitutional provision is simply to declare that no liens shall be created upon nontaxable property which would render it liable to the poll tax to the owner after it has passed into the hands of third persons. For the appellee it is argued that the word "lien" is used in its broadest sense, and excludes not only the idea of a technical lien enforceable against third persons, but excludes also all right or power in the legislature or any executive officer or in any court to proceed against, to charge, or to subject, nontaxable property to the payment of the poll tax. Counsel for the respective parties press upon the attention of the court with great earnestness those matters which, if viewed alone, would lead to the one or the other construction contended for. In our opinion, they are all of importance, and are to be considered.

In construing the Constitution, we are to resort to such rules as would aid in the construction of a statute, keeping always in view the fact that, while statutes descend into particulars and details, constitutions deal usually in generalities, and furnish along broad lines the framework of government. In *Daily v. Scope*, 47 Miss. 867, it was said: "The Constitution is a law, differing only from a statute as it is of superior and paramount force, irrepealable by the legislature, and which prescribes, where it conflicts with a statute. When the framers of the Constitution employ terms which in legislative and judicial interpretation have received a definite meaning and application, which may be more restricted or general than when employed in other relations, it is a safe rule to give to them that sig-

nification sanctioned by the legislative and judicial use." To find the meaning of the language of the Constitution, we are to look to the existing body of the law, whether common or statutory (Endlich, Interpretation of Statutes, § 520); to former constitutions (*Allegheny County v. Gibson*, 90 Pa. 897, 35 Am. Rep. 870); to existing evils; to the objects and purposes to be accomplished; and to the remedies intended to be provided (Cooley, Const. Lim. 70; *People, Les. v. Chautauque County Supers.* 48 N. Y. 10; Endlich, Interpretation of Statutes, § 518).

We know that a large part of the property of this state has for many years been exempt from taxation. Since the year 1871, there have been exempt, among other things, the wearing apparel of all persons, provisions in hand necessary for family consumption, and farming produce raised in this state in the hand of the producer, one gun, all poultry, household furniture not to exceed in value \$250, two cows and calves, ten head of hogs, ten head of sheep or goats, colts foaled in the state under three years old, farming utensils used for agricultural purposes, the tools of any mechanic necessary for carrying on his trade, the libraries of all persons, and pictures and works of art not kept or offered for sale as merchandise. The valuation of real and personal property for taxation in the year 1880 was \$165,847,834. If to this be added the assessment value of railroads in the state approximately, \$24,000,000, we have total value of taxable property,—\$189,847,834. By the eleventh census of the United States, the value of the agricultural products of this state for the year 1889 was given at \$73,342,995. There were in the state in that year 144,318 farms. If to each farm it be assumed that there was of all other exempt property the value of \$25, there would be \$3,607,950 to be added, making a total valuation of property exempt from taxation of \$76,950,945. Of this exempt property, probably fully one half was in cotton, the staple agricultural product, and this, in the course of the year, all passed out of the hands of the producer. There is great force, therefore, in the suggestion that the framers of the Constitution did not intend to provide that one third of the property of the state should be held exempt from a tax imposed by the convention itself in aid of a cherished object,—the common schools of the state,—but only intended that the property should not be subjected after it had passed into the hands of third persons, innocent purchasers of our great staple.

But we are not to look to the existing statutes alone to determine in what sense the word "lien" was used. We are to consider the condition of things as existing at the time, and especially must we note those grave and permeating forces for evil which were known by all men to exist, the silent and increasing influences of which were corrupting the public conscience, and threatening to involve in common ruin the morals and civilization of one race, and the liberty and safety of another. It is not the province of this court to consider with whom rested the fault which gave origin to the conditions under which the convention was assembled. We deal with them only as existing facts, forming a part of the history of

the times. We consider them because we are working to discover the sense in which an ambiguous word was employed by the convention, and because, as existing facts, they cast a light upon the question under investigation. It cannot be doubted that the question involved in the proper settlement of the electoral franchise had been the subject of more reflection and thought for a period of many years than was bestowed upon all other subjects as to which our Constitution underwent material change. Not only in this state, but throughout our sister states, thoughtful and anxious men turned upon the solution of the question all the light to be gathered from history or speculation. Our unhappy state had passed in rapid succession from civil war through a period of military occupancy, followed by another, in which the control of public affairs had passed to a recently enfranchised race, unfitted by educational experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct, and in intelligence, was restored to power. The anomaly was then presented of a government whose distinctive characteristic was that it rested upon the will of the majority, being controlled and administered by a minority of those entitled under its organic law to exercise the electoral franchise. The habitual disregard of one law not only brings it finally into contempt, but tends to weaken respect for all other laws. The most dangerous and insidious form in which this evil can exist is that which manifests itself in the disregard of public rather than private right, for not only are the consequences more widely diffused, and less rapidly eradicated, but, because no particular right of individuals is directly involved, resistance is less prompt, and the evil progresses to dangerous proportions before its existence is noted. Not only was the question of the franchise a most difficult one for solution by reason of its nature, but there was added to its treatment the limitations upon state action imposed by the amendments to the Federal Constitution. The difficulty, as all men knew, arose from racial differences. The Federal Constitution prohibited the adoption of any laws under which a discrimination should be made by reason of race, color, or previous condition of servitude.

It would too much extend the volume of this opinion to enter upon a review and examination in detail of all the provisions of our recent Constitution in which the subject of the electoral franchise, and its cognate one of the selection of governmental agencies, is dealt with. We deal with so much only as is necessary to a determination of the question involved. He who reads the Constitution of 1869 and that of 1890 will have his attention arrested by the marked difference in the number and character of the provisions upon the franchise, and the selection of the chief magistrate of the state. The Constitution of 1869, in its single article on the franchise (§ 2, art. 7), provided simply that "all male inhabitants of this state, except idiots and insane persons and Indians not taxed, citizens of the United States, or naturalized, twenty-one years old and upward, who

have resided in this state for six months and in the county one month next preceding the day of election at which said inhabitant offers to vote, and who are duly registered according to the requirements of § 8 of this article, and who are not disqualified by reason of any crime, are declared to be duly qualified electors." The governor and other state and county officers were under this Constitution selected by popular election. The corresponding article in the Constitution of 1890 (§ 241) is as follows: "Every male inhabitant of the state, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States twenty-one years and upwards, who has resided in the state for two years and one year in the election district, or in the incorporated town or city in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid on or before the first day of February of the year of which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but every minister of the gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district if otherwise qualified." By other provisions, representation in the house and senate was apportioned among the counties, and the counties were arranged in three groups, and the minimum representation to which each group should be entitled in the house was fixed; but it was provided that a reduction in the number of senators and representatives might be made by the legislature, if the same be uniform in each of the said three divisions. To the election of the governor by the popular vote, it is necessary that some person shall receive not only a majority of the popular vote, but also a majority of "electoral votes," which are votes distributed among the several counties in proportion to the number of representatives to which they are respectively entitled. If no person shall receive such majorities, then the house of representatives is required to choose a governor from the two persons who shall have received the highest number of popular votes. Const. §§ 254-256, 140, 141.

If we look at the map of the state, and at the census reports, showing the racial distribution of our population, and consider these in connection with the apportionment of the Constitution, it will at once appear that, unless there shall be a great shifting of population, the control of the legislative department of the state is so fixed in the counties having majorities of whites as to render exceedingly improbable that it can be changed in the near future by the ordinary flow of immigration, or by the growth by births among our own people. The election of the chief executive of the state is also largely affected by the same means. It is in the highest degree improbable that there was not a consistent, controlling directing purpose governing the convention by which these

schemes were elaborated and fixed in the Constitution. Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone. A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement, and one well calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not.

In the article of franchise is found the section we have under consideration. True, as argued by counsel, it was a revenue measure, for it imposes a tax. But it is also true that the payment of the tax is one of the qualifications of an elector, and the question is whether its primary purpose is for revenue, with incidental disqualification to vote attached upon its nonpayment, or whether the tax was levied primarily as an additional disqualification to those who should not pay it, with the incident of revenue derivable from those who should pay. It is to be noted that the section is a part of the article on franchise, and not of that on common schools, in aid of which the tax was levied, and where it would more appropriately be placed as a revenue measure. This is not of great importance, but is of some weight. When a Constitution is submitted to the vote of the people, and becomes operative only when adopted by them, we are aware of the rule that the debates of the convention and the journals showing how and when amendments were introduced, and the course of procedure, are of little weight. The reason is that, under such circumstances, it is not so much what the members of the convention thought or said upon a given subject, as what the people intended to declare by adopting the instrument, that is material. But it must be remembered that our Constitution was never submitted to the people. It was put in operation by the body which framed it, and therefore the question is what that body meant by the language used. In this view, the following history of the subject of poll taxes, as appearing in the journals of the convention, will cast some light upon the question involved: The poll tax was first suggested by some amendments

offered by Mr. Calhoun (the president of the convention), of which 300 copies were ordered to be printed, and the amendments were referred to the appropriate committees. The poll-tax section was among the amendments relating to franchise, and, as offered, provided that its payment should be a prerequisite to entitle one to vote, but "no penalty other than levy and sale of landed property shall ever be exacted for its nonpayment." Journals, p. 88. The 7th section of the article on education, as reported by the committee on that subject, was as follows: "The legislature shall levy a poll tax of \$2 a head in aid of the common school fund, and for no other purposes, and the payment of said tax shall be made compulsory, under such conditions and exceptions as may be deemed best by the legislature." Id. p. 121. As reported to the convention by the committee on franchise, the clause now under consideration read as follows: "Said tax to be a lien on taxable property." Id. p. 135. As adopted, it was in its present form. Id. p. 238. It is evident, therefore, that the convention had before it for consideration two antagonistic propositions: One, to levy a poll tax as a revenue measure, and to make its payment compulsory; the other, to impose the tax as one of many devices for excluding from the franchise a large number of persons, which class it was impracticable wholly to exclude, and not desirable wholly to admit. In our opinion, the clause was primarily intended by the framers of the Constitution as a clog upon the franchise, and secondarily and incidentally only as a means of revenue.

Having reached this conclusion, it follows as a corollary that, when the language used is susceptible of two constructions, it must be so construed as to carry into effect the purposes of the convention. It is evident that, the more the payment of the tax is made compulsory, the greater will be the number by whom it will be paid, and therefore the less effectual will be the clause for the purpose it was intended. It cannot be denied that it was the purpose of the convention to declare a different rule in reference to property subject to taxation and that which was exempt; and, when we consider the fact that a very large proportion of those it was thought desirable to exclude from the exercises of the franchise owned no other property than that which had for many years been exempted from taxation, the conclusion becomes irresistible that it was intended to leave the payment of the tax to the voluntary action of those who owned no other than non-taxable property.

Having reached this conclusion, it is not deemed necessary to examine and review the various statutes which have been brought to our attention. They were all brought forward into the Code of 1892 from the Code of 1890, which was enacted under our former Constitution, in which there were no restrictions. They must now be confined in their operations to such property as is within the competency of the legislature to subject to seizure and sale.

The decree is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Edgar M. WESTERVELT, Receiver of Citizens' National Bank of Grand Island, *Pff.* in *Err.*,

George A. MOHRENSTECHEK *et al.*

(76 Fed. Rep. 118.)

1. The bond of a cashier of a national bank for the faithful performance of his duties "for and during all the time he shall hold the said office" covers defaults in years subsequent to that in which it is given, notwithstanding the by-laws of the bank provide, that the cashier shall be elected annually, and a resolution appointing him to the office was passed in each year, as the act of Congress relating to national banks provides that the cashier may be dismissed at pleasure of the board of directors, and the first appointment under such act is for an unlimited term.

2. It is no defense to an action upon the bond of a cashier of a national bank for misappropriation of money and excessive loans that the bank or its receiver has obtained judgments upon the notes taken by the cashier for such money and loans.

(August 31, 1894.)

ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of defendants in an action brought to enforce liability on the bond of a bank cashier. *Reversed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Messrs. O. A. Abbott and Ralph W. Breckinridge, for plaintiff in error:

The office of cashier of the Citizens' National Bank of Grand Island, Nebraska, was not an annual office. The directors of said bank had no power to hire a cashier for a specified time, and George A. Mohrenstecher held the office of cashier from the time he was qualified as such until the suspension of the bank, at the pleasure of the board of directors.

No by-law could make this an annual office.

Bank of United States v. Dandridge, 25 U. S. 12 Wheat. 64, 6 L. ed. 552; *Bullard v. National Eagle Bank*, 85 U. S. 18 Wall. 589, 21 L. ed. 923; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107; *Harrington v. First Nat. Bank*, 1 Thomp. & C. 361; *Union Bank v. Ridgely*, 1 Harr. & G. 324; *Dedham Bank v. Chickering*, 3 Pick. 335; *Amherst Bank v. Root*, 2 Met. 523.

In the absence of any allegation on the part of the sureties of knowledge on their part of the existence of the by-law in question, they are conclusively presumed to have contracted solely with reference to the statutory term of office, and can claim no rights or exemptions under such by-law.

The language of the bond in suit is broad enough to cover the whole time that Mohrenstecher filled the office of cashier.

State, Jackson Twp., v. Berg, 50 Ind. 496; *Thompson v. State*, 37 Miss. 518; *Placer County*

NOTE.—For bonds of cashiers, see also *McShane v. Howard Bank (Md.)* 10 L. R. A. 532; *Walden Nat. Bank v. Birch (N. Y.)* 14 L. R. A. 211; 34 L. R. A.

v. Dickerson, 45 Cal. 12; *State, Gulley, v. Daniel*, 6 Jones, L. 444; *Sparks v. Farmers' Bank (Del.)* 9 Am. L. Reg. N. S. 865; *State, Bueman, v. Kurtzborn*, 78 Mo. 98; *Long v. Seay*, 73 Mo. 648; *Wheeling v. Black*, 35 W. Va. 266; *Lynn v. Cumberland*, 77 Md. 449; *Exeter Bank v. Rogers*, 7 N. H. 21.

Mr. John W. Blee also for plaintiff in error.

Messrs. C. C. Flansburg and S. L. Geishardt, for defendants in error Stull and O. A. Mohrenstecher:

Where the by-laws of a national bank provide that the directors, at their first meeting in January of each year, shall elect a cashier of said bank, and that said cashier shall hold his office for one year and until his successor is elected and qualified, the office of such cashier is to be construed as an annual office.

Chelmsford Co. v. Demarest, 7 Gray, 1; *Welch v. Seymour*, 28 Conn. 387.

Whether the office was annual or not, Mohrenstecher's original appointment was terminated by the directors on January 14, 1890.

United States v. Kirkpatrick, 23 U. S. 9 Wheat. 720, 6 L. ed. 199.

A bond, general in its terms and unlimited as to time, nevertheless binds the sureties thereon only for the period to which the office may be limited by the charter or by-laws of the corporation, or up to the time of the election of a successor to the incumbent in the person either of himself or of another.

United States v. Irving, 42 U. S. 1 How. 250, 11 L. ed. 120; *Harris v. Babbitt*, 4 Dill. 185; *Savings Bank v. Hunt*, 72 Mo. 597, 37 Am. Rep. 449; *Kaw Life Assn. v. Lemke*, 40 Kan. 661; *United States v. Kirkpatrick, supra*; *Wapello County v. Bigham*, 10 Iowa, 40, 74 Am. Dec. 370; *State Treasurer v. Mann*, 34 Vt. 371, 80 Am. Dec. 688; *Wilmington v. Horn*, 2 Harr. (Del.) 190; *South Carolina Ins. Co. v. Smith*, 2 Hill, L. 590; *Kington Mut. Ins. Co. v. Clark*, 83 Barb. 196; *Doer v. Twombly*, 42 N. H. 59; *Welch v. Seymour, supra*; *Scott County v. Ring*, 29 Minn. 398; *Fresno Enterprise Co. v. Allen*, 67 Cal. 505.

The suit by the receiver upon the notes was an election of remedies and an adoption and ratification of the cashier's act in making the loans. He was the representative, not only of the bank, but also of the creditors and all parties concerned. He is therefore estopped to maintain this action since it implies a repudiation of acts which he has solemnly made his own.

Crook v. First Nat. Bank, 88 Wis. 81; *Fowler v. Bowers Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145; *Crossman v. Universal Rubber Co.* 127 N. Y. 84, 13 L. R. A. 91; *Equitable L. Assur. Soc. v. May*, 82 Ga. 646; *Hanley v. Foley*, 18 B. Mon. 519; *Buckmaster v. Grundy*, 8 Ill. 626; *Himmelmann v. Sullivan*, 40 Cal. 125; *Louisiana Levee Co. v. State*, 31 La. Ann. 250; *Washburn v. Great Western Ins. Co.* 114 Mass. 175; *Thomas v. Joslin*, 36 Minn. 1; *Hooker v. Hubbard*, 102 Mass. 289; *Steinbach v. Relief Fire Ins. Co.* 77 N. Y. 498, 38 Am. Rep. 655; *Lilley v. Adams*, 108 Mass. 50; *Martin v. Boyce*, 49 Mich. 122.

A bank cannot disaffirm the acts of its officers and at the same time take to itself the profits accruing under it.

Thomp. Corp. § 4829; *Hale v. Richards*, 80 Iowa, 164.

If an officer of a bank wrongfully borrows its money and gives to the bank a note, or other evidence of indebtedness, the bank may sue him either on his evidence of indebtedness, or for his wrong, or for money had and received. If it elects to treat him as a debtor to the bank, it certainly after that cannot pursue him further for his fraud.

Boone, Banks & Banking, § 38; *Witters v. Soules*, 33 Fed. Rep. 11.

A judgment against George A. Mohrenstecher on these notes is a bar to an action against him for the taking or making of these notes, even though it be in another aspect of the transaction.

Hale v. Richards, *supra*; *Holmes, B. & H. v. Willard*, 125 N. Y. 75, 11 L. R. A. 170; *Hedell v. Duinell*, 89 Ga. 532.

Mr. W. H. Thompson, for defendant in error G. A. Mohrenstecher:

An excess loan made by the cashier of a national bank is not such an act as will give rise to a cause of action on his bond.

Minor v. Mechanics' Bank, 26 U. S. 1 Pet. 55, 7 L. ed. 51, note; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *O'Hare v. Second Nat. Bank*, 77 Pa. 96; *Pangborn v. Westlake*, 38 Iowa, 546; *Vining v. Bricker*, 14 Ohio St. 331; *Union Nat. Bank v. Matthews*, 98 U. S. 624, 25 L. ed. 188; *Harris v. Runnels*, 53 U. S. 12 How. 79, 12 L. ed. 901; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Wyman v. Citizens' Nat. Bank*, 29 Fed. Rep. 734; *First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. ed. 592; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Southern P. R. Co. v. Orton*, 82 Fed. Rep. 457.

The notes, after being executed, were placed with the assets of the bank, adopted as such by all the bank officers, interest at 10 per cent per annum paid from the date of each of the notes. After the receiver was appointed, with full knowledge of all the facts, these notes were sued, judgments rendered, execution issued, creditor's bill filled. These acts constituted a ratification of the respective loans, and that the plaintiff is estopped from prosecuting this action.

Phillips v. Bossard, 35 Fed. Rep. 99, *Winters v. Armstrong*, 37 Fed. Rep. 521; *Curran v. Arkansas*, 56 U. S. 15 How. 804, 14 L. ed. 705; *Putnam v. New Albany & S. O. Junction R. Co.* ("Burke v. Smith"), 83 U. S. 16 Wall. 390, 21 L. ed. 361; *New Albany v. Burke*, 78 U. S. 11 Wall. 96, 20 L. ed. 155; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 619, 21 L. ed. 735.

A party must make his election before bringing the first suit, and after he has once asserted the validity of the contract he is estopped to afterwards assert its invalidity, and when he has so brought the suit, he has elected his remedy, and cannot afterwards institute other and further proceedings.

Washburn v. Great Western Ins. Co. 114 Mass. 175; *Thomas v. Joslin*, 36 Minn. 1; *Hooker v. Hubbard*, 102 Mass. 239; *Steinbach v. Relief* 34 L. R. A.

Fire Ins. Co. 77 N. Y. 498, 33 Am. Rep. 655; *Lilley v. Adams*, 108 Mass. 50; *Martin v. Boyce*, 49 Mich. 123; *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 43 Wis. 424, 28 Am. Rep. 549; *Littlewort v. Davis*, 50 Miss. 403; *Fritts v. Palmer*, 182 U. S. 282, 33 L. ed. 317; *Wood v. Corry Waterworks Co.* 44 Fed. Rep. 146, 12 L. R. A. 163; *Hanley v. Foley*, 18 B. Mon. 512; *Buckmaster v. Grundy*, 8 Ill. 626; *Himmelmann v. Sullivan*, 40 Cal. 124; *Indianapolis Rolling Mill Co. v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 256, 30 L. ed. 639; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648.

When the bank allowed him to make one loan without objection and to continue to make others, the repetition of those acts for a considerable time without objection ought to preclude it from making them the ground of an action against him for damages therefor, on the principle *volenti non fit injuria*.

Holmes, B. & H. v. Willard, 125 N. Y. 75, 11 L. R. A. 170.

Sanborn, Circuit Judge, delivered the opinion of the court:

This was an action upon the bond of the cashier of the Citizens' National Bank of Grand Island, Nebraska, brought by Edgar M. Westervelt, the receiver of that bank. The defendant in error George A. Mohrenstecher was the cashier, and the principal, and Mary Mohrenstecher, Otto A. Morenstecher, and William Stull were the sureties, on the bond. Judgment was rendered against the plaintiff below upon the pleadings, on the ground that the office of cashier of this bank was an annual office, and that the delinquencies charged in the petition occurred after the expiration of the year during which the bondsmen were liable. The facts material to the questions presented to this court, which were disclosed by the pleadings, are: The Citizens' National Bank of Grand Island, Nebraska, was a national banking association engaged in the business of banking from some time anterior to January, 1899, until on December 4, 1893, it suspended payment and went into the hands of the plaintiff in error, who was appointed its receiver by the comptroller of the currency. The national bank act provides that such a banking association shall be a body corporate and shall have power:

"Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed." 13 Stat. at L. chap. 106, p. 101, § 8; U. S. Rev. Stat. § 5136, p. 993.

The articles of association of this bank provided: "The board of directors shall have power . . . to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix

the salaries to be paid to them, and continue them in office or dismiss them, as in the opinion of a majority of the board the interests of the association may demand."

The by-laws of the association provided that the cashier of the bank should be elected at the first meeting of the board of directors in January of each year; that he should give a bond in the sum of \$10,000, and should hold his office one year, and until his successor should be elected and qualified. One D. H. Vieths was appointed cashier of this bank at the annual meeting of its board of directors in January, 1889, and resigned in May of that year. Thereupon the board of directors passed this resolution: "Resolved, That George A. Mohrenstecher be appointed cashier of this bank;" and Mohrenstecher entered upon the discharge of his duties as cashier, and continued to discharge them until the bank suspended on December 4, 1893. On August 13, 1889, the defendants in error delivered their bond in the sum of \$10,000 to the bank, and the latter accepted it, and never thereafter took any other bond to secure the faithful discharge of the duties of this cashier. This bond contained no recital of the time or term for which Mohrenstecher was appointed, and no reference of any kind to his appointment, or to the time during which the obligors bound themselves to be responsible for his acts, except that which is contained in the following condition of the bond, viz.:

"The condition of the above obligation is such that whereas the above-bound Geo. A. Mohrenstecher has been appointed cashier of the Citizens' Nat. Bank of Grand Island, Nebr., by reason whereof he will receive into his hands and have under his care and charge money, goods, and chattels, and other things the property of said bank. Now, if the said Geo. A. Mohrenstecher for and during all the time he shall hold the said office of cashier of the said bank shall execute the duties thereof with integrity and fidelity, and will faithfully perform and fulfil the trust thereby in him reposed, and well and truly at all times when thereunto required, account for and render over to said bank all moneys, goods, chattels, and other things the property of said bank that may come into his hands, possession, or control, so that no default, fraud, or failure shall happen or be occasioned by any neglect or failure on his part to perform his duties as such cashier, then this obligation shall be void, otherwise it shall remain in full force and virtue."

On January 14, 1890, and at the first meeting of the board of directors in each January thereafter, that board passed a resolution in substantially this form:

"Resolved, That George A. Mohrenstecher be appointed cashier of this bank."

Subsequent to January 14, 1890, Mohrenstecher appropriated to his own use large amounts of money of the bank, under the pretense of loaning it to himself and others, whose promissory notes he took, payable to the bank, and placed among its assets. He also loaned money of the bank, in excess of the amounts permitted by the national bank act, to several persons, upon their promissory notes. By these unlawful acts of its cashier, 84 L. R. A.

the bank lost \$17,321.82. The bank or its receiver obtained judgments upon the various notes so taken in its name, but has been unable to collect the judgments. The defendant in error Mary Mohrenstecher was a married woman when she signed the bond.

Were the obligors on this bond liable for the defaults of the principal in it after January 14, 1890, under this state of facts? The contention of their counsel is that the office of cashier of this bank was an annual office, and that their liability was limited to the unexpired term of Vieths, for which Mohrenstecher was appointed in May, 1889. It is familiar law that, in cases, where the term of office to which the principal is elected or appointed is fixed by law, the liability of his bondsmen will be limited to the current term, unless they expressly agree to continue liable after its expiration. *Harris v. Babbitt*, 4 Dill. 185; *United States v. Irving*, 42 U. S. 1 How. 250, 259, 11 L. ed. 120, 124; *United States v. Kirkpatrick*, 23 U. S. 9 Wheat. 720, 6 L. ed. 199; *Savings Bank v. Hunt*, 72 Mo. 597, 37 Am. Rep. 449; *Wapello County v. Bigham*, 10 Iowa, 59, 74 Am. Dec. 870; *Wardens of St. Saviour's v. Bostock*, 2 Bos. & P. 175; *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 887; *Scott County v. Ring*, 29 Minn. 398; *Tresno Enterprise Co. v. Allen*, 67 Cal. 505; *Biselow v. Bridge*, 8 Mass. 274; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Hassell v. Long*, 2 Maule & S. 363; *Peppin v. Cooper*, 2 Barn. & Ald. 481; *Leadley v. Evans*, 2 Bing. 32; *State Treasurer v. Mann*, 84 Vt. 371, 80 Am. Dec. 688; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196. It is equally well settled that, where the bond recites the length of the term for which the officer is elected or appointed, the liability of the bondsmen is presumed to be limited to that term, in the absence of an express agreement to be responsible for a longer time. *Lord Arlington v. Merricke*, 8 Wms. Saund. 411; *Liverpool Waterworks Co. v. Atkinson*, 6 East, 507; *Kaw Life Assn. v. Lemke*, 40 Kan. 661, 664. But a bond for the fidelity of one who holds his office during the pleasure of the appointing power covers all delinquencies until he resigns or is removed. *Ezeler Bank v. Rogers*, 7 N. H. 21, 23. No one denies that the law favors sureties, that doubts of the extent of their liability are to be resolved in their favor, and that the burden of proof is upon the obligee to establish their liability upon their bond. But, after all is said, a bond is nothing but a contract. It is the written evidence of the meeting of the minds of the parties to it, and, subject to the rules favoring sureties to which we have referred, it must be construed by the established canons for the interpretation of contracts. The rule for the construction of contracts which prevails over all others is that the court may put itself in the place of the contracting parties; may consider, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, what they intended by the terms of their contract, and when their intention is manifest it must control in the interpretation of the instrument, regardless of inapt expressions, or more technical rules of construction. *Accumulator Co. v. Dubuque Street R. Co.* 27 U. S. App. 364, 872, 13 C. C. A. 87, 41, 42, and 64 Fed. Rep'

70, 74. Let us apply this salutary rule to the bond in this case. The act of Congress under which this bank was organized provided that its board of directors might appoint a cashier, require bonds of him, and fix the penalty thereof, and dismiss him at pleasure, and appoint another to fill his place. Its articles of association provided that the board might appoint a cashier, fix his salary, and continue him in office, or dismiss him, as in the opinion of a majority of the board the interests of the association might require. It is plain that, in the absence of any other regulations, a cashier once appointed under this act of Congress and these articles of association would hold his office until he resigned, or until the board of directors of the bank dismissed him. A subsequent appointment of the same man to the same office would have no more effect upon him, or upon the term of his office, than a second deed of the same property by one who had already conveyed it to the same grantee would have. The only act of the board of directors that could affect the tenure of his office, under the act of Congress, would be his dismissal.

It is, however, contended that the by-laws (which provided that the cashier should be elected at the annual meeting in January in each year, should give a bond in the sum of \$10,000, and should hold his office for one year and until his successor was elected and qualified) made this an annual office, and limited the term of the office of this cashier to the unexpired portion of the year for which his predecessor, Vieths, was elected. But how could the by-laws of this bank repeal or modify the act of Congress and the articles of association under which they were enacted? The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers "or any of them at pleasure and appoint others to fill their places." It provided that this cashier should always hold his office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this provision of the national bank act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success—to the very existence—of a banking institution that

the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision of the act of Congress to which we have referred was inserted, *ex industria*, to provide for this very contingency. In any event, it is there, and it clearly provides that the cashier of a national bank may be dismissed at the pleasure of the board of directors, and that it may appoint, not the same man again but another in his place. National banks are the creatures of the act of Congress. Under familiar principles, they have no powers beyond those expressly granted, and those fairly incidental thereto. *Re Omaha Bridge Cases*, 10 U. S. App. 98, 174, 2 C. C. A. 174, and 51 Fed. Rep. 809; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 2 C. C. A. 174, 280, 51 Fed. Rep. 309, 816, 10 U. S. App. 98. It follows from this principle that, since the act of Congress expressly provides that the cashiers of national banks should hold their offices subject to the pleasure of the board of directors, neither the bank nor its board can make time contracts or appointments in violation of that provision. *Hurrlington v. First Nat. Bank*, 1 Thomp. & C. 361; Boone, Banking, § 353; Ball, Banks, 65. What, then, is the effect of these established rules upon the by-laws of this bank? It is that that part of these by-laws which provides that the cashier shall hold his office for one year, and that he shall be elected annually, must fall, and the cashier of the bank must hold his office under the act of Congress, subject to immediate removal at the pleasure of the board of directors, until he resigns or is removed.

It is argued that the fact that this cashier was again appointed in January of each year converted his term of office from a continuous term, at the will of the board of directors, into annual terms. If the board of this bank had passed daily resolutions appointing him cashier, would those resolutions have made his term of office daily? The fact is that he would have continued in office exactly as he did, if none of the resolutions or appointments subsequent to May, 1889, had ever been passed or made by the board of directors. His first appointment was, under the act of Congress, to an unlimited term,—to a term that could be ended by the bank only by his dismissal by its board of directors. That board never did dismiss him. It never did appoint another to take his place. How subsequent resolutions of appointment could affect the term of his office, which was fixed by this act of Congress, it is difficult to understand. It seems clear that his appointment to an office which he already held, and would continue to hold without further appointments, could not be more than the manifestation of an intention on the part of the board of directors that he should continue to hold his position. 1 Morse, Banks & Banking, § 27, p. 80; *Amherst Bank v. Root*, 2 Met. 522, 539; *Dedham Bank v. Chickering*, 3 Pick. 335, 340. Now, let us place ourselves in the situation of the parties when this bond was made, and see if its expression of their intention is doubtful. Mohrenstecher had been appointed cashier of this bank in May, 1889. On August 13 in that year, three months after he was appointed, and four months before the

annual election of cashier, according to these by laws, Mohrenstecher and his sureties gave a bond to this bank, in which they recited his appointment, and agreed to pay the penalty of the bond unless "the said Geo. A. Mohrenstecher, for and during all the time he shall hold the said office of cashier of the said bank, shall execute the duties thereof with integrity and fidelity," etc. It must be conceded that the obligors in this bond had the right and the power to agree to indemnify the bank against any defaults of Mohrenstecher, as its cashier, during the time subsequent, as well as during the time antecedent, to January 14, 1890, when they claim that their liability ceased. They certainly could, by apt words, have expressed their intention to limit their liability for him to the time antecedent to that date. They certainly might, by suitable expressions, have declared their intention to be liable for him both before and after that date. Which did they do in this bond? Is an agreement to indemnify "during all the time he shall continue to hold the office of cashier" an expression of an intention to indemnify for the first four months of the time he should continue to hold that office, or for all the time he should continue to hold it? This is the real question here, and it seems to us to be susceptible of but one answer. No apter or more suitable words than those used in this bond occur to us to express an intention on the part of these obligors to continue to be liable as long as Mohrenstecher should continue to hold this office, and we are unwilling to hold that the English language is incapable of giving expression to that idea. After a thoughtful and deliberate consideration of the plain words of this bond, and of the facts and circumstances surrounding these parties when it was made, all doubt of its meaning, and of the intention of the parties to it when it was executed, has disappeared from our minds; and the conclusion has been irresistibly forced upon us that these obligors intended to agree, and did agree, to indemnify the bank for the defaults of Mohrenstecher until he ceased to be its cashier.

The fact that the bank or its receiver has sued and obtained judgments upon the promissory notes which this cashier took for misap-

propriated money of the bank and for excess loans is no defense to this action. This is not an action to rescind any contract and recover back the consideration thereof. It is an action for damages for breach of the conditions of this bond. The obligation of the bond is to pay any loss or damage which the bank sustained by the failure of this cashier to faithfully fulfill and perform the trust reposed in him, and to comply with the other conditions expressed therein. Neither the bank nor the receiver is required to repudiate his transactions, or restore the consideration it has received from them, in order to maintain this action. There is no inconsistency between an action upon the notes he wrongfully took, and a recovery of all that the makers can pay upon judgments thereon, and an action upon this bond for the losses sustained by the breach of its conditions. The bank and the receiver may take every benefit they can derive from the acts of this cashier, use every just endeavor to collect every note he has obtained in the name of the bank, and at the same time may press this action on the bond for the damages caused by the breach of its conditions. Of course, the bank and the receiver can have but one payment and satisfaction of the debts owing upon the notes the cashier took, and when they are paid in full that payment will constitute a defense to this action, but until then both remedies may be pursued. *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85; *Walden Nat. Bank v. Birch*, 130 N. Y. 221, 14 L. R. A. 211; *Emery v. Baltz*, 94 N. Y. 408; *White v. Smith*, 83 Pa. 186, 75 Am. Dec. 589.

Whether or not this bond was signed or based upon the faith and credit of the married woman, Mary Mohrenstecher, or made with reference to her separate estate, is a disputed question under these pleadings, which does not appear to have been considered by the court below. For that reason, and because this judgment cannot be sustained in favor of the other defendants in error in any event, we will not enter upon its consideration until it has been decided by the circuit court.

The judgment below must be reversed, with costs, and the case remanded to the court below, with directions to proceed to its trial.

NORTH CAROLINA SUPREME COURT.

Robert DOSTER

v.

CHARLOTTE STREET RAILWAY COMPANY, *Appt.*

(117 N. C. 651.)

The frightening of a mule, caused by the usual noise incident to running a

street car by electricity, without any unnecessary noise made for the purpose of scaring the animal, does not make the street-railway company liable for resulting damages.

(December 20, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for Mecklenburg

NOTE.—Frightening of horse by street car.

1. Generally.
2. By bells, gongs, and whistles.
3. By steam.
4. Contributory negligence.

The case of *DOSTER v. CHARLOTTE STREET R. Co.* holds that an electric street-railway company was
34 L. R. A.

not liable for injuries caused by a mule backing and breaking a part of the buggy, where the mule was frightened by the noise of a street car coming towards him run by electricity, and there was no testimony to show that the motorman wantonly or maliciously made any unnecessary noise for the purpose of scaring the animal, and the car was stopped 15 feet distant from where the mule had

County in favor of plaintiff in an action brought to hold defendant liable for injuries and expenses caused to plaintiff by reason of defendant's alleged negligence in frightening his mule. *Reversed.*

Plaintiff was driving a mule along a public street and met a street car coming towards him. The mule was frightened and began to rear and back. In so doing he broke some portions of the buggy. Plaintiff thereupon signaled the motorman to stop, which he failed to do until he had arrived opposite the place where the plaintiff was trying to control the animal. Plaintiff sued for injury to the buggy

and to the mule, and for loss of time and expense which had been caused by the accident. Further facts appear in the opinion.

Messrs. Burwell, Walker, & Cansler, for appellant:

If a railway company runs its cars in the ordinary way, without making any unusual or unnecessary noises, it is not liable to plaintiff, whose horse becomes frightened at the cars and causes injury to the plaintiff.

Morgan v. Norfolk Southern R. Co. 98 N. C. 248; 23 Am. & Eng. Enc. Law, title *Street Railways*, p. 1081; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 806, 49 Am. Rep. 580.

stopped. The court held that a motorman was not negligent in failing to diminish the speed unless the animal was actually on the track in his front, or unless the motorman had reasonable ground to believe that the animal was so frightened that he would cause a collision.

I. Generally.

The cases hold that a street-railway company is not liable for injuries caused by horses being frightened by the cars or gong, where the danger could not have been anticipated by the employees of the railway company, or where there was no negligence on their part in running the cars, or where there is no evidence that the injury is caused by their cars, or where the driver of the horses is guilty of contributory negligence. Some of the cases tend to the doctrine that the ringing of the gong is not negligence on the part of the company, and that the presumption from horses being hitched near the track is that they are used to the cars. The rule is that a company is only required to use reasonable care in operating the cars.

But a street-railway company was held liable for injuries where the employees unnecessarily, recklessly, or violently sounded the gong or made other noises frightening horses, thereby causing injury, and where the danger was apparent and could have been avoided by the use of reasonable care on the part of the employees of the company, and especially where the place was more dangerous than usual owing to a narrow roadway or obstructions.

A stricter degree of care is required where the dangerous character of the place is caused by the street-railway company. And recovery has been allowed against a city, which without authority allowed the use of steam on a street railway, which caused an injury by frightening a horse.

So, an electric-car company was not held liable where horses were frightened at the sounding of a car gong, and ran away and killed a man in a buggy, and the driver said "the horses pulled me over the end gate on the tongue and ran away," as, while the horses were attached to the wagon and the driver's feet were inside, he could not be pulled out on the tongue while holding on to the lines. There was no evidence that he was jolted out by the wagon striking an obstruction, nor that the motorman could reasonably anticipate that the driver would be placed in such a perilous and helpless position by anything that was occurring. This decision was on the ground that the law does not imply that the driver of the horse is in peril because the horse is merely frightened by a trolley car, but the presumption is that the driver will be able to control the horse. The court also held that the motorman must use reasonable care if he sees that the driver is in peril. *East St. Louis & St. L. Electric Street R. Co. v. Wachtel*, 63 Ill. App. 181.

And a company was not held liable where a team became restive at the approach of an electric car, and the driver left the rear end of his wagon and went to the horses' heads to quiet them, and the

car stopped at a crossing near the horses, the gripman at the same time ringing his bell, and the horses took fright and ran away. The court said that the plaintiff might naturally be supposed to be able to control the horses, standing at their heads, and the ringing of the bell was not negligence. A steam whistle tends to alarm horses, but a traction bell does not. *Steiner v. Philadelphia Traction Co.* 134 Pa. 199.

And the same was held where a team hitched to a post on a street was frightened by the sounding of a street-car gong while the car was moving along the track, and broke loose and ran away causing injury to the wagon, and it did not appear that the gong was sounded unnecessarily or negligently, and it was not shown that the driver of the car was aware that the horses were frightened. The court said that the motorman might well act on the presumption that teams standing on the side of the street were not liable to be frightened. *North Side Street R. Co. v. Tippins* (Tex. App.) 14 S. W. 1067.

And was not held liable where a horse was frightened at the movement of a street car in being replaced on the track, and the horse reared and fell dead, and there was nothing unusual in the movements to restore the car to the track; and this on the ground that street-car companies have just as much right to run cars on the streets of the city as other citizens have to drive through the streets with their horses. There was no evidence that the death was caused by the cars. *Hassel v. People's Pass. R. Co.* 122 Pa. 90.

So, where the motorman rang a gong when he saw in front of his car a carriage with the back curtain closed, and it was his duty to ring a warning at the crossing, and the injury was caused by the effort to pass the car by the driver losing one line and the control of the horse, and personal injuries resulted, the company was not held liable. The court said that the mere fact that the horse became frightened at an electric car and by the sounding of its gong, and ran away, does not make the car company liable. But if the motorman discovered that the horse was frightened and danger was apparent, his continuing to sound the gong would be such wilful conduct as to make the company liable. *Galesburg Electric Motor & P. Co. v. Manville*, 61 Ill. App. 490.

And a company was not held liable where a dummy train was ascending a steep grade, and someone, without authority, checked the train with a brake, and the conductor had the brake taken off to help the engineer advance the train, and the engineer, not knowing this fact, reversed the engine at the same time, which caused the train to back too rapidly, causing a collision with a wagon which was on the track, by reason of the mules being suddenly frightened by the backward movement of the train, and personal injuries resulted. *Rome Street R. Co. v. McGinnis*, 94 Ga. 229.

So, where a driver was injured by reason of her horse being frightened by an approaching electric

If plaintiff could have avoided the consequence of defendant's negligence, or was himself negligent at the same time that defendant was, he cannot recover.

Meredith v. Cranberry Coal & I. Co. 99 N. C. 576; *Turrentine v. Richmond & D. R. Co.* 92 N. C. 638; *Cornwall v. Charlotte, O. & A. R. Co.* 97 N. C. 11.

Mr. James A. Bell, for appellee:

A street railroad accepts its charter on the implied condition that it will not injure others by the construction or maintenance of its road. It must be maintained upon the most approved

plans, and by the use of common and approved means, with a view to the safety and convenience of the public traveling on the streets.

2 Lawson, Rights, Rem. & Pr. 1005.

The rules which govern ordinary railroads does not apply to street railways.

23 Am. & Eng. Enc. Law, p. 942.

The very business of a street railway requires that it should operate its cars along the most public streets, while the track of an ordinary railroad is generally laid to avoid the most public thoroughfares; the trains of any ordinary railroad are made up of many cars,

car, which was not shown to have been moving at an unusual rate of speed, or at a rate greater than that allowed by a city ordinance, and the horse turned suddenly and the wheel of the wagon struck an obstacle and upset the wagon, the company was not held liable. *Yingst v. Lebanon & A. Street R. Co.* 107 Pa. 438.

And the company was not liable where the motorman failed to stop the car, simply because a horse on the same street had become frightened at the appearance and noise of a car run by steam, and the failure to stop the car was not shown by the circumstances to be a wanton and wilful disregard for the safety of the horse, so that the continued movement of the car could have been attributed only to malice. A demurrer was sustained to the petition, which alleged injury to plaintiff caused by the horse being frightened, running away, kicking the plaintiff and injuring him, as the court said there was no allegation of improper speed or needless noise, and it was consistent with the petition that the train was being operated with due care, and the only negligence charged was that the company did not stop the car to allow plaintiff to pass. But the petition charged that it was running at a high rate of speed, making a terrific noise so as to greatly frighten plaintiff's horses, which began to plunge to get away, that this was seen by defendant's employees, and that the place was in a very narrow point between the railroad and the bank of a river, and that the employees failed and neglected to stop the car until plaintiff could drive the horse past it. *Chapman v. Zanesville Street R. Co.* 27 Ohio L. J. 70.

A verdict against a street-car company was set aside as not sustained by sufficient evidence, where the horse took fright at an approaching car, and the motorman appeared to have been vigilant and active from the moment when he first saw the horse coming until the collision, and during that time the car only passed over a distance of 80 to 50 feet, and when the horse came near the car the driver had lost control of him and then the horse made a sharp turn in front of the car, capsize the buggy and caused the death of the driver, and there would have been no collision if the horses had not turned. It was claimed that if the motorman had stopped the car there would have been no collision, but the court said if he had, who can tell that the horse would have turned just as he did. *Bishop v. Belle City Street R. Co.* 93 Wis. 139.

And where a team driven by a full-grown man began to prance 175 feet distance from a car, and there was no evidence that the team seemed to be beyond control, and it backed suddenly in passing the car, threw the corner of the sleigh against the car and injured the persons riding therein, the company was not held liable. *Eastwood v. La Crosse City R. Co.* (Wis.) 68 N. W. 661.

And a recovery was refused where two women were standing in a buggy preparing to get out, and as the gripman began ringing a gong at the crossing of a street the horse reared and as the car came opposite backed the buggy against the car, and 34 L. R. A.

one of the women was injured. The horse had been accustomed to grip cars and the gong, and it was mere conjecture why the horse suddenly lost his good behavior, and his bad behavior was not shown to have been provoked by the street-car company, and what scared the horse was mere opinion. *North Chicago Street R. Co. v. Harma*, 59 Ill. App. 378.

So, where a team was frightened at the sight of cars being operated upon the street, the company was not liable unless it failed to use reasonable care to avoid damages, after it discovered that there was danger by fright of teams or otherwise. *Kankakee Electric R. Co. v. Lade*, 55 Ill. App. 454.

An instruction that when the servants of an electric-car company "saw the plaintiff's horses were frightened, then it was the duty of the defendant company to have stopped its car and allowed plaintiff to get out of danger," was erroneous, as what the servants should do was a question for the jury and not for the court. *Ibid.*

So, an instruction that if an electric-car company "by watching out, could have seen plaintiff with his team, and that the team was frightened, then it was its duty to do what it could to avoid accident," is erroneous, as it was only the duty of the employees to use reasonable care to avoid injury. *Ibid.*

In a suit for personal injuries caused to the owner while driving horses which were frightened by cars, claiming that the company failed to stop the cars when the horses were frightened, a city ordinance requiring the motorman to keep a vigilant watch for carriages and govern himself accordingly was inadmissible in evidence. *Ibid.*

In *Omaha Street R. Co. v. Duvall*, 40 Neb. 22, it was said that a street-car company would not be liable if the motorman, in the exercise of reasonable care could not have checked the car in time to have avoided a collision, where the horse was frightened and sprang in front of the moving car causing injury to the rider.

But the reckless use of gong or steam, or failure to use reasonable care to prevent an anticipated accident, has been held sufficient to impose liability on street-railway companies, where injuries were caused by horses being frightened.

So, a recovery was had against a street-railway company where a person was injured by reason of his horse being frightened while standing near the track, and the gripman negligently sounded the gong violently and too near the horse while he was frightened. The court held that the case of *Steiner v. Philadelphia Traction Co.* 134 Pa. 199, to the effect that the traction bell does not naturally tend to alarm horses, was not approved. The question as to the effect of a gong is not local, but general, and the views of the state court of last resort are not binding on the Federal court on this question. A street-railway company is liable for damages caused by unnecessarily recklessly, and violently ringing the gong, when by due prudence harm might be properly avoided. *Lightcap v. Philadelphia Traction Co.* 60 Fed. Rep. 212, Affirmed Phila-

and are heavy and difficult of management, while the street cars are easily controlled, and can be readily stopped and started.

Muncie Street R. Co. v. Maynard, 5 Ind. App. 372; *Ellis v. Lynn & B. E. Co.* 160 Mass. 841; *Benjamin v. Holyoke Street R. Co.* 160 Mass. 8.

Avery, J., delivered the opinion of the court:

The plaintiff voluntarily exposed himself, his buggy, and his mule to the risk of any accident which might be caused by the animal's taking fright at the usual noise incident to run-

ning a street car by electricity, there being no testimony tending to show that the motorman wantonly or maliciously made unnecessary noise for the purpose of scaring the animal. Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the animal is actually on the track, in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as

delphia Traction Co. v. Lightcap, 61 Fed. Rep. 762, 17 U. S. App. 606.

And where a woman was injured by her horse becoming frightened at a street car, and the motorman sounded the gong, overtook her and sounded the gong again, as the jury might find negligence if the car was not stopped nor its speed slackened, and the gong was sounded while the plaintiff was in obvious difficulty from the fright of her horse, the company was held liable. The court held that the omission to stop the car or to stop the noise of the gong, under the circumstances, might well be deemed to show carelessness. *Benjamin v. Holyoke Street R. Co.* 160 Mass. 8.

And the company was held liable where horses ran away, and the servant of the railway company was guilty of negligence in continuing to ring the bell or sound the gong, when it appeared that the horses, which were frightened, would be likely to run away. The court held that it was the duty of the railway company to either stop the car or cease ringing the bell or sounding the gong, when the circumstances were such as to reasonably lead to the belief that to continue to do so would likely cause the team to run away. *Citizens' R. Co. v. Hair* (Tex. Civ. App.) 32 S. W. 1060.

An electric-railway company was held liable where the driver of a carriage was injured by reason of the horse being frightened at the noise of an approaching electric street car, and such fright was manifest to the motorman, who continued to propel the car and to make a loud noise with the gong, causing the horse to become unmanageable, and threw the driver out of the carriage, and the driver was in the exercise of due care. The court said that the duty of a driver of a horse and the manager of an electric car upon a highway are equal, and each must have a reasonable regard for the safety and convenience of the other. *Ellis v. Lynn & B. E. Co.* 160 Mass. 841.

And the company was held liable where plaintiff was driving in front of an approaching dummy engine, and as he turned towards the curb the engineer sounded an unusual and extraordinary whistle, and the horses became frightened and ran in front of the engine and were injured. The court held that the question of negligence was one for the jury. *Lott v. Frankford & S. Pass. R. Co.* 159 Pa. 471.

A city was liable for damages where a person was injured by the fright of his horse occasioned by a steam motor upon the street, the fee of which was in the city for public uses, and the city without authority had permitted the use of steam motors on the streets, and McClain's (Iowa) Code, § 1282, authorized railways to cross over or under any highway, but this did not confer the power to grant the right to use steam on the streets. *Stanley v. Davenport*, 54 Iowa, 463, 87 Am. Rep. 216.

And the company was held liable where a boy riding in a vehicle was killed, and the horse was about 300 feet from the car and was frightened from the repeated sounding of the gong, and the motorman

was in a position to see the peril of those riding in the wagon long before the collision, and to have avoided it with due care, but kept ringing the bell until within 20 or 30 feet of the wagon. It was shown that if he had slackened the speed of the car when he must have first seen the horse's actions, he could have stopped the car and prevented the injury, and the driver was not guilty of negligence. *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47.

And a recovery was allowed where the plaintiff was sitting in a sleigh at the side of the road, and an electric car coming at a high rate of speed frightened another team causing it to run into plaintiff's question as to the rate of speed, and as to whether team, and the motorman did not slacken his speed or stop the car when he saw or should have seen that the team was frightened. The court held that the the motorman should have stopped the car, was for the jury. In this case the motorman admitted that he was instructed by the manager to stop if he found a team at all restive. *Lines v. Winnipeg Electric Street R. Co.* 11 Manitoba Rep. 77.

And a recovery was allowed where the motorman might, in the exercise of ordinary care, have seen at a distance of a square that the horse was frightened, and that the driver was in a perilous situation, and the motorman drove the car at a rate of 8 or 10 miles an hour, and injury resulted, although he might have stopped within a distance of 25 feet, and the horse had passed the car several times without becoming frightened on that evening. The court held that the question of negligence was one for the jury. *Marion Street R. Co. v. Carr*, 10 Ind. App. 200.

So a recovery was allowed where the horses were frightened by the engine and car, and the horses commenced to lunge and back, and finally one fell upon the track and the other fell upon that one, and the engine ran upon the animal killing him, and the evidence showed that the engineer could have seen the helpless position of the plaintiff in time to have stopped his train and have avoided injury. The court held that it was the duty of the engineer to be constantly on the alert, and if he discovered plaintiff's property so situated that injury must follow unless he stopped the engine, it was his duty to make a reasonable effort to do so. But the court said that it is not obligatory to stop an engine upon a street-car track upon seeing that a horse is frightened, unless the situation will cause a reasonable man to believe that danger could not otherwise be avoided. *Muncie Street R. Co. v. Maynard*, 5 Ind. App. 372.

And the company was held liable where the motorman in charge of the car could, in the exercise of reasonable care, have seen the plaintiff in time to have checked his car after the plaintiff's horse from sudden fright sprang upon the track and before a collision occurred which caused injury to the rider. The court said that utmost skill and watchfulness on the part of the motorman, as well as other employees of street-railway companies, is required to avoid collisions with individ-

to cause a collision. *Snowden v. Norfolk Southern R. Co.* 95 N. C. 98; *Wilson v. Norfolk & S. R. Co.* 90 N. C. 69; *Carlton v. Wilmington & W. R. Co.* 104 N. C. 385. Where the engineer on a railway train actually sees a person driving a team in the direction of a crossing in his front, or in the act of passing over it, it is not his duty to stop, unless he has reasonable ground to believe that the horse or vehicle is in some way fastened or detained upon the track, or that some emergency has arisen which may be reasonably expected to cause a collision, with consequent injury to person or property. *Bullock v. Wilmington & W. R. Co.*

105 N. C. 180; *Rigler v. Charlotte, C. & A. R. Co.* 94 N. C. 604. It may often happen that greater care is obviously necessary to avoid in jury to a loose, frightened animal (as in *Wilson v. Norfolk & S. R. Co. supra*) than to a man in the same position, on or off a track, because, if apparently in possession of all of his powers and faculties, the man may be reasonably expected, up to the last moment, to avoid peril, while the excited animal is as ready to rush into as to run away from danger. There was no testimony tending to show that the mule was upon the track in front of the car, or that there was any apparent danger that it would

uals equally entitled to the use of public highways. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29.

And a company was held liable where an electric car was running at a high rate of speed faster than usual at a place at which there was a cut in the street, and a high embankment caused by the company, and a horse in the cut became frightened and attempted to climb out of the roadway over the embankment and his rider pulled him back, and while trying to dismount, the horse was struck by the car. The court held that the obstruction in the street tended to cause the injuries, and great care should have been used in running the cars at such a place. *Greeley v. Federal Street & P. V. Pass. R. Co.* 153 Pa. 218.

And was held liable where a team of horses was being driven in a narrow place near the track, and as soon as the electric car came in sight became frightened and unmanageable, and began to rear and jump and one of them was injured by the car, which was running at a high rate of speed, and the conductor saw or ought to have seen, in the exercise of ordinary prudence, the team, and that they were frightened. The court held that it was the duty of the conductor to stop or slow up when failing to do so would cause an injury. And the question of negligence was for the jury. *Gibbons v. Wilkesbarre & S. Street R. Co.* 155 Pa. 379.

And a company was held liable where it ran its cars fast with an engine and smoke, steam, and noise which were frightful to horses, and the persons on the engine saw, some distance away, that a horse driven by a woman was frightened, and ran so close that she could not turn and get away on account of a pile of rocks, and the buggy was upset. The charter of the company did not disclose any authority for propelling its street cars by steam. It was said that even if it did, the franchise would not excuse it from liability from injuries caused by negligence, where such negligence consisted in the mismanagement of the cars or in the character of the motive power. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 20 L. R. A. 858.

A railway company was held liable where a horse was injured by a collision, caused by an electric car coming at a high rate of speed where the roadway was very narrow, and as soon as the car came in sight the horses began to rear and jump, and the conductor saw or ought to have seen, in the exercise of ordinary prudence, the team, and that they were frightened, and in view of the narrow road should have slowed up the car. *Gibbons v. Wilkesbarre & S. Street R. Co. supra*.

And where horses driven alongside of a car track were frightened by the car, although there was no negligence in starting the car, but the presence of the car prevented the plaintiff from seeing a mass of snow which had been accumulated contrary to an ordinance by the railroad company, in cleaning its track, and which caused his buggy to upset and injure him, a recovery was allowed. It was a question for the jury whether the negligence in piling the snow was not the cause of the accident, al-

though the company was not liable for the frightening of the horse when there was no negligence in that part of it. It was said that if plaintiff's horses had shown indications of fright before the car had started, and this had been seen by the servants of defendant, it might be submitted to the jury whether to start the car under such circumstances would not be negligence, if plaintiff was injured by being thrown out of his vehicle by the frightened horse. *McDonald v. Toledo Consol. Street R. Co.* 74 Fed. Rep. 104, 43 U. S. App. 73.

And the court refused to set aside a verdict for plaintiff, where the evidence was conflicting as to whether there was not room for a car to pass without hitting a wagon, and the motorman disregarded the signal to stop until the horse could be unhitched, and collided with the wagon and injured the horse, or whether there was room to pass, and the horse became frightened and turned the wagon so as to strike the car. *Kestner v. Pittsburgh & B. Traction Co.* 158 Pa. 422.

A recovery was allowed where a person with horses was riding one and leading the other, and the street car touched one of them and excited them, and the evidence was conflicting as to whether or not the horses were so agitated by the subsequent use of the street-car driver's whip as to cause them to fall near the car on the ice, injuring the rider. *Berke v. Twenty-Third Street R. Co.* 22 N. Y. S. R. 432.

And where a person was injured by her horse becoming frightened from the noise, steam, and smoke of a steam engine on a street railway. Whether the horse was fractious or skittish, or whether the party injured was a proper driver, were questions for the jury. The court held that if the negligence of the company was the proximate cause, the fact that the horse was fractious or she a poor driver would not relieve the company from liability. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 20 L. R. A. 858.

So, where a woman was injured by her horse becoming frightened at the gong of a street car, the question as to whether or not the horse was a proper one for her to drive was held to be a question for the jury. The mere failure to look, by a woman driving a horse, where she was injured by reason of the horse being frightened by the gong of the car not at a crossing, will not prevent a recovery by her. *Benjamin v. Holyoke Street R. Co.* 160 Mass. 3.

2. By bells, gongs, and whistles.

A street-car company was not held liable for injuries caused by frightening a horse by a bell where the motorman had reason to suppose that the horse was under control. (See subdivisions 1 and 4 for fuller statement of facts in these cases.) *Steiner v. Philadelphia Traction Co.* 134 Pa. 199.

So, where plaintiff was guilty of gross negligence. *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. 615

rush upon it. The motorman was the servant of the quasi corporation, which enjoyed privileges granted to it by the legislature in consideration of its duty to transport passengers safely and more speedily than they are ordinarily carried in vehicles drawn by horses. People who pay their money in the reasonable expectation of being carried expeditiously are not to be delayed by every person who ventures to test the nerve of a horse or a mule by driving it along the same street on which a company runs its street cars by electricity. Where persons subject themselves to such risks, and no collision with the moving car ensues, injuries caused by the conduct of frightened animals are deemed in law to be due directly to their own want of care. Where the animal rushes upon the track in front of the car, the company is answerable for the consequences of a collision only where, by proper watchfulness on the part of the

motorman, the danger might have been foreseen, and the injury avoided by using the appliances at his command to stop the car. Where there is apparent danger of running over or coming in contact with persons or animals, either the principle announced in *Pickett v. Wilmington & W. R. Co.* (decided at this term) 117 N. C. 616, 30 L. R. A. 257, or that laid down in *Wilson v. Norfolk & S. R. Co.* *supra*, may be applicable. But it does not appear that the plaintiff was on or very near to the track. The car, according to the undisputed testimony, was stopped 15 feet distant from the place where his mule had stopped. There was error in refusing to charge the jury that in no aspect of the evidence could they find in response to the issue that the injury was caused by the negligence of the defendant.

For this error a new trial must be awarded.

And the same was held in cases of fright to horses by use of a gong, where the motorman could not reasonably have anticipated that injury would result. *East St. Louis & St. L. Electric Street R. Co. v. Wachtel*, 63 Ill. App. 181; *North Side Street R. Co. v. Tippins* (Tex. App.) 14 S. W. 1067; *Galesburg Electric Motor & P. Co. v. Manville*, 61 Ill. App. 490.

So, where it was not shown that the gong was the cause of the bad behavior of the horse. *North Chicago Street R. Co. v. Harms*, 59 Ill. App. 375.

But the company was held liable for injuries caused by the gong of the street car, where the man in charge of the car was negligent and unnecessarily frightened a horse. *Lightcap v. Philadelphia Traction Co.* 60 Fed. Rep. 212, Affirmed *Philadelphia Traction Co. v. Lightcap*, 61 Fed. Rep. 762, 17 U. S. App. 605.

And so where the danger could have been reasonably anticipated. *Benjamin v. Holyoke Street R. Co.* 160 Mass. 3; *Ellis v. Lynn & B. R. Co.* 160 Mass. 241; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47.

And the same was held where the fright was caused by the bell or gong. *Citizens' R. Co. v. Hair* (Tex. Civ. App.) 32 S. W. 1050.

The street-railway company was held liable for injuries caused from frightening horses, where a whistle was unnecessarily sounded near a team. *Lott v. Frankford & S. Pass. R. Co.* 159 Pa. 471.

3. By steam.

A street-railway company was not held liable for frightening a team by steam cars where the employees could not reasonably have anticipated and prevented the danger. *Rome Street R. Co. v. McGinnis*, 94 Ga. 229.

So, where the negligence of the company was not shown to amount to a wilful and wanton disregard of the driver's safety. *Chapman v. Zansville Street R. Co.* 27 Ohio L. J. 70.

And so where the plaintiff was guilty of gross negligence. *Coughtry v. Willamette Street R. Co.* 21 Or. 249.

But a city was held liable for the use of steam cars on the streets where such city granted the privilege in the absence of any authority. *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216.

And a street-railway company was held liable where the engineer could have reasonably anticipated the danger. *Muncie Street R. Co. v. Maynard*, 5 Ind. App. 372; *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 30 L. R. A. 333.

4. Contributory negligence.

The cases generally hold that a recovery cannot. 84 L. R. A.

be had for injuries caused by street cars, gongs, bells, or use of steam frightening horses, if the plaintiff or driver of the team is guilty of contributory negligence.

So, a street-car company was not held liable where a horse was injured by being frightened at the ringing of the bell on a street car, and jerked away from the owner who was holding him, and ran away and was struck by the car, where the plaintiff was guilty of gross negligence in unhitching the horse with a pile of boxes between the horse and himself, and there was no competent evidence to show that the gripman could have stopped and avoided the collision. The court said it was not negligence to ring the bell at that place. *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. 615.

And was not held liable where a person was injured in driving a young horse alongside of an electric street railway, where the horse had never been in such a situation before and the driver wanted to see how he would act, and there was ample opportunity for him to have turned into another street, and the car was about 150 feet distant and slowed down and stopped before reaching the point where plaintiff stopped his horse, got out of the buggy and let his horse into an open field, where he ran away, and there was no excessive speed. *Cornell v. Detroit Electric R. Co.* 82 Mich. 495.

So, where the driver of a carriage was not holding to the lines of his team but standing by the door of the coach reading a newspaper, and the team was frightened by a snow plow of a street-railway company and ran away, injuring one of the horses and the carriage, the court held that the negligence of the driver prevented a recovery. But a verdict of 6 cents for splashing the lining of the carriage with mud by the snow plow was allowed to stand, although plaintiff claimed that it was too small as the evidence showed damages to the amount of \$50 if the lining had been renewed. It was questioned whether even this verdict should be allowed to stand. *Gray v. Second Ave. R. Co.* 2 Jones & S. 519, 65 N. Y. 551.

And the company was not held liable where a team of horses was injured by a collision and the plaintiff had allowed the team to linger by the track fastened together only with lines, until it became unmanageable and got upon the track and was struck by the engine, and it was not shown that the motor could have been stopped after the engineer saw that the horses were on the track. *Coughtry v. Willamette Street R. Co.* 21 Or. 249.

L. T.

UNION BANK OF RICHMOND
v.
COMMISSIONERS OF OXFORD, *Appts.*
(119 N. C. 214.)

1. Constitutional requirements as to the style of acts or the manner of their passage are mandatory, and not directory.
2. Certificates of speakers that an act is ratified, although conclusive of the fact that it was read three several times in each house and ratified, do not show that an act was read three several days in each house and that the yeas and nays were entered on the Journal as required by Const. art. 2, § 14, when the act authorizes the creation of indebtedness by a town.
3. Failure to enter the yeas and nays on legislative journals, as required by Const. art. 2, § 14, on the second and third readings of an act authorizing the creation of indebtedness by a town, renders the act void.
4. A consent judgment entered into by town authorities cannot bind the town to a subscription to a railroad unless the power to subscribe or donate has been legally granted by the legislature.
5. Mandamus to compel the levy of a tax to pay a consent judgment entered into by town authorities will not be granted if it appears that there was no authority to issue the bonds for which the judgment was rendered.
6. The payment of interest on town bonds which were void because issued without authority does not ratify them.

(Patricloth, Ch. J., dissents.)

(November 17, 1896.)

APPEAL by defendant from a judgment of the Superior Court for Granville County in favor of relators in a mandamus proceeding to compel the levying of a tax to pay certain railroad aid bonds. *Reversed.*

On March 14, 1891, a proposition was made to submit the question of subscribing \$40,000 to the stock of a railroad company to the voters at a coming election in the town of Oxford. The election was held and the result declared in favor of the issuance of the bonds. Subsequently the town refused to issue the bonds and an action was instituted to compel them to do so. Pending the action a settlement was agreed upon between the town and the railroad company, and a judgment was drawn and approved by the judge requiring the issuance of \$20,000 of the bonds. These bonds were issued and delivered to the railroad company for sale and purchased by the plaintiff. The town having refused to recognize their validity, this action was brought to compel it to do so.

Further facts are stated in the opinion.

Messrs. M. V. Lanier, R. O. Burton, W. A. Guthrie, and Edwards & Royster for appellants.

Messrs. William J. Leake, J. Crawford Biggs, Manning & Foushee, and Shepherd & Busbee, for appellee.

The only question open for discussion is

whether so much of the charter as confers authority on the town of Oxford is valid; in other words, whether that part of the act is utterly void by reason of alleged noncompliance with the provisions of § 14, art. 2 of the Constitution.

Carr v. Coke, 116 N. C. 232, 28 L. R. A. 737, conclusively settles this question.

The court held that it had no jurisdiction to look behind the record, and investigate by inquiry and proof the manner in which this record was established by the legislative branch of the government, for any of the causes alleged in the complaint.

23 Am. & Eng. Enc. Law, p. 202.

The principle is followed in reference to constitutional provisions similar to that relied upon by the defendant.

Ex parte Wren, 68 Miss. 535, 56 Am. Rep. 825; *State, George, v. Swift*, 10 Nev. 176; *State, Pangborn v. Young*, 33 N. J. L. 41; *Sherman v. Story*, 80 Cal. 256, 89 Am. Dec. 93; *Thomas v. Dakin*, 23 Wend. 9; *Warner v. Beers*, 23 Wend. 108; *People v. Purdy*, 2 Hill, 81; *Purdy v. People*, 4 Hill, 384; *De Bow v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 Denio, 97; *People v. Chenango Supers.* 8 N. Y. 317; *People v. Devlin*, 33 N. Y. 269, 68 Am. Dec. 377; *Pacific R. Co. v. The Governor*, 23 Mo. 353, 66 Am. Dec. 673; *Brodnaz v. Groom*, 64 N. C. 244; *Fouke v. Fleming*, 13 Md. 412; *Evans, Auditor of State, v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 16.

The act cannot be attacked in a collateral proceeding.

Brodnaz v. Groom, 64 N. C. 248; *State, Scarborough v. Robinson*, 31 N. C. 425; *Galling v. Tarboro*, 78 N. C. 119.

There was an estoppel by reason of the judgment in the action of mandamus against the defendant.

A judgment is never void because the cause of action is void.

Van Fleet, Collateral Attack, § 236; *Arnold v. School District*, 78 Mo. 229; *United States v. Board of Auditors*, 28 Fed. Rep. 407; *Rhinhardt v. Schuyler*, 7 Ill. 528.

A judgment is none the less effective as a bar, because its merits were determined, in whole or in part, by the agreement of the parties. A judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon demurrer or verdict.

Black, Judgm. § 705; *Sharp v. Danville, M. & S. W. R. Co.* 106 N. C. 306; *Vaughan v. Gooch*, 92 N. C. 524; *Moore v. Grant*, Id. 316; *Kerchner v. McEachern*, 93 N. C. 447; *Deaver v. Jones*, 114 N. C. 649.

The judgment operates as an estoppel, or is conclusive as evidence upon parties and privies, not only upon such matters as were actually urged to sustain or defeat the claim asserted in the action, but as to every possible matter that might have been so urged.

Tuttle v. Harrell, 85 N. C. 456; *Anderson v. Rainey*, 100 N. C. 321; *Yates v. Yates*, 81 N. C. 397; *Falls v. Gamble*, 66 N. C. 456; *Rogers v. Kimsey*, 101 N. C. 559; *Abbott, Trial Ev.*

NOTE.—See, on the other side of the question, as to the effect of a constitutional requirement of the entry of yeas and nays on legislative

journals, the case of *Lafferty v. Huffman* (Ky.) 20 L. R. A. 203.

pp. 828, 882; *Nashville, C. & St. L. R. Co. v. United States*, 118 U. S. 261, 28 L. ed. 971; *McElvess v. Blackwell*, 101 N. C. 192.

The power to borrow money necessarily implies the power to determine the time of payment, and also the power to issue bonds or other evidence of the indebtedness.

Evansville, I. & C. S. L. R. Co. v. Evansville, 15 Ind. 412; *Com., Hamilton, v. Pittsburgh*, 34 Pa. 511; *Com., Reinboth, v. Pittsburgh*, 41 Pa. 288; *Lynde v. Winnebago County*, 88 U. S. 16 Wall. 6, 26 L. ed. 272; *Mitchell v. Burlington*, 71 U. S. 4 Wall. 270, 18 L. ed. 350; *South-erland v. Goldsboro*, 96 N. C. 49; *Tucker v. Raleigh*, 75 N. C. 267; *Street v. Craven County Comrs.* 70 N. C. 644.

The respect due to coequal and independent departments requires the judicial department to act on the assurance that the act was properly passed, leaving the courts to determine whether the act so authenticated is in conformity with the Constitution.

Brodnax v. Groom, 64 N. C. 244; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294; *McClure v. Orford Twp.* 94 U. S. 429, 24 L. ed. 129; *Claybrook v. Rockingham County Comrs.* 114 N. C. 453; *Wood v. Orford*, 97 N. C. 227; *Norment v. Charlotte*, 85 N. C. 887; *Cain v. Davie County Comrs.* 86 N. C. 8; *Jones v. Person County Comrs.* 107 N. C. 248.

Clark, J., delivered the opinion of the court:

When this case was here before (116 N. C. 339) the court set aside the nonsuit taken below, and held that the plaintiff could maintain an action as the case was then presented. The court did so upon the ground that, there being apparently a valid liability of \$40,000 against the town of Oxford, the compromise thereof for the sum of \$20,000 was not necessarily void, and that the court below erred in nonsuiting the plaintiff. The case had been tried upon the view that the charter of the town of Oxford authorized the election under which the \$40,000 indebtedness was contracted. The judge below held that this was not so, and hence that the compromise was not binding. This court sustained the view taken below that the town charter did not authorize the contraction of the indebtedness, but held that on its face the act chartering the railroad (Acts 1891, chap. 315, § 10) authorized the election. The question as to the efficacy of that act had not been questioned below, as the plaintiff had rested its claim upon the authority of the town charter to sustain the election. The questions decided before need not be called in controversy. We must take it that our former opinion settles that the town had authority to compromise a valid liability for a smaller sum, and that Act 1891, chap. 315, on its face authorized the election. When the second trial was had below, the point was taken for the first time that, conceding, as this court had held, that Act 1891, chap. 315, by its terms, authorized the election, that act was invalid, because not passed as required for all acts empowering counties, cities, and towns to issue bonds. Const. art. 2, § 14. This section of the Constitution is imperative, and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in 84 L. R. A.

the organic law would be converted into a nullity by judicial construction. It was intended as a safeguard, and has been held mandatory in all other courts in which that question has been presented, as will be seen below. This point was not raised below in the former trial, nor in this court, as the plaintiff was then relying upon the charter of the town, which we held invalid for that purpose. On the second trial, when the plaintiff offered for the first time Act 1891, chap. 315, as authority to show a valid election authorizing the indebtedness of \$40,000 as a basis to authorize the compromise (for, except as a compromise, the judgment would be void on its face, being *ultra vires*), the defendant contended that Act 1891, chap. 315, while valid as a railroad charter, was unconstitutional and void so far as authorizing the creation of an indebtedness by the town, because not enacted in the manner required by Const. art. 2, § 14. The journals were put in evidence, and showed affirmatively that the act was not read three several days in each house, and that the yeas and nays were not entered on the readings in the house, as required by the Constitution for acts authorizing the creation of public indebtedness. The point, therefore, thus arises for the first time in this case, and was not presented, and could not be presented, in the former appeal, for the reasons above given. The point is one of transcending importance, and is simply whether the people in their organic law can safeguard the taxpayers against the creation of state, county, and town indebtedness by formalities not required for ordinary legislation, and must the courts and the legislature respect those provisions? This safeguard is § 14 of art. 2 of the Constitution. It provides: "No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or impose any tax upon the people of the state, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and "unless the yeas and nays, on the second and third reading of the bill, shall have been entered on the journal." The journals offered in evidence showed affirmatively that "the yeas and nays on the second and third reading of the bill" were not "entered on the journal;" and the Constitution—the supreme law—says that, unless so entered, no law authorizing state, counties, cities, or towns to pledge the faith of the state, or to impose any tax upon the people, etc., shall be valid.

This case has no analogy to *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 737. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house, and ratified. Const. art. 2, § 23. And so it is here; the certificate of the speakers is conclusive that this act passed three several readings in each house, and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house, and that the yeas and nays were entered on the journals. The journals were in

evidence, and showed affirmatively the contrary. The people had the power to protect themselves by requiring in the organic law something further as to acts authorizing the creation of bonded indebtedness by the state and its counties, cities, and towns than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, in addition to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the journals on the second and third reading in each house. It is provided that such laws are "no laws"—i. e. are void—unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journals. This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a state or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 Dillon, Mun. Corp. 545, and cases cited. It is certainly in the power of the sovereign people, in framing their Constitution, to require as a prerequisite for the validity of this class of legislation these precautions, and the additional evidence of the journals that they have been complied with, over and above the mere certificate of the speakers, which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the journals is plain beyond power of controversy. Accordingly, the law is well settled by nearly 100 adjudicated cases in the courts of last resort in thirty states, and also by the Supreme Court of the United States, that where a state Constitution prescribes such formalities in the enactment of laws as require a record of the yeas and nays on the legislative journals, these journals are conclusive as against not only a printed statute, published by authority of law, but also against a duly enrolled act. The following is a list of the authorities, in number ninety-three, sustaining this view either directly or by very close analogy. It is believed that no Federal or state authority can be found in conflict with them. Decisions can be found, as, for instance, *Carr v. Coke*, *supra*, to the effect that, where the Constitution contains no provision requiring entries on the journal of particular matters,—such, for example, as calls of the yeas and nays on a measure in question,—the enrolled act cannot, in such case, be impeached by the journals. That, however, is a very different proposition from the one involved here, and the distinction is adverted to in *Field v. Clark*, 148 U. S., on page 671, 86 L. ed. 308. The authorities are as follows:

Alabama: *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Buckley*, 54 Ala. 599; *Perry County v. Selma, M. & M. R. Co.* 58 Ala. 546; *Walker v. Griffith*, 60 Ala. 861; *Moog v. Randolph*, 77 Ala. 597; *Hall v. Steele*, 83 Ala. 562. 84 L. R. A.

Arkansas: *Burr v. Rose*, 19 Ark. 250; *Vinsant v. Knox*, 27 Ark. 266; *Worthen v. Budgett*, 33 Ark. 496; *Smith v. Garth*, 33 Ark. 17; *Chicot County v. Davies*, 40 Ark. 200; *Glide-well v. Martin*, 51 Ark. 559.

California: *Railroad Tax Case*, 8 Sawy. 238, 18 Fed. Rep. 722; *Weill v. Kenfield*, 54 Cal. 111; *Oakfield Paving Co. v. Hilton*, 69 Cal. 479.

Colorado: *Re Roberts* 5 Colo. 525; *Hughes v. Felton*, 11 Colo. 489; *Robertson v. People*, 20 Colo. 279.

Florida: *Mathis v. State*, 31 Fla. 291.

Georgia: *Harper v. Elberton Comrs.* 28 Ga. 566.

Illinois: *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Turley v. Logan County*, 17 Ill. 151; *Schuyler County Supers. v. People, Rock Island & A. R. Co.* 25 Ill. 181; *People, Barnes, v. Starne*, 35 Ill. 121, 85 Am. Dec. 548; *Wabash R. Co. v. Hughes*, 88 Ill. 174; *Illinois C. R. Co. v. Wren*, 43 Ill. 77; *People v. De Wolf*, 62 Ill. 258; *Ryan v. Lynch*, 68 Ill. 160; *Burritt v. State Contract Comrs.* 120 Ill. 322.

Indiana: *Indiana C. R. Co. v. Potts*, 7 Ind. 683; *McCulloch v. State*, 11 Ind. 424.

Iowa: *Koehler v. Hill*, 60 Iowa, 548.

Kansas: *Re Division of Howard County*, 15 Kan. 194; *Leavenworth County Comrs. v. Higginbotham*, 17 Kan. 62; *State, Atty. Gen., v. Francis*, 26 Kan. 724.

Kentucky: *Norman v. Kentucky Bd. of Managers of World's Columbian Exposition*, 93 Ky. 537, 18 L. R. A. 536.

Louisiana: *Hollingsworth v. Thompson*, 45 La. Ann. 223.

Maryland: *Berry v. Baltimore & D. P. R. Co.* 41 Md. 448, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203.

Michigan: *Southworth v. Palmyra & J. R. Co.* 2 Mich. 287; *Green v. Graves*, 1 Dougl. (Mich.) 351; *People, Anderson, v. Le Grange Trop. Board*, 2 Mich. 191; *People, Drake, v. Mahaney*, 13 Mich. 481; *Steeckert v. East Saginaw*, 22 Mich. 104; *Atty. Gen. v. Joy*, 55 Mich. 94; *Callaghan v. Chipman*, 59 Mich. 610; *Atty. Gen. v. Rice*, 64 Mich. 385; *People, Hart, v. McElroy*, 72 Mich. 448, 2 L. R. A. 609; *Sackrider v. Saginaw County Supers.* 79 Mich. 59; *Auditor General v. Menominee County Supers.* 89 Mich. 598; *Atty. Gen. v. Detroit & S. Pl. Road Co.* 97 Mich. 589.

Minnesota: *Ramsey County Supers. v. Heenan*, 2 Minn. 380 (Gil. 281); *State, Minnesota R. Constr. Co., v. Hastings*, 24 Minn. 78; *State v. Peterson*, 38 Minn. 143; *Lincoln v. Haugan*, 45 Minn. 451.

Missouri: *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; *State, Atty. Gen., v. Mead*, 71 Mo. 266.

Nebraska: *Hull v. Miller*, 4 Neb. 503; *State, Huff v. McLelland*, 18 Neb. 286; *State, Poole v. Robinson*, 20 Neb. 96.

Nevada: *State, Stevenson, v. Tufty*, 19 Nev. 891.

New Hampshire: *Opinion of the Justices*, 35 N. H. 579, 52 N. H. 622.

New York: *People v. Chenango Supers.* 8 N. Y. 817; *People, Adsit, v. Allen*, 42 N. Y. 379; *People, Purdy, v. Marlborough Highway Comrs.* 54 N. Y. 276; *Rumsey v. New York & N. E. R. Co.* 130 N. Y. 88; *People v. Purdy*, 2 Hill, 31; *Purdy v. People*, 4 Hill, 334; *De Bow v. People*, 1 Denio, 9; *Commercial Bank v.*

Sparrow, 2 Denio, 97; *Warner v. Beers*, 23 Wead. 184.

Ohio: *Fordyce v. Godman*, 20 Ohio St. 1.

Oregon: *Currie v. Southern P. Co.* 21 Or. 566.

Pennsylvania: *Southwark Bank v. Com.* 26 Pa. 446.

South Carolina: *Bond Debt Cases*, 12 S. C. 200; *State, Atty. Gen., v. Hagood*, 18 S. C. 46.

Tennessee: *Williams v. State*, 6 Lea, 549; *Brewer v. Huntingdon*, 86 Tenn. 782; *State v. Algood*, 87 Tenn. 163; *Nelson v. Haywood County*, 91 Tenn. 596.

Texas: *Ewing v. Duncan*, 81 Tex. 230; *Hunt v. State*, 22 Tex. App. 396.

Virginia: *Wise v. Bigger*, 79 Va. 269.

West Virginia: *Osburn v. Staley*, 5 W. Va. 85, 18 Am. Rep. 640.

Wisconsin: *Bound v. Wisconsin C. R. Co.* 45 Wis. 543; *Meracle v. Down*, 64 Wis. 828; *McDonald v. State*, 80 Wis. 407.

Wyoming: *Brown v. Nash*, 1 Wyo. 85; *Union P. R. Co. v. Carr*, 1 Wyo. 96.

United States: *Gardner v. Barney* ("Gardner v. The Collector"), 73 U. S. 6 Wall. 499, 18 L. ed. 890; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Post v. Kendall County Supers.* 105 U. S. 667, 26 L. ed. 1204.

Of these cases, especially pertinent are *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Post v. Kendall County Supers.* 105 U. S. 667, 26 L. ed. 1204; *People, Admt. v. Allen*, 42 N. Y. 879; *Hollingsworth v. Thompson*, 45 La. Ann. 228; *State, Atty. Gen., v. Mead*, 71 Mo. 266; *Hunt v. State*, 22 Tex. App. 396. To same purport are Black. Const. Law, §§ 81, 102; Cooley, Const. Lim. 6th ed. 156, 163, 168; Smith, Const. & Stat. Constr. 833; Story, Const. 590; Sedgw. Stat. & Const. Law, 539, 551; Cushing, Law & Practice of Legislative Assemblies, § 2211; 1 Whart. Ev. 3d ed. 260; 1 Greenl. Ev. 491.

Constitutional requirements as to the style of acts or the manner of their passage are mandatory, not directory. *State v. Patterson*, 98 N. C. 660, 663, 665. The thirty days' notice required before the passage of a private act is not required by the Constitution to be entered on the journals, as is required as to the readings on several days, and the ayes and nays on each reading, with bills authorizing the contraction of public indebtedness; and hence it may be that the giving of such thirty days' notice is conclusively presumed as to such private acts (*Harrison v. Gordy*, 57 Ala. 49; *Walker v. Griffith*, 60 Ala. 361), though the contrary was intimated in *Gatlin v. Tarboro*, 78 N. C. 119. The history of the country at large and of this state as well has shown the necessity of this safeguard as to acts authorizing the creation of public indebtedness, which has been incorporated also into several other state Constitutions. We have no power nor wish to nullify so plain and mandatory a provision, so carefully and explicitly worded, and which has been held binding by all other courts wherever the question has been presented.

The judgment, on its face, is by consent, and for a railroad subscription. It is therefore, on its face, to be treated as void being *ultra vires* unless a special authority is shown authorizing the indebtedness for which it was a compromise (*Kelley v. Milan*, 127 U. S. 150, 32 L. 34 L. R. A.

ed. 83); for, *ex virtute officii*, town commissioners have no authority whatever to bind the town by submitting to a consent judgment for \$20,000 for a matter appearing on the face of the judgment to be not for town purposes. If the commissioners of the town were vested with no authority to create the debt, they certainly could not acquire such power by entering into a consent judgment. The consent judgment entered into by the town authorities could not bind the town to a subscription to a railroad unless the power to subscribe or donate had been legally granted by the legislature. Consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded. As such they bind the parties themselves thereto as fully as other judgments; but, when parties act in a representative capacity, such judgments do not bind the *cestuis que trustent* unless the trustees had authority to act; and when (as in the present case) the parties to the action, the town authorities, had, as appears above, no authority to issue the bonds, their honest belief, however great, that they had such power, would not authorize them to acquire such power, and bind the town by consenting to a judgment. It is not a question of a fraudulent judgment, but a void judgment from want of authority to consent to a decree to bind principals (the taxpayers) for whom they had no authority to create an indebtedness by consenting to a judgment any more than they would have had by issuing bonds. If authorized to create the indebtedness, either the bonds or the consent judgment would be equally an estoppel, but as they had no such authority, neither bonds nor judgment is binding on the taxpayers. It is not their bond nor their judgment. In *Kelley v. Milan*, *supra*, Blatchford, J., says: "The declaration of the validity of the bonds contained in the decree was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor of the town and the officer of the . . . railroad company. The act of the mayor in signing that agreement could give no validity to the bonds if they had none at the time the agreement was made. . . . The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds. . . . This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the town by such a consent, because it gave life to invalid bonds; and the authorities of the town had no more power to do so than they had to issue the bonds originally." In *Texas & P. R. Co. v. Southern P. Co.* 187 U. S. 48, 56, 57 L. ed. 614, 617, Fuller, Ch. J., says: "The decrees were entered by consent and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties; and hence holds that the Federal courts in disregarding such decrees were not violating the rule that due effect must be given to the determination of the matter by a state court having jurisdiction. In *Laurence Mfg. Co. v. Janesville Cotton Mills*, 188 U. S. 552, 34 L. ed. 1005, Fuller Ch. J., again says: "The prior decree

was the consequence of the consent [of parties], and not of the judgment of the court, and this being so, the court had the right to decline to treat it as *res judicata*," citing many cases, among them our own case of *Lamb v. Gallin*, 2 Dev. & B. Eq. 87, *infra*, and refused to execute a former decree, saying: "As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the circuit court being correct upon the merits, is also correct in that the court refused to be constrained by the previous erroneous consent decree to decree contrary to the right of the cause." In *Gay v. Purpart*, 106 U. S. 679, 27 L. ed. 256, Miller, J., says (page 698, 106 U. S., and page 268, 27 L. ed.). "Such decree as was had, being dependent upon consent, did not operate as a judicial decision by the court." This treatment of consent decrees prevails thus in law as well as equity; *Kelley v. Milan*, *supra*, being an action at law to recover judgment on bonds issued in aid of a railroad, and the other cases above cited being in equity. In *Brownsville Taxing Dist. Comrs. v. Loague*, 129 U. S. 498, 505, 32 L. ed. 780, 784, which is substantially like the present, being an application for a mandamus to compel the levying of a tax to pay a judgment rendered on interest coupons of bonds, Fuller, Ch. J., says: "The court cannot decline to take cognizance of the fact that the bonds are utterly void, and that no such remedy exists. *Res judicata* may render straight that which is crooked, and black that which is white,—*facit ex curvo rectum, ex albo nigrum*.— . . . but where application is made to collect judgments by process not contained in themselves, and requiring to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when, upon the face of the record, it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." So, in the present case, even if the former judgment had not been by consent, it appears that there was no authority to issue the bonds, and the courts will not issue a mandamus to levy a tax to pay such judgment. In *Lamb v. Gallin*, 2 Dev. & B. Eq. 87 (cited and approved by the Supreme Court of the United States, *supra*), Gaston, J., says, as to the effect of a consent judgment by an executor, that it did not bind the beneficiaries of the estate (as here the taxpayers are not bound by the consent judgment entered into by the town authorities), because "it is not in truth a decree rendered *in invitum*, and by a judgment of the court to which the defendant was compelled to submit, and which, therefore, not only binds him, but those also for whose benefit he held the estate, unless it can

34 L. R. A.

be impeached for fraud, but it is a voluntary settlement between the defendant and the persons then claiming, which the parties to that settlement have chosen to invest with the forms of a judicial determination. The decree . . . is avowedly adopted because it was made by the parties. A decree thus rendered as against the present plaintiffs [who were the principals whom the defendant in the consent judgment represented] has no force except so far as it is seen to be just." There are other authorities to the like effect and purport, but the above will suffice. A recital of facts which the corporate officers had no authority to determine, or are cital of matters of law, does not estop the corporation. *Dixon County v. Field*, 111 U. S. 88, 28 L. ed. 860; *Northern Nat Bank v. Porter Twp.* 110 U. S. 608, 28 L. ed. 258.

The certificate of the speakers is not good for what it certified; *i. e.*, that the bill has been read three times in each house, and ratified. And, ordinarily, that makes the bill a law. But for this class of legislation the Constitution provides that the facts thus certified by the speakers will make no law unless it further appears that the yeas and nays have been recorded on the journals on the second and third reading in each house. The Constitution makes the entry on the journals essential to the validity of the act. If it be conceded that presumption of regularity arises from the publication of the act in this case, it was rebutted, for the journals were offered by the defendant, and showed that no constitutional authority had been conferred to issue the bonds or contract the indebtedness. It is incumbent upon the purchaser of municipal bonds to examine whether the power to issue has been duly granted. *Lake County Comrs. v. Graham*, 180 U. S. 674, 32 L. ed. 1065; *East Oakland Twp. v. Skinner*, 94 U. S. 255, 24 L. ed. 125; 1 Dill. Mun. Corp. 545. The bonds, having been issued without authority were absolutely void. *Marsh v. Fulton County Supers.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *Clarke v. Hancock County Supers.* 27 Ill. 808. The payment of interest is no ratification, for there can be no ratification when there is want of power. *Doon Dist. Twp. v. Cummins*, 143 U. S. 376, 35 L. ed. 1048; *Davies County v. Dickinson*, 117 U. S. 657, 665, 29 L. ed. 1026, 1030; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. ed. 178, 189; *Lewis v. Shreveport*, 108 U. S. 262, 287, 27 L. ed. 728, 730.

In instructing the jury upon the evidence to find the issues in favor of the plaintiff, there was error.

Faircloth, Ch. J., dissents.

Rehearing denied.

MISSOURI SUPREME COURT (Division 2).

James A. REED and Wife, *Respts.*,
v.
WESTERN UNION TELEGRAPH COM-
PANY, *Appt.*

(.....Mo.....)

1. A stipulation limiting the liability of a telegraph company for errors and mistakes in the transmission of an unrepeatable message is not valid so far as it applies to mistakes caused by negligence of the telegraph operators.
2. A mistake in the transmission of a telegram makes a prima facie case of negligence, and casts on the telegraph company the burden of disproving negligence.
3. A contract made in Iowa for the transmission of a telegram from a place in that state to a place in Missouri is governed by the laws of Iowa making the proprietor of the telegraph liable for all mistakes in transmission.
4. The difference between the actual market value of a lot and the price received is the measure of damages for a mistake in the transmission of a telegram which is not in cipher to an agent, by which a lower price is named to him than that stated by the principal, and in reliance upon which he executes the contract.

(October 7, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiffs in an action brought to recover damages for failure to correctly transmit a telegram. *Affirmed.*

Statement by Gantt, P. J.:

This action is by a sendee or addressee of a commercial telegram against the telegraph company for negligence in its transmission, whereby the plaintiff or sendee was misled into authorizing her agent to conclude a contract of sale of a tract of land for \$1,300 when she believed she was obtaining \$1,900 therefor. Plaintiff's agent, Hedges, living in Cedar Rapids, Iowa, where her real estate was situated, delivered to the defendant telegraph company, to be transmitted to plaintiff, living in Kansas City, Missouri, the following message:

Cedar Rapids, Iowa, May 25, 1889.

James A. Reed, 806 Nelson Building, Kansas City, Mo.:

Offered thirteen hundred cash, lot two, houses near planing mill. Must hear immediately. Can't get more. George T. Hedges.

The regular tariff rate was paid by Hedges. This message when delivered was as follows:

Cedar Rapids, Iowa, May 25, 1889.

James A. Reed, 806 Nelson Building, Kansas City, Mo.

Offered nineteen hundred cash, lot two, houses near planing mill. Must hear immediately. Can't get more. George T. Hedges.

NOTE.—In overruling a prior decision to adopt the rule which precludes telegraph companies from stipulating against their own negligence, the supreme court of Missouri does the same that was done by the supreme court of North Carolina in *Brown v. Postal Tele. Cable Co.* 17 L. R. A. 648; see 34 L. R. A.

It will be noted the offer was changed in transmission from "thirteen hundred" to "nineteen hundred" dollars. After requesting the operator and agent of defendant at Kansas City to verify the message on account of its importance, and having been informed by the operator that he had verified it, and she could rely upon it, plaintiff, ignorant of the error in the message received, on the same day, sent Hedges this telegram:

Sell property for amount offered. Will send deed by Monday, 27th.

Armed with this power of attorney, Hedges, the agent, also ignorant of the mistake in his message to plaintiff, and supposing he was authorized to sell the lot for \$1,300, received a part payment of the purchaser thereon, and gave a written memorandum of the sale, agreeing to make the deed and deliver possession. On the 27th of May, 1889, plaintiff and her husband joined in the execution of a deed to the purchaser, reciting a consideration of \$1,900, and forwarded it to Hedges, who received it on the 29th. When Hedges received the deed, he thought possibly there was a mistake, owing to the insertion of \$1,900, instead of \$1,300, and suggested to the purchaser that they wait until he could write plaintiff; but, the purchaser threatening a suit, he delivered the deed, and accepted \$1,300, which he remitted to plaintiff, less his commission. Upon receiving the letter, and being apprised for the first time of the mistake, plaintiff at once, and within the sixty days limited therefor, made claim for \$600 damages, which being refused by defendant, she commenced this action. Defendant offered no evidence whatever to account for the mistake in the transmission of the message. The company relies upon various alleged errors to reverse the judgment recovered by plaintiff.

Meers, Karnes, Holmes, & Kranthoff, for appellant:

The court erred in admitting in evidence the statute of the state of Iowa, and Mr. Stiles's oral testimony as to the unwritten law of that state relative to the liability of telegraph companies.

The telegram in question was sent from Cedar Rapids, Iowa, to Kansas City, Missouri. It was therefore an interstate transaction and not subject to the laws of the state of Iowa.

Stanley v. Wabash, St. L. & P. R. Co. 100 Mo. 435, 8 L. R. A. 549, 3 Inters. Com. Rep. 176; *Missouri P. R. Co. v. Sherwood*, 84 Tex. 125, 17 L. R. A. 648, 4 Inters. Com. Rep. 240; *Otis Co. v. Missouri P. R. Co.* 112 Mo. 632; *Western U. Tele. Co. v. Pendleton*, 123 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306.

The validity of the conditions under which the message in controversy was sent must be determined by the rule or decision announced

footnote to the latter case for other decisions on this question. Also on the same point see *Francis v. Western U. Tele. Co.* (Minn.) 25 L. R. A. 406; and *Shingleur v. Western U. Tele. Co.* (Miss.) 30 L. R. A. 444.

by the supreme court of Missouri, namely that the provision limiting liability for errors and mistakes in unreported messages is valid.

Wann v. Western U. Telegr. Co. 87 Mo. 472, 90 Am. Dec. 395, and cases cited; 2 Shearm. & Redf. Neg. § 553, p. 405; *Kiley v. Western U. Telegr. Co.* 109 N. Y. 231; *Western U. Telegr. Co. v. Stevenson*, 128 Pa. 442, 5 L. R. A. 515; *Thompson v. Western U. Telegr. Co.* 64 Wis. 531, 54 Am. Rep. 644.

There was neither allegation nor proof of gross negligence on the part of the defendant, nor did the plaintiff's instructions predicate their recovery upon the presence of this element.

That phrase is used in the sense of wilful mistake or fraud.

Ellis v. American Telegr. Co. 13 Allen, 226; *Redpath v. Western U. Telegr. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Hart v. Western U. Telegr. Co.* 66 Cal. 579, 55 Am. Rep. 119; *Breese v. United States Telegr. Co.* 45 Barb. 274; *Beven, Neg.* p. 63, note.

The same rule prevails in actions against telegraph companies that governs the recovery for damages in ordinary cases; the damages must be limited strictly to those which are proximately caused by the negligence complained of, and cannot include those which are remote.

Western U. Telegr. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 306, 207, 35 L. ed. 147, 150; *Cahn v. Western U. Telegr. Co.* 48 Fed. Rep. 810, 2 U. S. App. 24.

A well-established and eminently just rule imposes upon a party injured or exposed to danger of injury from the act of another, however wrongful, the duty to actively exert himself to take steps to avoid or lessen the injuries and to make exertions and incur reasonable expenses to that end.

Douglass v. Stephens, 18 Mo. 362; *Fisher v. Goebel*, 40 Mo. 475; *Waters v. Brown*, 44 Mo. 802; *State, Rice, v. Powell*, Id. 436; *Hayler v. Owen*, 61 Mo. 271; *Eoff v. Olay*, 9 Mo. App. 176; *Harrison v. Missouri P. R. Co.* 88 Mo. 625; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 232; *Alliance Trust Co. v. Stewart*, 115 Mo. 236; *Baldwin v. United States Telegr. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Daugherty v. American U. Telegr. Co.* 75 Ala. 168, 51 Am. Rep. 435; 1 Sutherland, Damages, 2d ed. §§ 88, 89, pp. 191, 192; 3 Sutherland, Damages, 2d ed. §§ 921, 973; 1 Sedgw. Damages, 8th ed. §§ 202, 204, 205, 214-216, and 233; 2 Sedgw. Damages, 8th ed. §§ 815, 858, 872, 895; Gray, Communication by Telegraph, p. 178; § 76, p. 137.

In a legal sense the loss in this case must be attributable to the act of the plaintiffs in voluntarily carrying out and accepting the benefits of a contract which could not have been enforced against them, and in failing to take steps to set aside the delivery of the deed by Hedges to Scott, when ample ground existed therefor.

In such a case the error in transmission was not only a remote cause, but did not even contribute to the injury, upon any just consideration of the transaction.

First Nat. Bank v. Western U. Telegr. Co. 80 Ohio St. 555, 27 Am. Rep. 485; *Bodkin v. Western U. Telegr. Co.* 31 Fed. Rep. 134; *Baldwin* 34 L. R. A.

v. United States Telegr. Co. supra; *Smith v. Western U. Telegr. Co.* 83 Ky. 104.

The plaintiff's cause of action was complete when the telegram was delivered on May 25, 1889, and defendant did no act afterwards which influenced the conduct of the parties. They acted voluntarily with knowledge that an error had been committed, and their conduct alone proximately caused the loss complained of.

Lowery v. Western U. Telegr. Co. 60 N. Y. 198, 19 Am. Rep. 154; *Hart v. Direct United States Cable Co.* 86 N. Y. 633.

The plaintiffs were chargeable with Hedges' knowledge of the mistake, and as to this defendant, are responsible for his acts. They must seek a remedy for the result of his acts, if unauthorized, against him.

Proudfoot v. Montefiore, L. R. 3 Q. B. 511.

It was the duty of Hedges to inquire of Reed by telegraph, instead of waiting on the slower process of the mail; and it was Reed's duty, when he received Hedges' letter, to answer by wire, and it certainly was Hedges' duty, after having written to Reed, to await his answer.

Strong v. A Certain Quantity of Wheat ("The Contoy's Wheat"), 70 U. S. 3 Wall. 225, 230, 18 L. ed. 194, 197; *Proudfoot v. Montefiore, supra*.

The circumstances under which Hedges made his contract with Scott were such that the contract could not have been specially enforced against the Reeds. It would have been a complete answer that its execution had been induced by mistake.

Pom. Spec. Perf. § 245; *Waterman, Spec. Perf.* §§ 349, 361, 363; *Fry, Spec. Perf.* 3d ed. pp. 361, 370 and note, 723, 729, 734, and 739; 1 Story, Eq. Jur. 18th ed. § 140, and note; *Kerr, Fraud & Mistake*, pp. 412, 416; *Clark v. Maurer*, 77 Iowa, 717; *Kraft v. Egan*, 78 Md. 36.

And if it appear that the plaintiff's property was worth \$2,000 at the time the contract was made, specific performance of the contract would have been refused as being unfair and oppressive.

Taylor v. Williams, 45 Mo. 83; *Veth v. Gierth*, 92 Mo. 97.

Consequently, Hedges consummated a contract which was not binding, and which could not have been enforced. He knew the facts which constituted a complete defense; so that his act was an independent intervening cause, making the error in transmission only the remote cause of the damages complained of.

Hudson v. Wabash Western E. Co. 101 Mo. 13.

On the same ground the plaintiffs could have sustained a bill to cancel the deed and compel a reconveyance.

1 Sedgw. Damages, 8th ed. §§ 215, 216.

Instead of taking steps to this end, the plaintiffs, with full knowledge of all the facts, accepted the proceeds of Hedges' act, and thereby ratified all that he had done; or, in other words, completely identified themselves with Hedges, and assumed the same responsibility for his acts that would have existed had they been acting in person.

Mechem, Agency, §§ 148-150; *Beven, Neg.* p. 744.

A telegraph company is not subject to the rules governing common carriers.

Leonard v. New York, A. & B. Electro Magnetic Tele. Co. 41 N. Y. 544, 1 Am. Rep. 446.

The limit of liability for negligence is that the defendant shall be under a duty to the plaintiffs. There must be a duty as well as a breach, and that duty must be one to the person sustaining a loss, and not to some other person.

Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L. R. A. 746; *National Sav. Bank v. Ward*, 100 U. S. 195, 200, 25 L. ed. 621, 623; *Little Rock & Ft. S. R. Co. v. Lawton*, 55 Ark. 428, 15 L. R. A. 434; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322; *Kahl v. Love*, 87 N. J. L. 5; *Ward v. Fagin*, 101 Mo. 669, 10 L. R. A. 147; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 118 Mo. 570, 18 L. R. A. 599; *Robbins v. Jones*, 15 C. B. N. S. 221; *O'Brien v. Capwell*, 59 Barb. 497; *Beven*, Neg. pp. 337, 782, 788.

The person who employed the defendant, and as to whom it assumed a duty, was Hedges, who is conclusively held to have assented to the conditions of the contract under which the message was sent, and stood bound thereby.

Hill v. Western U. Tele. Co. 85 Ga. 425, and cases cited; *Grinnell v. Western U. Tele. Co.* 118 Mass. 299, 18 Am. Rep. 485; *Gray*, Communication by Telegraph, pp. 52, 53.

The plaintiffs, by claiming the right to sue, occupy the position and are bound by the conditions which would control the agent who acted for them in employing the defendant.

Ellis v. Harrison, 104 Mo. 270; *Saunders v. McClintock*, 46 Mo. App. 216; *Ellis v. American Tele. Co.* 13 Allen, 226; *Aiken v. Western U. Tele. Co.* 5 S. C. N. S. 358.

This action, whatever its form, is in reality one based upon a duty arising out of contract.

Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111; *Russell v. Polk County Abstract Co.* 87 Iowa, 233.

Contracts limiting the liability of such companies for damages resulting from errors in transmitting unrepeatable messages, even though caused by its own negligence, are valid.

Primrose v. Western U. Tele. Co. 154 U. S. 1, 38 L. ed. 883 (1894); *Western U. Tele. Co. v. Wood*, 57 Fed. Rep. 471, 21 L. R. A. 706, 13 U. S. App. 317; *Birkett v. Western U. Tele. Co.* 103 Mich. 861, 33 L. R. A. 404.

The receiver derives any right of action he may have in such a case as this by reason of the fact that the contract of transmission was made for his benefit or on his behalf.

Western U. Tele. Co. v. Wood, *supra*; *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218; *American Nat. Bank v. Klock*, 58 Mo. App. 335, and cases cited; *Findley v. Western U. Tele. Co.* 64 Fed. Rep. 459; *Manier v. Western U. Tele. Co.* 94 Tenn. 442; *Lewis v. Brookdale Land Co.* 124 Mo. 672.

Indemnity does not include damages which arise in consequence of the inactivity of the complaining party.

Boston Tow-Boat Co. v. Pettie, 1 U. S. App. 57, 49 Fed. Rep. 464; *Kansas City v. Morton*, 117 Mo. 446.

Messrs. **Kagy & Bremermann**, for respondents:

Telegraph companies are common carriers.
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Connell v. Western U. Tele. Co. 116 Mo. 34, 20 L. R. A. 172; *Gray*, Communication by Telegraph, p. 6, bottom, citing numerous cases; *Tyler v. Western U. Tele. Co.* 60 Ill. 436, 14 Am. Rep. 88.

A company cannot by stipulation relieve itself from the consequences of negligence. This principle is fully settled in relation to carriers, and applies with equal force to telegraph companies.

Whart. Neg. ¶ 762, and cases cited; *Western U. Tele. Co. v. Harris*, 19 Ill. App. 347; *Ayer v. Western U. Tele. Co.* 79 Me. 497; *Tyler v. Western U. Tele. Co.* *supra*; *Candee v. Western U. Tele. Co.* 34 Wis. 477, 17 Am. Rep. 452; *Marr v. Western U. Tele. Co.* 85 Tenn. 529; *Bartlett v. Western U. Tele. Co.* 62 Me. 218, 16 Am. Rep. 437; *Fowler v. Western U. Tele. Co.* 80 Me. 336; *Western U. Tele. Co. v. Shotton*, 71 Ga. 762; *Western U. Tele. Co. v. Blanchard*, 68 Ga. 309, 45 Am. Rep. 480; *Gray*, Communication by Telegraph, pp. 21, 22, 50-52, and cases cited.

Agreements for stipulated damages are also illegal.

Gray, Communication by Telegraph, p. 93.

A telegraph company is held to a high degree of care.

Fowler v. Western U. Tele. Co. 80 Me. 339.

It must duly transmit and deliver messages with integrity, skill, and diligence.

Western U. Tele. Co. v. Blanchard, *supra*; *Western U. Tele. Co. v. Craham*, 1 Colo. 237, 9 Am. Rep. 136.

It must exercise that degree of care and skill which an ordinarily prudent man would employ under similar circumstances.

Western U. Tele. Co. v. Griswold, 37 Ohio St. 818.

Wann v. Western Tele. Co. 87 Mo. 474, 90 Am. Dec. 395, was decided in 1866, before the status of telegraph companies had been settled by the courts, and very few authorities are cited in support of the decision.

The English doctrine has been repudiated since this decision was rendered, by all of the American courts that have had occasion to pass upon it.

Sweetland v. Illinois & M. Tele. Co. 27 Iowa, 435, 1 Am. Rep. 285; *Nickey v. St. Louis, I. M. & S. R. Co.* 35 Mo. App. 79; *Doan v. St. Louis, K. & N. W. R. Co.* 38 Mo. App. 408; *Conover v. Pacific Exp. Co.* 40 Mo. App. 81; *Witting v. St. Louis & S. F. R. Co.* 101 Mo. 681, 10 L. R. A. 602; *Otis Co. v. Missouri P. R. Co.* 112 Mo. 629.

The same rule applies to telegraph companies as to other common carriers.

Whart. Neg. ¶ 762; *Loy v. Western U. Tele. Co.* 35 Mo. App. 177.

The proposition that a telegraph company can stipulate against every kind of negligence except gross negligence, which was entertained by some of the courts in the early decisions, has been thoroughly exploded by all of the modern authorities, both as to telegraph companies and as to railroads and other common carriers.

Whart. Neg. ¶ 762, and cases cited; *Western U. Tele. Co. v. Harris*, *supra*; *True v. International Tele. Co.* 60 Me. 17, 11 Am. Rep. 156; *Bartlett v. Western U. Tele. Co.*, *Ayer v. Western U. Tele. Co.*, *Fowler v. Western U.*

Tele. Co., Western U. Tele. Co. v. Shotton, Western U. Tele. Co. v. Blanchard, Candes v. Western U. Tele. Co., and Marr v. Western U. Tele. Co. supra; Parks v. Alta California Tele. Co. 13 Cal. 423, 78 Am. Dec. 589; *Western U. Tele. Co. v. Grinnold, supra; Gray, Communication by Telegraph*, §§ 50-52; 2 Redf. Railways, 3d ed. 244.

Negligence and gross negligence are synonymous terms, and a telegraph company cannot stipulate its exemption from it.

McPheeters v. Hannibal & St. J. R. Co. 45 Mo. 26; *Lemon v. Chanolor*, 68 Mo. 358, 30 Am. Rep. 799; *Wilson v. Brett*, 11 Mees. & W. 118; *Hinton v. Dibbin*, 2 Q. B. 646; *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. ed. 376; *Shearm. & Redf. Neg.* § 48; *Gray, Communication by Telegraph*, p. 66.

Plaintiffs did the very thing they ought to have done with this message in order to insure its absolute accuracy. They asked to have it repeated, were told it had been done, was absolutely correct and could be relied on.

Gray, Communication by Telegraph, §§ 76, 76, p. 135, note; *Western U. Tele. Co. v. Howell*, 88 Kan. 686; *Western U. Tele. Co. v. Orall*, Id. 688.

And it makes no difference that plaintiffs paid nothing for the repetition.

Coggs v. Bernard, 3 Ld. Raym. 909a.

The simple undertaking on the part of a person to perform work, although there is no money paid, binds the party so undertaking the work to use all proper care in its performance, and for a failure he is liable in damages.

Coggs v. Bernard, 3 Ld. Raym. 917; *Whart. Neg.* 438, 497; *Gill v. Middleton*, 105 Mass. 479, 7 Am. Rep. 548; *Thorne v. Deas*, 4 Johns. Rep. 84; *Sweeney v. Old Colony & N. E. Co.* 10 Allen, 368, 87 Am. Dec. 644.

In the construction of contracts, the *lex loci contractus*, governs unless the contract is, by its terms, to be wholly performed in some other state than that in which it is made; but when a contract is made in one state, partly to be performed in that state and partly to be performed in another state, the law of the place of the contract governs.

Hartmann v. Louisville & N. E. Co. 89 Mo. App. 88; *Otis Co. v. Missouri P. R. Co.* 112 Mo. 623.

This was a valid contract which the purchaser could have specifically enforced or recovered damages for its breach, although the contract was made and part of the purchase money received under a mistake, the doctrine of the courts being that a telegraph company, having been selected as a means of communication, becomes the agent of the person using it, and that as between him and the innocent party the user of the telegraph must suffer, but has recourse against the company for the damages sustained.

Leonard v. New York, A. & B. Electro Magnetic Tele. Co. 41 N. Y. 566, 1 Am. Rep. 446; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 365, 4 Am. Rep. 673; *Ayer v. Western U. Tele. Co.* 79 Me. 498; *Savelund v. Green*, 40 Wis. 481; *Western U. Tele. Co. v. Shotton*, 71 Ga. 768; *Levy v. Western U. Tele. Co.* 35 Mo. App. 177.

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Gantt, P. J., delivered the opinion of the court:

1. It is earnestly insisted by defendant that its liability is limited by the following stipulation made by it with plaintiff's agent when it received and undertook to transmit the message: "All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." It is agreed that this was an unrepeatable message. The position of defendant is that the stipulation limiting its liability for errors and mistakes in the transmission of said message is valid. It goes further, and asserts it is not even liable for the negligence of its operators in the transmission of said message; and that it is only liable upon an averment and proof of gross negligence; and it is supported by most eminent authority in said claim. *Primrose v. Western U. Tele. Co.* (1894) 154 U. S. 1, 38 L. ed. 988; *Kiley v. Western U. Tele. Co.* 109 N. Y. 281; *Western U. Tele. Co. v. Stevenson*, 128 Pa. 442, 5 L. R. A. 515; and many other cases. Moreover, such is the latest authoritative statement of the law on this subject by this court. *Wann v. Western U. Tele. Co.* 37 Mo. 472, 90 Am. Dec. 395. At the threshold, then, the question arises: Shall this court adhere to the ruling in the *Wann Case*? The reasoning of that case, which was the first in which this court was called upon to construe the statute of 1855 (§§ 5 and 6, p. 1521), was that the transmission of messages by electricity was so seriously affected by atmospheric causes, which were uncontrollable, that it would be ruinous to deny telegraph companies the right to limit their liability to any extent short of gross negligence. In other words, if that decision is to stand, it simply means that in this state telegraph companies are not liable for negligence, because all their messages are sent subject to the same stipulation, exempting them from all liability for the negligence of their servants in transmitting messages. Ought such a precedent to be longer followed? Is it not contrary to a sound public policy, which denies to common carriers and other agencies which conduct a public, as contradistinguished from a private, business, the right to stipulate against their own negligence? We unhesitatingly answer in the affirmative. Loth as we are to overrule a decision that has stood so long, we are convinced it cannot be longer maintained on principle. It was rendered when the system of telegraph communication was yet in a crude state. The difficulties which then appeared to the courts to be so serious have largely vanished. The art of telegraphy in the thirty years that have since intervened has been reduced to comparative exactness; and when, as in this case, there is no evidence what-

ever of atmospheric disturbances or unfavorable conditions, it is very plain that an error by which "thirteen" is distorted into "nineteen" is caused either by careless operatives or imperfect and insufficient instruments and appliances. Since that decision was made, the relation of the telegraph to the commercial and social intercourse of the world has excited the most thorough and critical discussion; and, as might be expected, many contrary views have been expressed, and many conflicting adjudications rendered. It is because the reasons which induced the decision in the *Wann Case* do not, in our opinion, any longer obtain, that we are constrained to review that decision. It cannot be maintained that the same degree of responsibility should attach to persons or corporations engaged in transmitting intelligence by a system which was as yet crude, their operators untrained, and its appliances only experimental, and by a system which, after fifty years of experience, with all the adventitious aids of modern science, has been perfected in all its parts both as to suitable instruments and the opportunity afforded to employ expert and experienced operators. While it was anticipated that this new method of communication would revolutionize old methods, no one thirty years ago could have predicted how essential and indispensable the telegraph would become to the commercial and social interests of the whole world. It occupies a unique and peculiar place, and all analogies to former agencies fail when we come to apply rules of liability. Thus, at first they were called and adjudged to be "common carriers," but criticisms of this title brought about a complete abandonment by the courts of that appellation. Equally unfortunate was the endeavor to class them as "private bailees." They are not bailees in any proper legal sense. What, then, is their legal attitude? When this question is correctly answered, just legal principles can be applied. They are corporations created for public benefit, endowed with special privileges, such as the right of eminent domain, and perform the most important functions of commerce, supplanting, in cases where celerity and rapid transmission of intelligence are necessary, the postal service of the government. Their business intimately concerns the public, and on this account the government assumes and has the right to regulate their business, so as to insure impartiality of service, and prevent the exaction of unreasonable tolls. Many and varied interests are dependent upon them. From their exceptional position, it is in their power by a corrupt use of their knowledge and information, to reap unconscionable advantages in the marts of trade, or, by their negligence, entail ruin and disaster upon individuals and communities. Having these exceptional advantages, and enjoying a practical monopoly, every reason exists why they should be held to a rigid accountability for the negligence of their servants and employees. Without rendering them liable as insurers, or holding them for the action of the elements, over which they have no control, sound judicial reasoning does demand that they should be required to perform their duties in a careful and diligent manner, and that they should respond for the negligence of their servants.

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Why not? Such a rule entails no hardship. It is less onerous than that exacted of common carriers of goods, and no greater than is required of carriers of passengers, to whose care are committed the lives and limbs of the public. Their duty springs, not alone, as a private bailee's does, from contract, but is the result of the character of their business and the laws regulating them. They voluntarily engage in the business. They solicit and receive the confidence of the public, and their occupation requires small outlay compared to the profits realized. Having undertaken to transmit the message, why should they not be held to a careful performance of that duty, and be liable for a negligent disregard thereof? Why should they be permitted to demand an extra half toll for the faithful performance of a duty for which they have already charged a reasonable price? They have absolute control of their employees, select their own instruments, own their own wires, and invariably demand pay in advance.

Notwithstanding our respect for the learned courts which have held that they are not liable for negligence, we cannot concur in that view. In the language of the supreme court of Tennessee in *Marr v. Western U. Teleg. Co.* 85 Tenn. 529, we hold that this stipulation "constitutes but an artful arrangement and device by which the consequence of their own negligence is thrown upon the shoulders of their customers, and they are [thus] enabled to conduct business with no responsibility beyond that of the most trivial character for their own want of due care." We hold it utterly unreasonable and contrary to all the analogies of the law and sound public policy to allow such companies to thus stipulate against liability for mistakes caused by their own negligence. Moreover, we hold that the distinction between negligence and gross negligence, contended for by defendant, does not exist in this state. It was pointed out by the learned judge who wrote the *Wann Case*, in the subsequent case of *McPheters v. Hannibal & St. J. R. Co.* 45 Mo. 22, that "there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet." *Grill v. General Iron Screw Collier Co.* 12 Jur. N. S. 727; *Lemon v. Chanstor*, 68 Mo. 858, 30 Am. Rep. 799; *Wilson v. Brett*, 11 Mees. & W. 113; *Hinton v. Dibbin*, 2 Q. B. 646; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. ed. 876; Beven, Neg. § 16; Gray, Communication by Telegraph, p. 86; *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301. Many of the courts of this country adopted the view pronounced in the *Wann Case* in the earlier stages of the discussion, but the tendency of judicial decision at present is that these companies should be held to the exercise of ordinary care; that is to say, they are bound to have suitable instruments and competent servants, and see that the service rendered to their patrons is performed with the care and skill requisite to their peculiar undertaking. Their reasons for so holding are entirely satisfactory to us. *Ayer v. Western U. Teleg. Co.* 79 Me. 498; *Tyler v. Western U. Teleg. Co.* 60 Ill. 421, 14 Am. Rep. 38; *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301; *Western U. Teleg. Co. v. Orall*, 88

Kan. 679; *Western U. Teleg. Co. v. Howell*, Id. 685; Bigelow, Cases in Torts, 603; *Western U. Teleg. Co. v. Allen*, 66 Miss. 549; *Marr v. Western U. Teleg. Co.* 85 Tenn. 529; *Sweetland v. Illinois & M. Teleg. Co.* 27 Iowa, 433, 1 Am. Rep. 285; *Harkness v. Western U. Teleg. Co.* 73 Iowa, 190. In *Sweetland v. Illinois & M. Teleg. Co.* 27 Iowa, 433, 1 Am. Rep. 285, Judge Dillon criticises the *Wann Case* in these words: "There is a dictum in *MacAndrews Case*—the first case which arose (17 C. B. 8, 1855), to the effect that by regulations the companies may protect themselves from liability for mistakes in unrepeatable messages, except those caused by their gross negligence, and this expression has been incautiously copied and used arguendo by other courts, as, for instance, in *Wann v. Western U. Teleg. Co.* 37 Mo. 472, 90 Am. Dec. 395." *MacAndrews Case* was an English case, and based upon an English doctrine that a common carrier may contract against his own negligence,—a doctrine repudiated by all American courts, except, perhaps, New York. See also *Western U. Teleg. Co. v. Fontaine*, 58 Ga. 433; *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western U. Teleg. Co. v. Cohen*, 78 Ga. 522; *Gillis v. Western U. Teleg. Co.* (1889) 61 Vt. 461, 4 L. R. A. 611; *Thompson v. Western U. Teleg. Co.* 64 Wis. 531, 54 Am. Rep. 644; *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744. Because we think that both reason and the weight of authority are against the decision in the *Wann Case*, and as no rule of property is involved, that case is overruled.

2. Having reached the conclusion that the defendant was bound to exercise ordinary care in transmitting the message to plaintiff, the next inquiry arises, Was there sufficient evidence to justify the verdict? Did plaintiff establish a prima facie case? It was established beyond peradventure that the message was not transmitted as it was delivered to defendant; that plaintiff acted upon it as received by her. When this was shown, a prima facie case of negligence was established, and the burden of disproving the negligence was cast upon defendant, and it made no explanation whatever. *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; Gray, Communication by Telegraph, § 77, and authorities cited; *Tyler v. Western U. Teleg. Co.* 60 Ill. 421, 14 Am. Rep. 38; *Smith v. Western U. Teleg. Co.* 57 Mo. App. 259; *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 801-813; *Bartlett v. Western U. Teleg. Co.* 62 Me. 209, 16 Am. Rep. 437; *Western U. Teleg. Co. v. Carew*, 15 Mich. 525.

3. There was no error in admitting in evidence § 1329 of the Statutes of Iowa (which provides that "the proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any of the duties required by law"), and the testimony of Judge E. H. Stiles, who for many years was the official reporter of the decisions of the supreme court of Iowa, and who was first qualified as being familiar with the unwritten law of Iowa. The objection was simply that it was incompetent, irrelevant, and immaterial, and the message was not governed by the laws of that state. The contract

was made in Iowa, and, according to its terms, it was to be partially performed in that state. Indeed, it is quite evident that its breach occurred in that state. Does the circumstance that it was to be partially performed in Missouri exempt it from the laws of Iowa? We think most clearly not. Like a contract of affreightment, its validity and interpretation ordinarily are to be governed by the law of the state in which it was made. The statute of Iowa in no sense attempts to regulate interstate communication by telegram. Both parties to this agreement for the transmission of the message resided in Iowa. The tariff was paid and defendant entered upon the performance of the contract in that state. The statute and laws of Iowa were therefore pertinent and admissible, and determined the effect of said contract. *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 416; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 457, 32 L. ed. 797.

4. But it is urged that, even if defendant is liable for negligence under the circumstances, still the loss of the difference between the price received and the actual market value of the lot is not the proximate result of that negligence,—in other words, is not the natural and reasonable consequence of defendant's mistake; and the principle is invoked that no one can recover damages which he can avoid by diligent effort upon his own part. Let us examine this view of the case. This message was not in cipher. The defendant was fully advised of its importance on the face of the message, and, after being so advised, its agent assured plaintiff that it had been repeated, and she could rely upon its correctness. In this way plaintiff was led to believe she was offered \$1,900 for her property. Being willing to part with it for that sum, she wired acceptance of the proposition made. The proposal was only \$1,300, but in this way she was made to accept that proposal. Her agent was clothed not only with apparent, but actual, authority to sell for \$1,300, so far as he was advised. Being thus empowered to sell, he made a binding contract, and accepted a part of the purchase money. The deed was forwarded, and he delivered it. All this was done upon reliance on the correctness of defendant's action. Could a more natural consequence ever follow a transaction than this loss did upon the mistake of defendant? Does it lie in defendant's mouth to speculate how plaintiff or her agent, by the exercise of care, which it failed to exercise, might have avoided her contract with the purchaser? Has the defendant the right to require plaintiff to enter upon a long and doubtful litigation to rescind the contract, which was fully executed by delivery of her deed and the receipt of the purchase money? We most clearly think not. The cases cited by learned counsel do not meet this case. Here the damages are the direct result of defendant's negligence. Moreover, they had fully accrued when plaintiff discovered the mistake. There were no means of avoiding them except to sue the blameless purchaser or the negligent company. She chose the latter course, and we think properly. Plaintiff's agent received her instructions by means of defendant's wire and acted in good faith, and it would seem he ought

not to be mulcted in damages for so doing. The purchaser dealt, not by means of the telegraph, but directly with the agent, apparently clothed with full power to sell. His vendor had selected the telegraph as the means of communication, and, as between vendor and vendee, the vendor should bear the loss occasioned by that means, in the absence of any evidence of fraud or knowledge of error on part of the vendee. In this case the question does not arise as to whether plaintiff was bound by the acts of the telegraph company as her agent. She was bound by the act of her own agent, who entered into a binding contract in her name with the vendee. We think the proper measure of damages under the circum-

stances was the difference between the actual market value of the lot and the price received by the mistake occasioned by defendant's negligence.

5. As to interest, as it was conceded on the trial that interest was recoverable, and defendant's counsel named the amount at \$100, it is clearly no ground for reversing the case. While the jury might or might not give it, when both parties act upon the presumption that, if a recovery is justifiable, interest should follow, it presents no ground of substantial error.

The judgment is affirmed.

Sherwood and Burgess, JJ., concur.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* Warner M. BATEMAN *et al.*,

v.

August H. BODE *et al.*

(.....Ohio.....)

"The act of April 17, 1896 (22 Ohio Laws, p. 186), which prohibits the name of any candidate for office from being placed upon the official ballot more than once, is a valid law.

(November 13, 1896.)

APPPLICATION for a writ of mandamus to compel defendants, constituting a board of election supervisors, to print certain names in a certain manner upon ballots to be used at a coming election. *Denied.*

Statement by Burket, J.:

The defendants constitute the board of elections of Hamilton county, and are *ex officio* deputy state supervisors of elections in said county. The proceeding is a petition in mandamus to compel said board to place the names of Alexander B. Huston and Alfred B. Benedict upon both the "Democratic judicial ticket" and upon the "Lawyers' judicial ticket," said two persons having been duly nominated by the parties representing both of said tickets. The board refused to place said names upon both tickets, but offered to place them upon such tickets as the persons might respectively designate, and, upon failure to so designate, to place them upon the Democratic ticket, as that nomination was first certified to the board.

Messrs. E. W. Kittredge, L. C. Black, and William Worthington, for relators:

Const. § 2, art. 1, declares that "government is instituted for the equal protection and benefit of the people."

This court has recently denounced the law

*Headnote by the Court.

placing an unequal tax upon inheritances, as being in violation of this section.

State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218.

And, in the same volume, it denounced a law imposing a burden upon a certain class of litigants for violating the same provision.

Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L. R. A. 886.

Equality of right in the exercise of the elective franchise is not less important, nor less secured by this article of the Bill of Rights, than equality of right to exemption from an unequal tax, or from a partial imposition of costs in the course of the administration of justice.

All elections shall be by ballot.

Const. art. 5, § 2.

In adopting a system for voting the legislature of Ohio has no right to deprive the voter of any material and substantial right or safeguard that was intended to be secured to him by the requirement that the election should be "by ballot," as that word was understood when the Constitution was framed.

The consideration which must, of necessity, in the great majority of cases, determine the electors' choice, is knowledge of who has selected and indorsed the several candidates for whom he is called upon to vote.

A law which provides for furnishing information to one party, upon the ballots themselves, of this controlling fact, and denies the same means to another class; and a law which enables the former class to vote by a single mark for all the candidates of their choice, thus determined, and denies this privilege to another class,—denies equality of right in the exercise of the elective franchise.

Fisher v. Dudley, 74 Md. 246, 13 L. R. A. 586; *Simpson v. Osborn*, 52 Kan. 829; *State, Christy, v. Stein*, 85 Neb. 860; *Williams v. Dalrymple*, 183 Mo. 62.

Every law in this state regulating the elective franchise must operate impartially and affect

NOTE.—As to the validity of a statute permitting a candidate to have his name appear but once on an 34 L. R. A.

official ballot, see also *Todd v. Election Comm.* (Mich.) 29 L. R. A. 380.

equally the exercise of the right by every voter.

Monroe v. Collins, 17 Ohio St. 666; *Daggett v. Hudson*, 48 Ohio St. 548, 54 Am. Rep. 832.

Messrs. Thomas McDougal, Lawrence Maxwell, Jr., J. W. Worthington, G. H. Wald, H. D. Peck, and Philip Rootinger also for relators.

Mr. August H. Bode, for defendants:

When the power of the general assembly is drawn into question, the proper inquiry is whether such an exercise of legislative power is clearly prohibited by the Constitution.

The grant of power being general, the question is as to the existence of a limitation arising from special prohibition.

Such prohibition must either be found in express terms, or be clearly inferable by necessary implication from the language of the instrument, when fairly construed according to its manifest spirit and meaning.

Lehman v. McBride, 15 Ohio St. 592; *Cass v. Dillon*, 2 Ohio St. 607; *State, Evans, v. Dudley*, 1 Ohio St. 487.

In all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right.

Copen v. Foster, 12 Pick. 485, 23 Am. Dec. 682.

In order to hold such laws unconstitutional they must be clearly so, and if they will bear a construction consistent with the Constitution, they will receive that construction, and be upheld.

Monroe v. Collins, 17 Ohio St. 665; *Lehman v. McBride*, 15 Ohio St. 592; *Cooley, Const. Lim.* § 602, *Paine, Elections*, § 801; *People v. Morris*, 80 Mich. 687, 8 L. R. A. 685.

The Constitution of Michigan is similar to our own. The same proof is required in Michigan as in Ohio to find a statute unconstitutional.

Under such similar circumstances a decision of the supreme court of Michigan is entitled to especial consideration, and the case of *Todd v. Elections Comrs.* 104 Mich. 474, 29 L. R. A. 380, would almost seem decisive.

Messrs. F. S. Spiegel and Fredrick Hertenstein also for defendants.

Burket, J., delivered the opinion of the court:

It is conceded by counsel for the relators that § 6a of the act of April 17, 1896 (92 Ohio Laws, p. 185), prohibits the printing of said names twice on the same ballot, but it is insisted that said section, in that regard, is unconstitutional. The only question, therefore, to be determined in this case, is whether the general assembly has the power to pass an act providing, as this one does, that the name of a candidate for office shall appear but once upon the ticket or ballot prepared by the board of elections. Full legislative power is vested in the general assembly, by § 1 of art. 2 of our Constitution, and the power in question is included in that grant of power, unless taken

away by some other provision of the Constitution. The only limitations upon this general grant of power cited by counsel for the relators in this case are § 2 of art. 1, which reads: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, . . ." and § 2 of art. 5, which reads: "All elections shall be by ballot." The relators seek to compel the board of elections to place the names of the two candidates upon both the Democratic and upon the Lawyers' judicial tickets. This necessarily concedes that those tickets are ballots, within the meaning of the Constitution, because, if they are not ballots, there is no right to have these or any other names placed thereon. If they are ballots when the names of certain candidates are on twice, they are equally ballots when the names are on but once. As the Constitution is silent as to the number of times a candidate's name shall appear on a ballot, the matter is open to be regulated by the general assembly. The ballot now authorized by statute is different in form from that in use at the time of the adoption of the Constitution, but it is nevertheless a ballot. No form of ballot is prescribed by the Constitution, and therefore the general assembly is free to adopt such form as, in its judgment, shall be for the best interests of the state. The election must be by ballot, but the form of the ballot, so long as it is a ballot, is left to the sound discretion of the general assembly. The ballot or ticket in question is clearly a ballot, and therefore does not contravene the 2d section of the 5th article of the Constitution. By the 2d section of the 1st article of the Constitution it is provided, in substance, that government is instituted for the equal protection and benefit of the people. It seems clear that the placing of the name of each candidate upon the ballot once, and only once, would be equal protection and benefit to all the candidates. To place the name of one on the ballot in two places, and the name of his opponent in only one place, would not be exactly fair. It would give the candidate whose name appears twice an advantage over the candidate whose name appears but once. So that the statute, instead of being in conflict with this section of the Constitution, is in harmony with it, and may have been passed for the purpose of doing away with this advantage which existed under the former statute. It is a proper regulation of the elective franchise, well calculated to avoid and prevent corruption and fraudulent practices, as well as undue advantage to one candidate over another.

But it is argued that the voters have a right to have the names appear upon both ballots, so that they may more easily vote for the candidates of their choice. No legislature and no court can know in advance how the electors desire to vote, and if an opportunity is given them to vote for the candidates of their choice, by placing the names once, in plain print, upon the ballots, it is all that can in fairness be required. The ballot is the same for all, and gives equal protection and benefit to all. There is no discrimination against or in favor of any one; and, if any inequality arises, it arises, not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable.

It is always much more difficult for some electors to cast their ballots than for others. Distance, bad roads, means of transportation, bad health, and many other considerations may and do render it much more difficult for some men to cast their ballots than others. But these difficulties inhere to the men themselves, and not in the law. Before the law all stand equal, with equal protection and equal benefit; and, if their condition becomes such as not to enable them to enjoy the protection or reap the benefit, it is their fault or misfortune, and not the fault of the law. The act in question was passed to secure purity in our elections. Certain evil practices had grown up by reason of placing the name of a candidate upon the same ballot more than once, and the general assembly attempted to prevent such practice by providing that the name of each candidate should appear on the ballot but once. This is a reasonable regulation of the elective franchise, and not in any sense a destruction thereof. But grant, as it is urged by the relators, that some voters may be somewhat inconvenienced, by reason of the name of each candidate appearing but once upon the ballot; yet such voters are not thereby deprived of any protection or benefit in casting their ballot. The inconvenience is only that which is experienced by everyone who votes other than a straight ticket. Such slight inconvenience to the voter should be endured, rather than permit the advantage which one candidate has over another when the name of one is placed upon the ballot twice, and the name of the other but once.

The subject is clearly within legislative discretion, and that body has the power to provide that the name of each candidate shall appear but once upon the official ballot, or it may permit the name to appear more than once. Whatever inconvenience there may be to either the candidate or voter in such cases does not rise to the importance of a failure of equal protection or benefit, and therefore does not conflict with the provisions of the 2d sec-

tion of our Bill of Rights. When rights secured by the Constitution seem to conflict when applied to the practical affairs of men, the general assembly is at liberty to so adjust the matter as to cause the least injury to the conflicting interests, and thereby protect the rights of the community as a whole. The equal protection and benefit guaranteed by the Constitution does not cover every little inconvenience which may be distorted or reasoned into a seeming inequality, but has reference rather to cases in which it is attempted by statute to grant rights or privileges to some which are withheld from others in the same substantial situation or relation. The case of *Fisher v. Dudley*, 74 Md. 242, 12 L. R. A. 586, is cited by the relators, and relied upon, to show that the names of candidates may appear more than once on the official ballot. In that case the power of the legislature to pass the act was not questioned, but the case involved the construction of a statute, which did not prohibit the name from appearing more than once on the official ballot; and the court held that, not being prohibited, it might properly appear as many times as nominations of the same person had been made by different parties. Such was the practice in this state, under a similar statute, before the enactment of the present statute. The Maryland case would therefore be an authority to show that our practice was right under the former statute, but it can have no bearing upon the question as to whether the general assembly has the power to prohibit the names from appearing more than once upon the official ballot. The case of *Todd v. Election Comrs.* 104 Mich. 474, 29 L. R. A. 330, and 104 Mich. 480, 29 L. R. A. 334, is very much like the present case, and fully supports the conclusions here reached.

We regard the act in question as clearly within the power of the general assembly, and therefore a valid law.

Writ refused.

RHODE ISLAND SUPREME COURT.

Frederick W. HARTWELL, Trustee, etc.,
et al.,

v.
Mary Abby TEFFT.

(.....R. L.....)

An adopted child is the "lawful issue" of a person within the meaning of a will making a gift to such person with remainder to his "lawful issue," under Pub. Laws 1866, chap. 627, making an adopted child for all purposes of inheritance and all other legal consequences and incidents a child of the parents by adoption the same as if born in lawful wedlock, except that he shall not take property expressly limited to "the heirs of the body or bodies" of such parents.

(November 21, 1896.)

BILL for the construction of the will of Dexter Thurber, deceased, which sought to ascertain the construction of a provision which defendant claimed to be in her favor *Judgment for defendant.*

The facts are stated in the opinion.

Messrs. Bassett & Mitchell, for complainants:

The rights of an adopted child are purely statutory, and are to be strictly construed.

The act, being in derogation of the common law, is to be strictly construed as against any person claiming any rights under it in contravention of the general laws of inheritance, founded upon natural relationship.

Keegan v. Geraghty, 101 Ill. 83; *Re Jessup's Estate*, 81 Cal. 408, 6 L. R. A. 594; *Ex parte*

NOTE—As to the legal status of adopted children, see *Warren v. Prescott* (Me.) 17 L. R. A. 485, and *note*; *Van Matre v. Sankey* (Ill.) 23 L. R. A. 34 L. R. A.

665; and *Murphy v. Portrum* (Tenn.) 30 L. R. A. 263.

Chambers, 80 Cal. 216; *Wallace v. Rappleye*, 103 Ill. 229; *Tyler v. Reynolds*, 53 Iowa, 148; *Gill v. Sullivan*, 55 Iowa, 841; *Shearer v. Weaver*, 56 Iowa, 578; *Wyeth v. Stone*, 144 Mass. 441; *People v. Congdon*, 77 Mich. 351; *Morrison v. Jessup's Estate*, 70 Mich. 297; *King v. Davis*, 91 N. C. 142; *Upon v. Noble*, 35 Ohio St. 655; *Ex parte Clark*, 87 Cal. 638; *Sutherland*, Stat. Constr. § 400, p. 510, § 189, p. 182; *Smith v. Howorth*, 53 Mo. 88; *State v. Clinton*, 67 Mo. 880, 29 Am. Rep. 506; *Fankee v. Thompson*, 51 Mo. 234; *Mueller v. Kassmann*, 84 Mo. 323.

Statutes of adoption should be strictly construed as against the adopted child.

Keegan v. Geraghty, *Ex parte Chambers*, *Wallace v. Rappleye*, and *Re Jessup's Estate*, *supra*.

The adopted child cannot take from the ancestor of the adopting parent.

24 Am. & Eng. Enc. Law, p. 424; *Meador v. Archer*, 65 N. H. 214; *Sunderland's Estate*, 60 Iowa, 732; *Helms v. Elliott*, 89 Tenn. 446, 10 L. R. A. 635; *Keegan v. Geraghty*, 101 Ill. 26.

The rules of construction of wills must manifestly leave the question whether or not the word "children" or "issue" or other words shall be held to include adopted children, very much dependent upon the circumstances of the case and the context of the will in question.

Where the words "issue" or "children" or "heirs" were used in the will, a child adopted after the execution of the will could not take under these words.

Jenkins v. Jenkins, 64 N. H. 407; *Russell v. Russell*, 84 Ala. 48; *Barnum v. Barnum*, 42 Md. 251; *Schafer v. Eneu*, 54 Pa. 804; *Bowdlear v. Bowdlear*, 112 Mass. 184.

And this principle has been carried so far as to refer, not only to the will of the ancestor, but to the will of the parent by adoption also.

Bowdlear v. Bowdlear and *Russell v. Russell*, *supra*.

Mr. Willard B. Tanner, for respondent:

In *Sevall v. Roberts*, 115 Mass. 263, the court said that the words "child," "issue" and "lawful issue" do not mean heirs of the body, and the adopted daughter took the whole estate under the settlement.

The language of the decision is broad enough to cover a case where the adopted child would take from an ancestor.

Whitmore, Law of Adoption, preface, p. 4.

The testator must be held then to have made his will in view of the statutory meaning of the word "issue," and the power of the granddaughter to give to an adopted child all the rights and status of issue, and therefore to have contemplated that an adopted child might take under his will.

Johnson's Appeal, 88 Pa. 346; 8 Am. & Eng. Enc. Law, p. 801.

The section in the law of descent which uses the word "child" must be understood as merely laying down the general rules of inheritance, and not as completely defining how the status is to be created which gives the capacity to inherit.

Power v. Hasley, 85 Ky. 671; *Fosburg v. Rogers*, 114 Mo. 123, 19 L. R. A. 201.
34 L. R. A.

An adopted child has the status of a child if he is not in fact a child.

2 Austin, Jur. 3d ed. 706, 709, 712, 974.

Warren v. Prescott, 84 Me. 483, 17 L. R. A. 435, is the same in principle as the case at bar.

The court held that the adopted child would take as a lineal descendant of the legatee,—not as a lineal descendant by birth, but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth.

Re Newman's Estate, 75 Cal. 218; *Johnson's Appeal*, 88 Pa. 346; *McGunnigle v. McKee*, 77 Pa. 81, 18 Am. Rep. 428; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Pace v. Klink*, 51 Ga. 220; *Loring v. Thorndike*, 5 Allen, 257; *Rowan's Estate*, 6 Pa. Co. Ct. 461.

In *Reinders v. Koppelman*, 94 Mo. 338, the court observes that the words "heirs at law" and "lawful heirs" mean in common language those upon whom the descent is cast by law, not an heir by adoption, and that the testator would have used the words "adopted heir" or "heir by adoption," if he had meant to include the adopted child of the wife.

But see *Buckley v. Frazier*, 153 Mass. 525; *Power v. Hasley*, and *Fosburg v. Rogers*, *supra*.

In the case at bar the only indication of intention outside of the use of the words "lawful heirs" are the provisions that the property shall go to lawful issue agreeably to the laws of descent. The latter words would indicate an intention in accordance with the logical result of the statute of adoptions, which places the adopted child in the place of lawful issue under the statute of descents.

Sevall v. Roberts, 115 Mass. 263; *Moran v. Stewart*, 122 Mo. 295; *Fosburg v. Rogers*, and *Humphries v. Davis*, *supra*; *Simmons v. Burvell*, 8 Misc. 888; *Kickford v. Knox*, 67 Tex. 200; *Wagner v. Varner*, 50 Iowa, 532; *McGunnigle v. McKee*, and *Pace v. Klink*, *supra*; *Re Wardell's Estate*, 57 Cal. 484; *Barnes v. Allen*, 25 Ind. 222; *Burrage v. Briggs*, 120 Mass. 108; *Re Newman's Estate*, 75 Cal. 218; *Power v. Hasley*, 85 Ky. 671; *Wyeth v. Stone*, 144 Mass. 441.

Stiness, J., delivered the opinion of the court:

The will of Dexter Thurber, late of Providence, left a fund to trustees, to pay the income, in stated proportions, to children and grandchildren, and upon their death to pay their respective portions to their lawful issue; and, if any of them should die without leaving lawful issue, then a gift over. The testator left a granddaughter, Emma Thurber Brown, who married Lyman B. Tefft. She died leaving no issue of her body, but after the death of the testator, she joined her husband in a petition to the municipal court of Providence for the adoption of the respondent, Mary Abby Tefft, the child of her husband by a former wife, as their child, pursuant to R. I. Pub. Stat. chap. 164, which petition was granted, and a decree entered. Mrs. Tefft having died, this bill is filed to ascertain whether the fund goes to her adopted daughter, under the bequest to her lawful issue.

Our statute for the adoption of children (Pub. Laws 1866, chap. 627) says: "A child so

adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." The argument for the complainant is, that in using the word "issue," the testator had in mind "heirs of the body" of his granddaughter, and so the case is really within the exception of the statute. The argument is based both upon a strict construction of the word "issue," and the fact that the will was made in 1858, before the statute for the adoption of children. A codicil was added in 1865, another in 1867, and a third in 1869. The last two codicils were after the statute, and as they do not revoke the will, but expressly declare that they are to be a part and portion of the will and codicils, they are a republication of the will as of the later date. A part of the argument is thus disposed of, although the fact remains that the adoption did not take place until after the testator's death. It was, however, in his lifetime, and before the last two codicils to his will, a possibility which is presumed to have been known to him, and in view of such possibility his will must be construed.

The meaning of the word "issue," in a will, where, as in this case, nothing appears to limit its legal import, was carefully considered in *Pearce v. Rickard*, 18 R. I. 142. Following the well-settled current of authority, it was held that the word, so used, includes all descendants; and as the statute gives to an adopted child the status of a descendant, and all the legal consequences and incidents thereof, the same as though he were born in lawful wedlock, there could be no question in such a case as this were it not for the exception of a limited estate. The question then is whether this fund is within the exception. In Maine, under a statute similar to ours, it was held in *Warren v. Prescott*, 84 Me. 488, 17 L. R. A. 485, that the exception relates only to an inheritance as an heir of the body. The reasoning is that, where an estate is limited to one and the heirs of his body, it must go to those to whom it is expressly limited, and that an adopted child, although he is to be regarded as a child and heir and a lineal descendant of his adopting parents, does not answer the description of an heir of the body, and so he cannot take the property out of the line to which it was limited. An adopted child is out, by the statute, into the status of a child, issue, or lineal descendant, but not that of an heir of the body. Hence, as to a legacy, when a legatee dies before a testator, leaving an adopted child, such child answers the descrip-

tion of a lineal descendant, who may take the legacy under a statute which prevents legacies from lapsing when the legatee leaves lineal descendants. The reasoning seems to be conclusive. It is the same result that was reached in *Sewall v. Roberts*, 115 Mass. 262, although the reasoning in the latter case is not so fully and clearly set forth as in the former. The court holds that the words "heirs of the body" are used in the exception in their primary, technical sense, with which the words "children" and "issue" are not equivalent terms. See also *McGunnigle v. McKee*, 77 Pa. 81, 18 Am. Rep. 428. Several cases have been cited which appear to take a different view, but we think they are clearly distinguishable from the case at bar. For example, in *Jenkins v. Jenkins*, 64 N. H. 407, under a similar devise and statute, the court said that the property was not expressly limited to the heirs of the body or bodies of the parents by adoption, but being a devise of land, and the statute of adoption of children not having been passed until after the death of the testator, he must have intended an heir in fact, and not one created for the purpose by subsequent legislation and judicial proceedings. A statute of New Hampshire defined the word "issue" to mean the lawful lineal descendants of the ancestors, and so the statute for the adoption of children could not operate to act retrospectively upon the will already effectual, so as to turn a devise into a different channel from that selected by the testator. Here the statute was passed before the death of Dexter Thurber. In *Keegan v. Geraghty*, 101 Ill. 26, the question was whether an adopted child could take by inheritance from a child of one of the adopting parents by a subsequent marriage, the adopted child not being a sister in fact. It was held that she could not. The statute of Pennsylvania is very different from ours. It provides that an adopted child shall have all the rights of a child and heir of the adopting parent. Hence in *Schafer v. Eneu*, 54 Pa. 304, it was held that, in a devise of land to one and her children, an adopted child could not take, especially in view of the fact that the will took effect in 1851, and the statute of adoption was not passed until 1855, when vested interests had attached. These cases will suffice to show the distinctions. But even upon the assumption that the words are sufficient, if they had related to realty, to create an estate tail, the result would be the same in this case, because the gift was of personality, which, under such conditions, becomes an absolute gift. *Bailey v. Hawkins*, 15 R. I. 578; *Albee v. Carpenter*, 12 Cush. 382.

An absolute gift of a fund to Emma Thurber Brown would, of course, now go to her adopted child. Our opinion is that the case is not within the exception of the statute, and that the adopted daughter, having the same status as a child born in lawful wedlock, and hence the same as "lawful issue," is entitled to take the fund under the bequest.

WISCONSIN SUPREME COURT.

Joseph EINGARTNER, *Appt.*,
v.
ILLINOIS STEEL COMPANY, *Resp.*

(.....Wis.....)

1. A citizen of one state may maintain in the courts of another state a transitory action arising at his residence against another citizen of the same state found in the other state, under the provision of the United States Constitution guaranteeing to the citizens of each state all the privileges and immunities of citizens in the several states, which the courts of the latter state have no discretionary power to dismiss.
2. A "carpenter gang" whose duty it is to replace the planks about a machine called the "bloom rolls" after their removal for the purpose of attaching new rolls, are not fellow servants of one employed to oil the machine, and their negligence in replacing the planks is chargeable to the master.
3. The mere existence of a slight variance of view, not amounting to a fundamental difference of policy, in the state in which a cause of action under the common law arose, and that in which it is sought to be enforced, does not deprive the court of the latter state of jurisdiction of the subject-matter.
4. The law of the forum prevails as to the form of the remedy, the conduct of the trial, and the rules of evidence in an action upon a transitory cause of action arising in another jurisdiction.
5. The statute of limitations of the state in which a cause of action arose is not available in an action in another state for the enforcement of such cause of action, unless it is offered in evidence.

(October 12, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Statement by Winslow, J.:

This is an action to recover for personal injuries suffered by plaintiff on the 4th day of September, 1891, in the respondent's rolling mill, in the city of Chicago, Illinois, the plaintiff being at that time and now a citizen of the state of Illinois, and the defendant being an Illinois corporation. The answer set up as a defense the citizenship of the parties in Illinois, and the fact that the accident had occurred in the state of Illinois, and that a law of the state of Illinois limited the time in which actions for personal injuries might be brought to two years after the happening thereof, and, therefore, that this action was barred by said statute. Upon the trial, after the plaintiff's evidence had been introduced, a peremptory nonsuit was granted. It appeared by the evidence that at the time of the accident, and for some

time prior thereto, the plaintiff was employed by the defendant in its rolling mill, and that his particular business was to oil a machine called the "bloom rolls." This was a large, heavy machine, standing 8 feet or more high from the floor, operated by steam power, and having upon one side a series of cogwheels meshed into each other. It appeared by the evidence that at intervals a section of the floor at the side of this machine, close to the series of cogwheels, had to be removed in order to put in new rolls. It further appears that this removal of the floor was done by a separate gang of workmen, called the "sailor gang," and that, after the replacing of the rolls, the floor was put down again by another gang of workmen, called the "carpenter gang." Each of these gangs worked under a separate foreman. The evidence tends to show that plaintiff had nothing to do with either the taking up or the putting down of the floor, or with the work of either the sailor gang or the carpenter gang. The plaintiff testifies that at the time of the accident he was about to oil the part of the machinery near the cogwheels; that he stepped upon the end of a loose plank in that part of the floor which had to be removed when the rolls were changed, and the plank tipped up, thus throwing his right hand into the cogs, and severing it. The plaintiff's version of the transaction was to a certain extent corroborated by other employees who testified to seeing the loose board immediately after the accident. It appeared by the evidence that this section of the floor had been taken up, and the rolls changed, and the floor relaid, two or three days before the accident happened; that plaintiff was one of a night crew, working from 6 o'clock in the evening until 7 o'clock in the morning; and that he had to oil the machine every fifteen minutes or so, and was obliged to walk over this portion of the floor where the plank was loose every time, but that he had not noticed that the plank was loose. The accident happened just before 7 o'clock in the morning. The plaintiff also offered in evidence the following decisions of the supreme court of the state of Illinois: *Lake Shore & M. S. R. Co. v. Hessons*, 150 Ill. 546; *Lanark v. Dougherty*, 153 Ill. 185; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Lobby, McN. & L. v. Scherman*, 146 Ill. 540; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215. At the close of the evidence, a motion for nonsuit was granted, and judgment was rendered dismissing the complaint upon the merits, for the following reasons: "First. Because it appears from the evidence that the occurrence out of which the alleged cause of action arose took place in the state of Illinois, and not in the state of Wisconsin; that both the plaintiff and defendant were at the time of such occurrence, ever since have been, and now are, residents of the state of Illinois, and not of the state of Wisconsin; that the alleged cause of action depends upon peculiar rules laid down

NOTE.—As to the effect of the constitutional guaranty of equal privileges and immunities upon the right of citizens to bring actions in courts of 34 L. R. A.

other states, see portion of note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A., on page 568.

by the courts of Illinois which do not prevail in Wisconsin, and never have done, and which are hostile and obnoxious to the law of the state of Wisconsin, as interpreted by the courts thereof; and that this court, therefore, in this action, is called upon to administer the laws of the state of Illinois, which it has no jurisdiction to do. Second. Because the plaintiff has wholly failed to show by evidence any negligence whatever on the part of the defendant which caused or contributed to the injury which is the basis of the action." From this judgment the plaintiff appealed.

Mr. C. H. Van Alstine, with Mr. J. W. Wegner, for appellant:

The court had jurisdiction of the subject-matter of the action.

Leonard v. Sparks, 117 Mo. 108.

An action for a personal injury is a transitory action, and when the cause of action arises in one state, the action may be brought in another state, provided, of course, jurisdiction of the person can be obtained.

Curtis v. Bradford, 33 Wis. 190; *Nonce v. Richmond & D. R. Co.* 33 Fed. Rep. 429; *Ackerson v. Erie R. Co.* 31 N. J. L. 309; *Hannibal & St. J. R. Co. v. Mahoney*, 42 Mo. 467; *Mason v. Warner*, 31 Mo. 508; *Smith v. Bull*, 17 Wend. 323; *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *Latourette v. Clarke*, 45 Barb. 327; *Hoy v. Smith*, 49 Barb. 860; *Northern O. R. Co. v. Scholl*, 16 Md. 331; *Robinson v. Armstrong*, 34 Me. 145; *Burrell v. Benjamin*, 15 Mass. 354; *Tyson v. McGuineas*, 25 Wis. 656; *Swift v. James*, 50 Wis. 540; *Mo-Leod v. Connecticut & P. Rivers R. Co.* 58 Vt. 727; *Peabody v. Hamilton*, 106 Mass. 217; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed 439; *Mostyn v. Fabrigas*, 1 Cowp. 161.

Whether there was negligence on the part of the defendant was a question for the jury.

The cause of action having arisen in Illinois, the law of that state governs the right and the law of Wisconsin governs the remedy. The common-law duty incumbent upon every employer and which he cannot delegate to others in such manner as to relieve himself from the consequence of his nonperformance, is to furnish his employee a reasonably safe place in which to work, and to use proper diligence to keep such place in a reasonably safe condition. The failure of the defendant to keep the place assigned to the plaintiff for the performance of his work in a safe condition is of the very gist of the action.

Libby, McN. & L. v. Scherman, 146 Ill. 541; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243, 18 L. R. A. 215.

The court can say, as matter of law, that the injury was not caused by the negligence of a fellow servant.

Chicago & A. R. Co. v. Kelly, 127 Ill. 637; *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115; *Lake Erie & W. R. Co. v. Middleton*, 46 Ill. App. 218; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57.

The law of Illinois respecting contributory negligence, as proved on the trial, is as follows:

The doctrine of comparative negligence as announced in the earliest cases is no longer the law of Illinois. The doctrine announced 84 L. R. A.

in the later decisions requires as a condition of recovery by the plaintiff that the person injured must be found in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant.

Lake Shore & M. S. R. Co. v. Hessions, 150 Ill. 546; *Lanark v. Dougherty*, 153 Ill. 163; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581.

Messrs. Van Dyke, Van Dyke & Carter, for respondent:

The courts of this state are not bound absolutely to take jurisdiction in such cases, but they are vested with the sound discretion to take or refuse jurisdiction according to the circumstances of the case.

Gardner v. Thomas, 14 Johns. 134, 7 Am. Dec. 445; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Morris v. Missouri P. R. Co.* 78 Tex. 17, 9 L. R. A. 349.

The plaintiff was the fellow servant of the person or persons who failed to nail or fasten the board, to the tipping of which he attributes his accident, and because such negligence was the negligence of the fellow servant, as that term is understood and construed in this state, the plaintiff could not, if the cause of action had arisen here, recover against the defendant.

Cadden v. American Steel Barge Co. 88 Wis. 409; *Filbert v. Delaware & H. Canal Co.* 121 N. Y. 207.

If there is one common general object to be attained by the two servants, it is immaterial that the immediate object of their work is different.

Smith, Neg. 77; *Heine v. Chicago & N. W. R. Co.* 58 Wis. 525; *Fowler v. Chicago & N. W. R. Co.* 61 Wis. 159; *Pense v. Chicago & N. W. R. Co.* Id. 168; *Mathews v. Case*, Id. 491, 50 Am. Rep. 151; *Kliegel v. Weisel & V. Mfg. Co.* 84 Wis. 149; *Dwyer v. American Exp. Co.* 82 Wis. 307; *Van den Heuvel v. National Furnace Co.* 84 Wis. 637; *Stuts v. Armour*, Id. 623; *Blasinski v. Perkins*, 77 Wis. 9; *Johnson v. Ashland Water Co.* Id. 51; *Corcoran v. Delaware, L. & W. R. Co.* 126 N. Y. 678; *Stringham v. Hilton*, 111 N. Y. 188, 1 L. R. A. 433; *Beel v. New York O. & H. R. R. Co.* 70 N. Y. 171; *Fraser v. Red River Lumber Co.* 42 Minn. 520; *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L. R. A. 97; *Buckley v. Gould & O. Silver Min. Co.* 14 Fed. Rep. 833, note 140; *Hoar v. Morrill*, 62 Mich. 386; *Killea v. Faxon*, 125 Mass. 485; *Quincy Min. Co. v. Kitts*, 42 Mich. 84.

Upon the question of how far the courts of one state will, in suits brought in them upon causes of action arising in another state between citizens of such other state, and depending for their existence upon peculiarities of the laws of such latter state, enforce such peculiar laws, there is a very wide and irreconcilable difference of opinion.

The decisions seem to range themselves in three principal divisions. First, those which hold that a transitory cause of action arising in one state under its laws will be enforced in any other state, although, as between her own citizens and the events from which it arose happening within her own borders no cause of action would arise which her courts could recognize.

Dennick v. Central R. Co. 108 U. S. 11, 26 L. ed. 439; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771.

The second class of cases lays down the rule that a right of action arising at the common law, or under a statute of another state than that in whose courts it is sought to be enforced, will be sustained, if such latter state has a similar though not identical statute, so that if the occurrence out of which it arose had happened in the state of the forum, a right of action would also have arisen from it there.

Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48, 38 Am. Rep. 491; *Lower v. Segal* (N. J.) 34 Atl. 945; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 18 L. R. A. 458; *Knight v. West Jersey R. Co.* 108 Pa. 250, 56 Am. Rep. 200; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 89.

The third class of cases holds that no action will lie in one state upon a right of action arising upon a statute of another state.

Anderson v. Milwaukee & St. P. R. Co. 87 Wis. 321; *Texas & P. R. Co. v. Richards*, 68 Tex. 375; *Richardson v. New York C. R. Co.* 98 Mass. 85; *Woodard v. Michigan Southern & N. I. R. Co.* 10 Ohio St. 121; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804; *Belt v. Gulf, C. & S. F. R. Co.* 4 Tex. Civ. App. 281; *Buckles v. Ellers*, 72 Ind. 220, 87 Am. Rep. 156; *Taylor v. Pennsylvania Co.* 78 Ky. 348, 39 Am. Rep. 244; *Willis v. Missouri P. R. Co.* 61 Tex. 432, 48 Am. Rep. 301.

If this were an action based upon an Illinois statute, it could not be maintained in this state.

But it is not such an action but depends upon the common law, which is, theoretically, at least, the same wherever it exists at all. And what it is, one court has as much right to determine as another.

Krogg v. Atlanta & W. P. R. Co. 77 Ga. 202; 1 Kent, Com. 470; *Normal School Dist. Bd. of Edu. v. Blodgett*, 155 Ill. 441, 31 L. R. A. 70; *Coburn v. Harrey*, 18 Wis. 148; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 613; *Gardner v. Michigan C. R. Co.* 150 U. S. 358, 37 L. ed. 1109; *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772.

Winslow, J., delivered the opinion of the court:

Two important questions arise in this case, viz.: (1) Whether the court could, in its discretion, dismiss the case because the parties were both residents of the state of Illinois, and because the cause of action arose in the state of Illinois, jurisdiction of the person of the defendant having been obtained within this state; (2) if the court could not dismiss the case for this reason, then whether the evidence of the plaintiff was sufficient to entitle him to have the case submitted to the jury upon the merits. These questions will be considered in the order indicated.

This is an action to recover damages for injuries to the person. It is therefore purely a transitory action, and the principle that the

courts of this state have jurisdiction to entertain such an action, although the cause arose in Illinois and the parties are residents of Illinois, is unquestioned. *Curtis v. Bradford*, 33 Wis. 190. A court of this state would even have jurisdiction of a transitory action of this nature where it arose in a foreign country, or on the high seas, and both parties to the action were aliens, provided jurisdiction of the person could be obtained. *Gardner v. Thomas*, 14 Johns. 184, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564; *Great Western R. Co. v. Miller*, 19 Mich. 312. But while it is held that a court has jurisdiction and may administer relief in an action between aliens brought upon a cause of action arising in foreign lands, it is also held that there is a certain discretion which may be used by the court in entertaining such actions, and that the court may dismiss such an action if, for any reason, it seems improper to take jurisdiction. In the present case it is practically claimed by defendant that this rule applies to such an action as the present; in other words, that citizens of another state of this Union are to be treated in the courts of this state precisely as if they were aliens, and that a cause of action arising in another state is to be treated as though it arose in a foreign country; and this really is the first question to be settled.

It is provided by the Constitution of the United States (§ 2, art. 4) that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The first attempt at a comprehensive definition of this clause of the Federal Constitution seems to be made in the case of *Corfield v. Coryell*, 4 Wash. C. C. 371, where Mr. Justice Washington, referring to this section of the Constitution, says: "The inquiry is, What are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. . . . They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes and impositions than are paid by the other citizens of the state, — may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental." The subject was again considered in *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449.

where it is said by Mr. Justice Clifford, who wrote the opinion in that case, referring to the words "privileges and immunities" in this section: "Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." In referring to the same subject in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, Mr. Justice Field, in the opinion of the court, after defining the object of the constitutional provision in question in quite similar terms, very aptly says: "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." These decisions are all referred to with approval in the opinion of the Supreme Court of the United States in the *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394. See, on this same subject, the following cases, which are in harmony with the cases just quoted; *Lemmon v. People*, 20 N. Y. 608; *Campbell v. Morris*, 3 Harr. & McH. 535. A case almost identical in its facts with the case before us is the case of *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511, where this provision of the Constitution of the United States is directly construed as guaranteeing the right to a citizen of another state to bring suits in the state of Michigan in any case where a citizen of Michigan was entitled to bring such suit. Indeed, we have been referred to no cases holding the contrary of this proposition, except, possibly, the case of *Morris v. Missouri P. R. Co.* 78 Tex. 17, 9 L. R. A. 849, where it was held that a Texas court might refuse to take jurisdiction of an action between a Choctaw Indian and a resident of another state, founded upon a cause of action accruing in another state. We do not, however, regard this case as of value as authority on this question, because it was held to be a local action, and not transitory. If this was the case, of course the courts of Texas could not entertain it, whatever the citizenship of the parties. Therefore, what is said at the close of the opinion with regard to the power of dismissing the case on account of the residence of the parties is *obiter*. Moreover, the question of the rights of a citizen of another state under the Constitution could hardly arise in a case where the plaintiff was a member of an Indian tribe, and consequently not a citizen of any state. We are entirely satisfied that one of the "privileges and immunities" referred to in the constitutional provision is the right to bring and maintain an action in the courts of the state. Any citizen of this state may bring an action in the circuit court of this state upon a transitory cause of action arising in another state, and against a citizen of another state, provided he can obtain jurisdiction of the person of the defendant in this state. This is one of the rights guaranteed him under our Constitution and laws. If the words "privi-

leges and immunities" in the constitutional clause in question refer to the right to maintain actions, then a resident of another state has the same right to bring an action in the courts of this state upon a cause of action arising in another state, and against a citizen of another state, that a citizen of this state has, because the Constitution guarantees him the same right as a citizen of this state. We entirely approve the doctrine held by the supreme court of Michigan in *Cofrode v. Gartner*, *supra*, and therefore hold that the trial court could not dismiss this action merely because the parties were both citizens of Illinois, and the cause of action arose in Illinois.

The question then arises whether the court was right in dismissing the case on the merits, either because no cause of action was proved, or on account of the supposed conflict of the laws of Illinois and Wisconsin. This court has held, as we have seen, that an action to recover for personal injuries negligently inflicted in another state is a transitory action, and is triable in the courts of this state, provided jurisdiction of the person is obtained. *Curtis v. Bradford*, *supra*. This doctrine is in accord with the decisions everywhere, and it is unnecessary to cite authorities. Another rule has been applied, however, by some of the decisions, with regard to actions founded on a statute of another state where such statute is inconsistent with the law of the forum. Thus, it has been held by this court in *Anderson v. Milwaukee & St. P. R. Co.* 37 Wis. 321, that the courts of this state will not enforce a cause of action arising in Iowa under a statute of that state making an employer liable to his employee for injuries suffered by reason of the negligence of his fellow servant, because it was the settled law of this state at that time that such an action would not lie. For cases holding similar doctrine, see *Story*, Conf. L. 8th ed. p. 844, § 625, note a; *Richardson v. New York C. R. Co.* 98 Mass. 85. This doctrine has been consistently disapproved by the Supreme Court of the United States, and by some other courts. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 489; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771. The question, however, does not arise in this case, and hence it is unnecessary to consider upon which side the weight of reason and authority preponderates. The present action is not founded upon any statute of one state not existing in others, but upon certain fundamental and well-settled principles of the common law which prevail in most states of the Union. The principles involved are, briefly: (1) Ordinary negligence by one person, proximately causing personal injury to another, to whom the first owes a duty of care, raises a right of action in the person injured. (2) In order to recover for such injuries, the injured person must himself have been in the exercise of ordinary care at the time of the injury. (3) A servant cannot recover damages of his master for injuries caused solely by the negligence of his fellow servant. (4) When the master undertakes to furnish the servant a place to work, with the preparation of which place the servant has nothing to do, then it is the master's duty to furnish a reasonably safe place to work, and this duty cannot be delegat-

ed; and the servant who prepares such place for work is not, in the eye of the law, a fellow servant with the other. These principles are well established in this state, and the decisions of the supreme court of Illinois offered in evidence on the trial show that they are recognized in that state. *Lake Shore & M. S. R. Co. v. Heasions*, 150 Ill. 546; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215; *Libby, McN. & L. v. Schervan*, 146 Ill. 540. Now, the complaint in the present case clearly states a cause of action under the common law for negligence, and the plaintiff's evidence was sufficient to go to the jury under the foregoing principles of the common law, recognized alike in both states. The evidence, in brief, tended to show that the floor upon which the plaintiff tripped was a place for him to work in, with the preparation of which he had no duty to perform. If this was so, then, under the principles laid down in *Cadden v. American Steel Barge Co.* 88 Wis. 409, and *Libby, McN. & L. v. Scherman*, 146 Ill. 540, we think the "carpenter gang," whose duty it was to replace the planks, were not fellow servants of the plaintiff. If they were not fellow servants, but were simply discharging a duty of the master, then, if they left the plank in question loose, and the plaintiff, without contributory negligence, suffered injury thereby, their failure was failure of the master, under the principles settled in the last-named cases.

We are not to be understood as attempting in advance to lay down rules for the retrial of this case. We have proceeded thus far in the discussion of certain fundamental principles of the law of negligence for the purpose simply of showing that upon these questions, which are the leading and important questions in this case, the law as expounded by the courts of last resort in both states is in substantial accord. The case, then, is this: A transitory cause of action arose and became vested in Illinois, under the principles of the common law recognized in both Illinois and Wisconsin alike; and the question is, Can it be prosecuted to judgment in the courts of Wisconsin, jurisdiction of the person having been obtained? We are clearly of the opinion that there can be but one answer to this question, and that in the affirmative. It is said, however, that there are some differences in the law as administered in the two states with reference to the question of whether a person employed by the same master is a fellow servant or a vice principal, and that in this respect the laws of Illinois are more favorable to the plaintiff than those of Wisconsin. Upon this basis the trial court held that the case depended upon principles of law which are obnoxious to the law of this state, and that it had no jurisdiction to administer the law of Illinois. It is well known that courts are frequently called upon to administer and enforce the laws of another state. Doubtless, upon the trial of this case the plaintiff's right of action will depend upon the law of Illinois as it shall be shown to be. There is no inherent difficulty in finding out or applying the legal principles governing the cause of action in Illinois when the accident happened. The same objection was made in the case of *Walah v. New York & N. E. R. Co.* 160 Mass. 34 L. R. A.

571, and was overruled. We fully agree with what was there said by Holmes, J., in the opinion of the court: "As between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." Thus far we go in the present case, and, going thus far, we hold that the trial court should have entertained and tried the case. As to the form of the remedy, the conduct of the trial, and the rules of evidence, the law of the forum would unquestionably prevail.

An Illinois statute of limitations was set up in the answer as a defense, but the statute was not offered in evidence. Consequently the question as to its effect upon the plaintiff's cause of action in this suit was not before the court below, is not before us, and hence is not decided.

Judgment reversed, and action remanded for a new trial.

Cassoday, Ch. J., concurring:

I fully concur in the reversal of the judgment in this case, and much that is contained in the opinion of my Brother Winslow. The only question I desire here to consider is as to whether the plaintiff has the absolute right to bring and maintain this action under the clause of the Constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." § 2, art. 4. The only case cited by counsel, or which any of us have been able to find, so holding in a case similar to this, is *Osgrode v. Gartner*, 79 Mich. 832, 7 L. R. A. 511, and in that case Mr. Justice Campbell dissented. Besides, that was a proceeding by mandamus to compel the court to entertain a case arising under a contract for the construction of a railroad in Michigan. That case was decided after Mr. Justice Cooley had left the bench. According to that learned author, the precise meaning of "privileges and immunities" is not as yet very concisely settled. Cooley, Const. Lim. 6th ed. 490. The Supreme Court of the United States (the final arbiter) has not, it would seem, determined the precise question suggested, although that court has many times considered the clause of the Constitution mentioned. Mr. Story says: "The intention of this clause was to confer on them [citizens], if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances." 2 Story, Const. § 1806. Mr. Hare says "that the clause in question adds nothing to the rights given and restraints laid by the other articles of the Constitution, except that the rules made by each state with regard to the citizens of her sister states must be the same as those which she imposes on her own citizens." 1 Hare, Const. Law, 513. In *Paul v. Virginia*, 75 U. S. 8 Wall. 180, 19 L. ed. 360, Mr. Justice Field said: "But the privileges and immunities secured to citizens of each state

in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states, under their Constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states." The definition thus given was sanctioned by Mr. Justice Miller in the *Slaughter-House Cases*, 88 U. S. 16 Wall. 36, 21 L. ed. 394, and he there added: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Many similar expressions have emanated from the same tribunal. In addition to the enforcement of the criminal laws and police regulations as to persons and property within the state, the principal functions of a state government would seem to be to make and enforce laws for and against its own citizens, and for and against property and rights of property located or having a *situs* therein. The party to such a controversy, although a nonresident and a citizen of another state, undoubtedly has the same "privileges and immunities" as a party who is a citizen of the same state; otherwise the administration of the law would be partial and unjust. But, in my judgment, the case at bar does not come within the letter or spirit of the constitutional guaranty mentioned. Since this state has no power to authorize an action to be commenced and maintained by one of its own citizens against another of its own citizens, in the courts of another state, in respect to a tort committed in this state, it necessarily follows that the courts of this state are not arbitrarily bound, by the constitutional provision quoted, to entertain jurisdiction of a suit commenced by one citizen and resident of Illinois against another citizen and resident or corporation of Illinois, when the only controversy is in regard to a tort committed in Illinois, unless that clause requires this state to grant "privileges and immunities" to citizens of other states which it has no power to grant to its own citizens "under the like circumstances." This, as shown, would be contrary to the authorities cited. To avoid such an anomaly, according to Mr. Story, the wording of the corresponding clause in the old Articles of Confederation was purposely changed to its present form. 2 Story, Const. § 1805. Actions like the one at bar are generally governed by the principles of interstate comity. Cooley, Const. Lim. 6th ed. pp. 150, 151. This court 31 L. R. A.

has recently not only recognized, but sanctioned, such principles of interstate comity, in an opinion by Mr. Justice Pinney. *Gilman v. Ketcham*, 84 Wis. 60 23 L. R. A. 52. Thus, in *National Teleph. Mfg. Co. v. Du Bois*, 165 Mass. 117, 80 L. R. A. 628, it is held that "to a foreign corporation having a place of business here and suing a citizen of another state, the courts of equity in this commonwealth are not open as matter of strict right, but as matter of comity." In *Smith v. Mutual L. Ins. Co.* 14 Allen, 336, it was held that "this court will not entertain jurisdiction of a bill in equity brought by a citizen of Alabama, who has never lived here, against an incorporated mutual life insurance company of New York, seeking to restore him to his rights under a policy issued by the defendants in New York upon his life, he having failed to pay the premiums required by the terms of the policy, although the defendants transact business in this commonwealth, and have appointed an agent resident here upon whom all lawful processes against the company may be served." To the same effect, *Bank of North America v. Rindge*, 154 Mass. 208, 18 L. R. A. 56; *Kimball v. St. Louis & S. F. R. Co.* 157 Mass. 7; *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562. Numerous other cases might be cited to the same effect. It may be conceded that an action for a tort to the person may generally be maintained in any jurisdiction in which the defendant can be legally served with process. It seems to be essential, however, that the wrong complained of, although actionable according to the law of the state where the action is brought, should also be actionable according to the law of the state or country in which it occurred or was committed. Dicey, Conf. L. 667, and cases there cited. In actions at common law this identity or similarity of law is assumed to exist in the absence of reasons to the contrary. Id., citing *Walsh v. New York & N. E. R. Co.* 160 Mass. 571. In statutory actions it is held that "if the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if, under our forms of procedure, an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." *Higgins v. Central, N. E. & W. R. Co.* 155 Mass. 180, and cases there cited.

In considering § 1 of art. 4 of the Constitution of the United States, Fuller, Ch. J., speaking for the majority of the court, said: "The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory." (*Cole v. Cunningham*, 183 U. S. 112, 83 L. ed. 541, affirming 142 Mass. 47, 56 Am. Rep. 657. He then said: "The intention of § 2 of art. 4 was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New

York, and have the full use and benefit of the courts of that state in the assertion of their legal rights; but, as that fact might affect the right of action as between them and the citizens of their own state, the courts of New York might have held that its existence put an end to the seizure of their debtor's property by Butler, Hayden, & Co., in New York. If, however, those courts declined to take that view, it would not follow that the courts of Massachusetts violated any privilege or immunity of Massachusetts' own citizens in exercising their undoubted jurisdiction over them." The learned chief justice then goes on at great length, and shows by the citation of numerous adjudications that since the litigants were both citizens of Massachusetts, and subject to the jurisdiction of its courts, one of them might be restrained from prosecuting an action previously commenced in New York to collect a debt by garnishment therein. The opinion is replete with learning and authorities to the effect that, where both parties to the controversy are citizens and residents of the same state, one may restrain the other from prosecuting a suit against him in some other state, and in fraud of the laws of the state where they both reside. If the Constitution

of the United States gives to every party to a transitory action the absolute right to commence and maintain the same in any state of the Union where he can get service on the defendant, then it is difficult to perceive upon what theory they can be restrained from exercising such constitutional right. In several of the states a nonresident is required by statute to give security for costs as a condition precedent to commencing or maintaining a suit, when no such requirement is made of a resident plaintiff; and the validity of such statutes have been sustained. *Reno, Non-Residents*, pp. 44, 45. If such authorities are sound, then it is difficult to perceive how the right to bring and maintain the suit can be regarded as an absolute constitutional right. If the constitutional clause in question gave to the plaintiff the absolute right to commence and maintain this action, then it would seem that the state courts have generally, and for a century, labored under a grave misapprehension in holding that jurisdiction in such cases was governed by the principles of interstate comity.

This hasty expression of opinion is merely to indicate the grounds on which I differ from the opinion filed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

G. F. B. HOWARD, *Appt.*,

v.

UNITED STATES of America.

(75 Fed. Rep. 986.)

1. An omission in a copy of the mittimus furnished under U. S. Rev. Stat. § 1022, by a mar-

shal to the warden of a penitentiary, when it is a mere clerical error and no such omission exists in the original mittimus or sentence, does not entitle the prisoner to his release on habeas corpus.

2. Cumulative and successive sentences are within the power of a court to impose at common law, and they may be imposed by Federal courts without any express authority, by act of Congress.

NOTE. Reduction of prisoner's term by allowance for good behavior.

I. Constitutionality of statutes providing therefor.

II. Construction and effect of statutes.

a. In general.

b. Federal cases.

I. Constitutionality of statutes providing therefor.

There is some conflict among the decisions as to the validity of the statutes upon this subject, but most of them hold that the legislature may constitutionally provide for good-time credits, or deductions from the sentences of prisoners on account of good conduct.

Different objections are raised against the validity of such statutes. One is that they infringe upon the governor's pardoning power. But this objection is not sustained by most of the courts that have considered it. Thus, the case of *Com. Johnson, v. Hallaway*, 43 Pa. 446, holds that such a statute does not infringe upon the pardoning power, although the court regards it as subject to another objection.

So, in Ohio the provision for a system of credits whereby the term of a sentence may be diminished which is given by the Ohio act of March 24, 1884, as amended May 4, 1885, § 7, is held not to be an interference with the pardoning power of the governor. *State, Atty. Gen., v. Peters*, 43 Ohio St. 629.

And in California a statute providing in express

terms that certain credits or deductions from a term of imprisonment shall be allowed for good conduct, without requiring any action on the part of the governor for this purpose, is held not to be unconstitutional as an infringement of his power to pardon, as it does not take away or interfere with such power in any way. The court says the statute simply fixes the term of imprisonment in certain cases and upon certain conditions, and that this provision enters into and becomes a part of the judgment of the court below. *Ex parte Wadleigh*, 82 Cal. 518.

But as applied to persons who were in the penitentiary at the time of the passage of the act, it is held in Tennessee that the act of 1885 (Acts Ex. Sess. p. 87), allowing good time to convicts, is an attempted exercise of the pardoning power which is vested alone in the governor under the Constitution, and therefore void. *State v. McClellan*, 87 Tenn. 52.

As to the claim that the Ohio act providing for parole of prisoners and giving a system of good-time credits is retroactive, and therefore unconstitutional so far as it affects past sentences, the court says, in *State. Atty. Gen., v. Peters*, *supra*, that the only party who could object is the prisoner, and he cannot where it is clearly for his benefit; and that the question whether a case might not possibly arise in which the personal rights of the prisoner would be infringed need not be considered until such a case does arise.

3. The possibility of a deduction by good-time credits, although contingent on the conduct of the convict, does not render a sentence so indefinite or uncertain that a successive sentence to begin on the expiration of the former will be invalid.
4. A consolidation of separate indictments charging definite offenses for the purposes of trial does not make them one offense so as to permit but one sentence.
5. The question of error in an order consolidating indictments cannot be re-examined by writ of habeas corpus, as error in that respect would not make the judgment and sentence void as without jurisdiction and authority.

(July 2, 1893.)

APPPEAL by petitioner from a judgment of the Circuit Court of the United States for the Southern District of Ohio denying a petition for habeas corpus to release petitioner from custody to which he had been committed under a sentence for using the postoffice department in execution of schemes to defraud. *Affirmed.*

The facts are stated in the opinion.

Before *Lurion*, Circuit Judge, and *Searens* and *Clark*, District Judges.

Another objection raised to such statutes is that they infringe upon the province of the judiciary.

But while the courts are usually given a discretion as to fixing a sentence between the maximum and the minimum penalty, or between alternative penalties, it is said by the supreme court of Ohio that this may be taken away without infringing upon the exclusive power of the judiciary. *State, Atty. Gen., v. Peters*, 43 Ohio St. 620.

This was decided in upholding the Ohio act of March 24, 1884, as amended May 4, 1885, providing for a system of merit and demerit accounts and deductions from sentences for good conduct (as well as for a parole of convicts and also for indeterminate sentences under which the prisoner must serve at least the minimum term provided by law, and cannot be held longer than the maximum term so provided, leaving the termination of the sentence within those limits to the board of managers). The court says: "It marks a new experiment in the management and discipline of prisoners, whether serving under fixed or indeterminate sentences. It is evidently prompted by a desire to reform as well as to punish, to make better those under sentence as well as to protect society." The court proceeds to say: "Whether this legislation is widely adapted to that end, or whether it is practicable, it is not the province of this court to determine."

But, on the other hand, the Pennsylvania act of May 1, 1861, providing for a graduated deduction from a term of imprisonment in the state penitentiary as a reward for good conduct, is held, in *Com. v. Johnson, v. Holloway*, 42 Pa. 444, to be unconstitutional as interfering with judgments of the judiciary, although the court does not regard it as an infringement on the governor's pardoning power. The court says: "From what judicial sentence may not the legislature direct 'deductions' to be made if this act be constitutional? What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences why may they not repeal them as fast as they are pronounced and thus assume the highest judicial functions?" Further on the court says: "In respect to one of the relators who was convicted and sentenced before the law was passed,

Mr. J. D. Brannan for appellant.

Mr. Harlan Cleveland, for appellees:

Relator was not detained or required to be detained by virtue of any warrant. He was detained by virtue of the judgment of the court, and that judgment was a sufficient authority for his detention.

People, Trainor, v. Baker, 89 N. Y. 460; *Church, Habeas Corpus*, § 128.

If the second mittimus will not hold the petitioner, the third one, No. 1, 729, would immediately become operative, and after it No. 1, 730, and so on to the end.

Blitz v. United States, 158 U. S. 808, 33 L. ed. 725; *Gregory v. Queen*, 15 Q. B. 974.

Clark, District Judge, delivered the opinion of the court:

Eight indictments were returned against petitioner, Howard, in the district court of the United States for the eastern division of the western district of Tennessee, charging him with violations of § 5490 of the Revised Statutes of the United States in the use of the postoffice establishment of the United States in the execution of schemes to defraud. The docket numbers of the cases were 1,727, 1,728, 1,729, 1,730, 1,731, 1,732, 1,758, and 1,759, respec-

it is considered very clear that it is a legislative impairing of an existing legal judgment. But is it not equally so in respect to him who was sentenced since the date of the act? The court could not have taken the act into account in measuring the sentence because they could not know how many days of abatement the prisoner would earn." It should be said, however, that the judges were not all agreed on this point, and that the decision was rested also on other and independent ground.

As to the parole of prisoners, see *People v. Cummings* (Mich.) 14 L. R. A. 285, and *note*.

The right of a convict to a prescribed reduction from his sentence upon compliance with the rules of the prison, which is given under 2 How. Stat. (Mich.) § 9704, is one of which he cannot be deprived, and the act of 1893, the effect of which is to deprive a person sentenced under the prior statute of this right in part by reducing the amount of his credits, is to that extent an *ex post facto* law, because its effect is to increase, and not to mitigate, his punishment. Therefore the prisoner is entitled to credit upon the basis of the statute under which he was sentenced. *Re Canfield*, 98 Mich. 644.

II. Construction and effect of statutes.

a. In general.

Independently of any constitutional objection, the Pennsylvania act of May 1, 1861, is construed as evidently meant to give the inspectors a measure of discretion by conferring upon them power and authority to discharge, without expressly enjoining the duty, and as in the exercise of that discretion they had declined to discharge the relators, and, indeed, to execute the law, the court said: "We will not overrule their reasons nor control their discretion." *Com. v. Johnson, v. Holloway*, 42 Pa. 446.

So, by the Pennsylvania act of May 21, 1863, it is held that large discretionary power in the matter of discharge for good behavior is given to the inspectors, the discharge in such cases not being a matter of strict right, but rather of favor. *Reinhart v. Vaux*, 10 W. N. C. 222.

No executive pardon is held necessary to the discharge of a prisoner at the expiration of his term as reduced by allowances for good conduct under

tively. These cases were, by order of the court, consolidated, and tried at the same time before the same jury. The trial resulted in a verdict of guilty on each of the indictments, and judgment and sentence were pronounced against the petitioner in each of the cases. The sentence in the first case was to eighteen months' imprisonment in the Ohio penitentiary and a fine of \$500, and, in each of the seven cases following, thirteen months' imprisonment and a fine of \$100 were imposed, the same to be applied to the indictments in their numerical order. The sentence in the second and each following case took effect at the expiration of the one next preceding. Mittimus issued, regular in form, under each judgment and sentence, directed to the marshal of the western district of Tennessee, and commanding him to commit the petitioner, Howard, to the Ohio penitentiary at Columbus, in the state of Ohio, to be there imprisoned for the terms fixed in the eight sentences. The defendant was ordered to stand committed until the several fines imposed and the costs of the prosecution were paid. When the defendant had served out the term of imprisonment imposed by the first sentence (the statutory deduction for good time being made), application was

made to the circuit court of the United States for the eastern division of the southern district of Ohio for a writ of habeas corpus. The petition for the writ alleged as grounds for the prisoner's discharge from custody: (1) That cumulative sentences, as imposed by the court, were without authority of law and without power in the court. (2) That the sentences, except the first, were too uncertain and indefinite, in that they were made each to take effect upon the expiration of the preceding sentence, which itself was made uncertain, because the question of allowing credit for good time under the statute was discretionary, and not absolute. (3) That the consolidation of the indictments against the prisoner, and his trial on all of them at the same time, was a proceeding unauthorized by law, and the sentences for that reason void.

Due return was made to the writ, with the answer of the warden of the penitentiary. The writ was discharged upon the trial, the petition dismissed, and the petitioner, Howard, remanded to the custody of the warden of the Ohio penitentiary to complete his terms of imprisonment, in accordance with the sentences of the United States district court for the western district of Tennessee. On appeal to this

Mass. Stat. 1867, chap. 284, 1868, chap. 77, and 1869, chap. 108. Opinion of the Justices, 13 Gray, 618. This case turns on the construction of the statutes rather than upon any question as to their validity, holding that the statutes give a right to the deductions and do not provide for a mere favor.

A convict discharged under the three-fourth's rule may be given a certificate of discharge by the warden of the penitentiary without any pardon from the governor, under Mo. Rev. Stat. § 7273, and therefore such a certificate may be put in evidence to show the fact of the discharge. *State v. Austin*, 118 Mo. 528.

It is for the officers of a prison to determine, in the first instance at least, whether an offender is being confined in prison for the first time or not, for the purpose of determining, under the Michigan act of 1883, his right to a good-time allowance. *Re Canfield*, 98 Mich. 644.

A prisoner cannot earn good time when out on parole under Ind. Acts 1888 (Elliot Supp. § 2025), providing for an allowance to a penitentiary convict "who shall have no infractions of the rules or regulations of the prison or laws of the state recorded against him, and who performs in a faithful manner the duties assigned him." *Woodward v. Murdock*, 124 Ind. 439.

But the time that he is out on parole is to be counted, and the good time that he earned while in prison is to be considered, although during another part of the time he is out on parole. He is entitled to his discharge when the time of the sentence expires as reduced by his good-time credits, although he has been out on parole part of the time. *Ibid.*

Under How. Stat. (Mich.) §§ 9708, 9704, governing debits and credits for good conduct or misconduct of convicts in prison, it is held that the rules to be established on the subject should be plain, certain, and specific, and known to the inmates of the prison, and be adopted by the board of inspectors, and made a matter of record; also that the convict's record should be made known to him monthly, and the reports investigated by the inspectors each month at a regular meeting and a record made of their action, so that the convict's standing shall not rest upon any computation of the warden's clerk, but may be shown at once 34 L. R. A.

from the record, and that the convict should be given, if he desires, an opportunity to be heard upon the matter of his report. *Re Walsh*, 87 Mich. 466.

But while the rules on this subject ought to be written, yet an unwritten rule or custom which has been in force for twenty years or more, to deduct for each infraction of a prison rule, whether trivial or serious, as many days of good time as the prisoner would be earning under the law each month in the year of such infraction, should be held operative and binding on the prisoner, and also upon the board of inspectors until the rule is changed. *Ibid.*

A commutation by the governor of a sentence of imprisonment for life to one of "nine years of actual time," providing for a discharge "when he shall have served nine years actual time in the said penitentiary," is not subject to Neb. Crim. Code, § 560, providing for good-time reductions. *Re Hall*, 34 Neb. 206. This decision is based on the construction of the governor's commutation which is said by its terms to show that he intended the reduced sentence to be for nine years of service within the penitentiary.

The failure of the superintendent of the penitentiary to keep a "good-time account" of the prisoners, as required by Mill. & V. Code (Tenn.) § 6383, and by the act of 1869-70, T. & S. Code, § 5559a, sub. 7, is held, in *State v. McClellan*, 87 Tenn. 52, to raise a presumption that a convict is entitled to the good time, and the want of the register or good-time account cannot be supplied by oral evidence, although such evidence might perhaps be heard to corroborate or to contradict such a record.

One sixth of the time of the sentence is to be deducted from the whole term when it does not exceed two years, and no charge is recorded against the prisoner under Neb. Crim. Code, § 560, and the term of imprisonment is to be dated from the time of sentence and not from the time the prisoner is delivered to the warden of the penitentiary, although the officer has thirty days in which to deliver him. *Re Fuller*, 34 Neb. 581.

The denial of good-time allowance to a third-term prisoner under Mich. Pub. Acts 1893, No. 118, § 33, applies to a prisoner in the state prison at Marquette who has previously served two terms in

court, the judgment of the court below was affirmed; whereupon a second application by petition was made to the same circuit court for the writ. Objections to the sentences were again set out in the petition as grounds for the second application. The only ground for the writ stated in the second petition which is not also contained in the first is based on an objection to the copy of the mittimus in case No. 1,728, which is the second in numerical order of the several mittimuses issued pursuant to the judgment and sentence of the court. What purport to be copies of the original mittimuses are attached to and made part of this petition, and also a copy of the transcript of the judgment of the court is attached to petition. These copies, it is evident from the petition, are not copies of the originals, but copies of papers in possession of the warden of the penitentiary, which the petition designates as "commitment papers," and which papers are themselves only copies of the originals. So the copies attached to the petition, and made part thereof, are copies of copies, and not of the originals. The objection to the mittimus in case No. 1,728 is that "from date of" is

omitted after the words "for the term of thirteen months;" these words being contained in each of the other mittimuses issued, and from which the sentence is clearly made to take effect from date of expiration of the sentence imposed in the case immediately preceding. The position taken is that this omission leaves the period of imprisonment under the sentence in 1,728 without a date for its commencement, and therefore uncertain and void, and that, as the prisoner has served out the first sentence, he is therefore entitled to be released from custody. The petition does not contain any statement that the copy of the mittimus attached thereto is a correct copy from the paper in the possession of the warden of the penitentiary, and, of course, no statement that the same is a correct copy of the original mittimus issued to the marshal, and under which the prisoner was in fact committed. Whether the failure to make the usual statement that the copy is a correct one of the original is entirely due to an oversight would, of course, be matter of conjecture. One or two other minor grounds are alleged as a basis for the application, but they are entirely without

the prison at Jackson, as the former is merely a branch of the other prison. *Re Prisoners*, 3 Det. L. N. No. 84.

One imprisoned for less than three months is held entitled to no reductions of sentence under Utah Comp. Laws 1888, vol. 2, § 5268, §§ 2, 3, 4, specifying an allowance of reductions for those imprisoned for three and six months and longer periods. *Ex parte Nokes*, 6 Utah, 106.

Two sentences cannot be aggregated or treated as one for the calculation of an allowance for good behavior, but are in law and in fact separate and distinct, so that the commutation is to be calculated on each one separately and successively. *Reinhart v. Vaux*, 10 W. N. C. 222.

But the California statute, which says that good-time credits shall be deducted from "the entire term of penal servitude to which he has been sentenced," means that they shall be deducted from the aggregate of the sentences when two or more of them are imposed at the same time. The deduction is to be taken from the end of the entire term. *Ex parte Dalton*, 49 Cal. 463.

The New Jersey statute, providing that where a prisoner is convicted and sentenced after a sentence and conviction under which a remission of time has been made for good behavior the remission shall be vacated, and he may be held under the later sentence to serve out the number of days remitted from the previous term, does not apply or authorize such time previously remitted to be added to the later imprisonment, where the term upon which the remission of time was made was between the time of conviction and the later sentence, sentence under the earlier conviction having been suspended and not pronounced until the expiration of the sentence under the second conviction. *State v. Patterson*, 14 N. J. L. J. 229.

b. Federal cases.

The good-time allowance of five days per month, provided by the act of Congress of March, 3, 1875, for prisoners sentenced under the law of the United States when in any "prison or penitentiary of any state or territory which has no system of commutation for its own prisoners," does not apply to persons imprisoned in county jails. *Re Deering*, 80 Fed. Rep. 265; *United States v. Schroeder*, 14 Blatchf. 344; *United States v. Goujon*, 39 Fed. Rep. 773; *Re Terry*, 37 Fed. Rep. 649. 34 L. R. A.

For the same reason this statute does not repeal that part of U. S. Rev. Stat. § 5543, 5544, which allows a deduction of one month per year for good behavior to persons imprisoned in "any state jail," where no credits for good behavior are allowed by state laws in such jails, although the other part of those sections relating to penitentiaries is repealed. *Re Deering*, *supra*.

But in *Re Terry*, *supra*, after holding that the act of 1875 does not apply to county jails, the court says the only other provision of an act of Congress under which credits can be properly claimed is found in U. S. Rev. Stat. § 5544, which gives the same rule of credits applicable to other prisoners in the same jail or penitentiary, and therefore does not apply to prisoners in a county jail when the state law giving credits does not apply to such jail. The court ignores in this case § 5543, which is held in *Re Deering*, *supra*, to be still applicable to jails in which state laws do not allow credits.

The case of *United States v. Goujon*, *supra*, was one in which the deduction was claimed under the act of 1875, and this was denied, but nothing seems to have been clearly decided in that case as to the right to an allowance under U. S. Rev. Stat. §§ 5543, 5544.

In a similar case, in which the right to credits under the act of Congress of 1875, was denied to a prisoner in a county jail, the court says: "The act supersedes the similar provision in §§ 5543, 5544, Rev. Stat., in which the words 'jail or penitentiary' are used. This change in the language is significant and indicates an intention to limit credits to those state prisons and penitentiaries properly so called." Yet as no claim seems to have been made to any credits under the Revised Statutes, this language may be taken to refer to the act of 1875, and not to hold that the Revised Statutes are altogether repealed. *Re Corcoran*, 47 Fed. Rep. 211.

A sentence to imprisonment under both the first and the third counts of an indictment, the term of imprisonment under the latter to commence on the expiration of the judgment under the former, may stand and be operative, as to the third count, making the imprisonment thereunder begin on the date for the commencement of the term under the first count, when the sentence on the first count is reversed on writ of error. *Blitz v. United States*, 158 U. S. 308, 88 L. ed. 725.

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merit, and were not insisted upon by the petitioner's counsel on the argument in this court. This petition, which is signed, and sworn to by petitioner alone, was, on motion, dismissed by the circuit court, and the case is here again by appeal. The judgment of the court denying the petition is as follows:

"This cause coming on to be heard on the petition of G. F. B. Howard for a writ of habeas corpus, upon consideration, the court finds that the petition shows the prisoner to be in lawful custody, and does not state a case for the issuance of a writ. Wherefore it is ordered that the petition be denied, at the costs of the petitioner. Whereupon the petitioner applies to the court for an allowance of an appeal to the circuit court of appeals for the sixth circuit from the order denying the petition, which appeal is accordingly allowed, and the clerk is directed to issue a citation upon such appeal to the United States attorney for the southern district of Ohio, as the representative of the United States, who will be the appellee in the proceedings on appeal in the circuit court of appeals."

It will be seen that the judgment is based on the petition alone and what appears therefrom. The objection based on the omission in the mittimus in 1,728 will be disposed of first.

By § 1028 of the Revised Statutes it is provided: "Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon."

The contention is that under this statute the copy of the mittimus furnished by the marshal to the warden of the penitentiary is made the warden's only authority for detention of the prisoner, and that, the copy in possession of the warden being void on account of the defect mentioned herein, the prisoner's restraint is unlawful. Omitting the direction and proper teste of the mittimus, the body thereof is as follows: "You are hereby commanded to commit the defendant, Joseph Leger, *alias* G. F. B. Howard, to the Ohio penitentiary at Columbus, Ohio, there to be imprisoned for the term of thirteen months, the expiration of his term of imprisonment under indictment No. 1,727, in accordance with a sentence of this court pronounced against said defendant on this the 4th day of January, 1894, for the crime of violating the laws of the United States in unlawfully using the mails with intent to defraud."

This contention does not require extended treatment. The warrant or order of commitment is simply an authority and direction to the marshal to take the prisoner to the penitentiary named. The copy furnished by the marshal or clerk to the warden is merely evidence, and evidence only, of the judgment and sentence of the court and the mittimus issued thereunder. The statute makes this evidence of a regular court judgment and mittimus sufficient authority and protection to the warden, and the warden is not required to go beyond this copy in satisfying himself of the existence of a valid sentence

against the prisoner. This is the purpose and effect of the copy, and nothing more. The prisoner is not committed by virtue of the copy, but by virtue of the judgment of the court, and the mittimus issued pursuant thereto; the real valid authority under which the mittimus is issued being the sentence of the court.

In *People, Trainor, v. Baker*, 89 N. Y. 461, Earl, J., said: "But the relator was not detained, or required to be detained, by virtue of any warrant. He was detained by virtue of the judgment of the court, and that judgment was a sufficient authority for his detention. The warrant of commitment is simply an authority and direction to the sheriff or other officer to convey the prisoner to the penitentiary. That need not necessarily be left with the keeper. If he has no other evidence of his authority to detain the prisoner he should have that. But, if the officer who brings a prisoner to the penitentiary furnished the keeper with a certified copy of the judgment of the court, then that is sufficient evidence of the keeper's authority and he needs to have no other. A prisoner who has been properly and legally sentenced to prison cannot be released simply because there is an imperfection in what is commonly called the 'mittimus.' A proper mittimus can, if needed, be supplied at any time; and, if the prisoner is safely in the proper custody, there is no office for a mittimus to perform."

This ruling is supported by the previous case of *People v. Nevins*, 1 Hill, 154, followed and approved by the Supreme Court of the United States, in *Ex parte Wilson*, 114 U. S. 422, 29 L. ed. 91.

And so in *Sennott's Case*, 146 Mass. 489, Knowlton, J., giving the opinion of the supreme judicial court of Massachusetts, and answering a similar formal objection to the mittimus, observed: "Besides, we have the judgment before us. The imprisonment rests upon the judgment, and the mittimus is important only as a direction to the officer, and as evidence of the authority which the judgment gives. *People, Trainor, v. Baker*, 89 N. Y. 460. See also *Ex parte Gibson*, 81 Cal. 620, 91 Am. Dec. 548; *Ex parte Kellogg*, 6 Vt. 511."

Moreover, as will be seen, the copy of the mittimus under No. 1,728, attached to the petition, refers to the sentence on indictment No. 1,727, and to the sentence of the court pronounced in No. 1,728, giving the character of the crime. The judgment of the court is not only thus referred to, but, as we have seen, a copy of the transcript of the judgment is attached to the petition, and made a part thereof. The judgment appears from this transcript to be regular in all respects, and makes the period of imprisonment, as well as the time of its commencement, clear, and shows that the sentence of the court contains no such defect or omission as that pointed out in the copy exhibited with the petition; and that the omission in the copy furnished by the marshal to the warden is a mere clerical error by the marshal or clerk in making such copy. For each and all of these reasons, we are of opinion that the defect pointed out in the petition furnishes no ground whatever for the writ, and is entirely without merit. A petition which does not impeach the judgment or original mittimus, directed to the marshal,

under which petitioner was actually committed, states no case for the writ. On the trial of the first petition, a full transcript of the record in the court of original jurisdiction was introduced, and was on file in the court below at the time of the judgment on the second petition, and a copy is also on file in this court. From this it fully appears that the original sentences and the original mittimus issued thereunder are in all respects regular; and it is argued that the court below might look to that transcript, and that, in support of the judgment below, this court may also inspect the transcript on file in this court. The disposition thus made of the objection, based on the defective copy, renders it unnecessary to decide this point. As has been seen, the action of the court below was based upon the petition alone and the papers attached thereto; and, in reviewing the judgment of the court below, we do not think we are at liberty to dispose of the case on matter appearing in a record different from that on which the judgment below was based.

This brings to us the question of the right and power of the court to impose cumulative and successive sentences. This question may arise in a given case upon a conviction on different counts in the same indictment charging distinct offenses, or upon conviction at the same term on separate indictments for distinct offenses. The principle involved is, however, the same as the right to join distinct offenses in different counts in the same indictment and is to avoid, to both parties, the burden and expense of two or more separate trials. If this question depended upon the law of the state where the petitioner was tried, there is a statute expressly authorizing cumulative sentences. Tenn. Code, § 5228; *Mitchell v. State*, 92 Tenn. 672.

In the absence of an act of Congress upon the subject, however, the courts of the United States in the administration of the criminal law are governed by the rules of the common law. *United States v. Nye*, 4 Fed. Rep. 888; *Erwin v. United States*, 87 Fed. Rep. 468, 2 L. R. A. 229; *United States v. Maxwell*, 8 Dill. 278. And there can be no question of the power of the court to impose cumulative sentences for separate offenses, according to the very decided weight of authority at the common law. *Re v. Wilkes*, 4 Burr. 2578; *Castro v. Queen*, L. R. 6 App. Cas. 241 (*Tichborne Case*); 1 Chitty, Crim. L. 718; Clark, Crim. Proc. 495; *United States v. Patterson*, 29 Fed. Rep. 775; *Re Remond*, 42 Fed. Rep. 427; *Blitz v. United States*, 153 U. S. 308, 317, 38 L. ed. 725, 728.

In *Blitz v. United States* the defendant was convicted on an indictment containing three separate counts, in which he was charged, in the first count, with personating and voting in the name of another; in the second, with voting at a precinct where he was not lawfully entitled to vote; and, in the third, with voting for the same candidate more than once; and a verdict of guilty was returned upon each count of the indictment. A motion in arrest of judgment was sustained as to the second count of the indictment, and overruled as to the first and third counts, and the defendant was sentenced on the first count to imprisonment in the penitentiary for one year and a day, and on the third count for a like period, beginning upon the expiration of the sentence on the first 34 L. R. A.

count. The Supreme Court of the United States held that the motion in arrest of judgment should have been sustained also as to the first count in the indictment, and affirmed the judgment as to the third count, and directed that the term of imprisonment under the third count should be held to commence on the day named for the commencement of the first term. As judgment was pronounced on both the first and third counts in the court below, the imprisonment under the third count commenced upon the expiration of the judgment on the first count. The contention of the plaintiff in error was that the cause should be remanded, with directions for a new trial. In answering this question, Mr Justice Harlan, giving the opinion of the court, said: "In *Kite v. Com.* 11 Met. 581, 585, it appeared that the accused was sentenced for a named period to confinement at hard labor, to take effect from and after the expiration of three previous sentences specified. The judgment was objected to as erroneous and void, because there were not three former sentences, legal and valid, and therefore no fixed time from which the punishment on the last sentence should begin. Chief Justice Shaw, referring to this objection, and delivering the unanimous judgment of the court, said that it was not error in a judgment in a criminal case to make one term of imprisonment commence when another terminates. 'It is as certain,' he said, 'as the nature of the case will admit, and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires; and then, by its terms, the sentence in question takes effect as if the previous one had expired by lapse of time. Nor will it make any difference that the previous judgment is reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and, though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect.' See also *Dolan's Case*, 101 Mass. 219, 223. In these views we concur."

Not only in *Blitz v. United States* were cumulative sentences imposed, but such was also the judgment of the court in *Re Henry*, 123 U. S. 872, 31 L. ed. 174, and in *Re Mills*, 135 U. S. 263, 34 L. ed. 108, and in other cases that might be referred to. And, while the authority to pronounce such judgment was not made a specific question in the cases, it was perfectly apparent in the cases that such practice had been pursued, and the Supreme Court of the United States, according to its own rules, reserves the right to "notice a plain error not assigned or specified." And, if the courts of the United States be without authority to pronounce cumulative sentences upon convictions of separate offenses, the error was so vital and so obvious in the cases that the court would certainly have felt called upon to notice it in the interest of the accused. *Montana R. Co. v. Warren*, 137 U. S. 848, 34 L. ed. 681.

And in *Williams v. State*, 18 Ohio St. 47, the supreme court of Ohio said: "To hold that, where there are two convictions and judgments of imprisonment at the same term, both must commence immediately, and be executed concurrently, would clearly be to nullify one of them. To postpone the judgment in one case until the termination of the sentence in the other would, if allowable, be attended with obvious inconvenience and expense, without any correspondent benefit to the convict. There is nothing in the statute requiring this, and it is not to be construed so as to defeat or impede the execution of its own provisions as to the punishment of crimes. We think, both upon principle and the weight of authority, that we are required to hold that it is not error, upon a conviction in a criminal case, to make one term of imprisonment commence when another terminates. There is but little force in the objection that the term of the commencement of the second term is contingent and uncertain. It is true that the first term may be ended by a pardon or a reversal of judgment, but its termination will be rendered certain by the event, and then the second sentence, by its terms, takes effect."

And the supreme court of Nebraska, answering a similar objection, and referring to certain cases cited as supporting the objection thus expressed its view: "But in our opinion the great weight of authority is in favor of the proposition that upon conviction of several offenses charged in separate indictments, or in separate counts of the same indictment, the court has power to impose cumulative sentences. See Whart. Crim. Pl. § 910; Bishop, Crim. L. § 953; *Kite v. Com.*, 11 Met. 581; *Mims v. State*, 26 Minn. 498; *State v. Smith*, 5 Day. 176, 5 Am. Dec. 132; *Re McCormick*, 24 Wis. 492, 1 Am. Rep. 197; *Re Fry*, 8 Mackey, 135; *Ex parte Hibbs*, 26 Fed. Rep. 421; *State v. Robinson*, 40 La. Ann. 780; *Parker v. People*, 13 Colo. 155, 4 L. R. A. 803; *Mills v. Com.*, 18 Pa. 631; *Brown v. Com.*, 3 Serg. & R. 273; *Russell v. Com.*, 7 Serg. & R. 489; *Williams v. State*, 18 Ohio St. 46; *Eldredge v. State*, 37 Ohio St. 191; *Bolun v. People*, 73 Ill. 488." *Re Walsh*, 37 Neb. 454.

It is true that cases are to be found holding a contrary doctrine. How far the decisions in such cases may have been influenced by legislation in the particular state we need not now stop to inquire. It is certain that such cases find little or no support in the common law, and certainly none in sound reason. The cases are practically agreed that separate offenses may be included in separate counts of the same indictment. *Ingraham v. United States*, 155 U. S. 434, 39 L. ed. 213; *Pointer v. United States*, 151 U. S. 396, 38 L. ed. 208.

It is also a recognized method of procedure to consolidate separate indictments and try them at the same time as one case; and it is not an uncommon thing that the same defendant is convicted of more than one offense at the same term, upon separate indictments and trials. And a rule which denies the court the power to impose cumulative sentences turns the trial and conviction on all the indictments except one into an idle ceremony. It is hardly necessary to say that a rule which leads to such results as this is unsound in principle, and can

be supported by no consistent process of reasoning. Under such a doctrine, a defendant convicted of two or a dozen crimes would suffer no greater punishment than a person convicted of one offense, except such difference as the statutory maximum and minimum limits on the sentence might justify. Such a rule finds no justification in law or morals. The other cumbersome and uncertain methods suggested for dealing with the subject would in effect result in complete failure.

Counsel for the petitioner relies with much confidence on *People, Tweed, v. Liscomb* (*Tweed's Case*), 60 N. Y. 559, 19 Am. Rep. 211, and authorities cited therein. The doctrine of this case, however, has met with universal disapproval. Mr. Bishop speaks of it as "a doctrine elsewhere never heard of before and generally rejected since." And in a note the author further says: "On the other hand, I have looked into all the cases cited from the books of reports in *Tweed's Case* and into such others as seemed to afford any promise of instruction, and I find no one, English or American, ancient or modern, which furnishes a precedent, or an authority, or even a dictum, for the conclusion arrived at by the court." 1 Bishop, Crim. Proc. § 1327.

And the supreme court of Colorado, in *Parker v. People*, 13 Colo. 155, 4 L. R. A. 803, said: "The doctrine announced in the *Tweed Case* has called for the severest criticism from our ablest criminal-law writers, and is contrary to the weight of authority both in England and in this country."

The *Tichborne Case* was one much considered by the English courts. The writ of error in the case was allowed by the attorney general out of respect to the ruling by the New York court in *Tweed's Case*. The case went first before the court of appeals, and on further appeal before the house of lords. The question of the soundness of the decision in *Tweed's Case* was therefore directly before the English courts. The decision was regarded by those courts as somewhat startling, and it was said, in effect, that, while the case might be good as American authority, the law of England was certainly otherwise. The English judges seem to have considered *Tweed's Case* only, and not to have been aware at that time that the weight of American authority was also against the ruling in that case.

We think the power thus to pronounce cumulative sentences exists in regard to felonies, as well as misdemeanors, although in the case at bar we are dealing with the misdemeanor grade of offense only. *Reagan v. United States*, 157 U. S. 303, 39 L. ed. 710; *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494.

We now come to the question of whether all of the sentences except the first were void for uncertainty. So far as this objection may be rested upon the ground that the second and subsequent sentences do not fix the date of commencement more definitely than as beginning at the expiration of the preceding sentence, the cases already referred to contain a sufficient answer. The real point of objection, however, as we understand counsel for petitioner, is this: That the sentences, except the first, are rendered uncertain by reason of the provisions of § 5544 of the Revised Statutes, as

amended by the act of March 3, 1875 (13 Stat. at L. 479), providing for a good-time credit on the sentences of convicts who are chargeable with no misconduct during the time of their imprisonment. The contention is that, as this may or may not be allowed, the precise time when the first or any subsequent sentence will expire, and the sentence next in order begin, cannot be certainly known. This objection is hardly thought to deserve elaborate consideration. There is no uncertainty by reason of this in the judgment and sentence. That is for a definite fixed time; and the statute is mandatory, giving the convict a right to the credit for the good time, provided his conduct has been such as to deserve it; and it is made the positive duty of the warden of the penitentiary, if the conduct of the convict has been good, to enter a certificate on the warrant of commitment showing the fact. The time fixed by the sentence of the court remains just as fixed until the time expires, less the deduction for good time, when the fact whether the sentence is to be cut down is determined by inspection of the certificate on the warrant of commitment. There is practically no uncertainty in this to the ordinary apprehension, except such uncertainty as may exist by reason of doubt as to what the conduct of the convict will be.

The justices of the supreme judicial court of Massachusetts, in answer to a question calling for their opinion by the governor upon a statute similar to the one now in question, said: "The first question is whether this act gives a right to the convict to have his term of imprisonment reduced and shortened by such a scale; or, in other words, whether these provisions of law bear upon the sentence, and shorten the term of imprisonment. We think they do. They afford an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit of an earlier release. We are aware that the words are not explicit that the term of imprisonment shall be reduced, but we think they are equivalent. The words are, 'There shall be a scale of deduction from the term of such convict's sentence.' It appears to be equivalent to an express provision that there shall be a deduction from the term of imprisonment, according to the scale so to be formed. According to this construction, the sentence, which is imposed by force of one law, is modified by the present law; so that, prior to the present, the time of imprisonment would be computed according to the words of the sentence, and be discharged at its termination by lapse of time; under the present, it will terminate by the time declared in the terms of the sentence, diminished by the number of days for which the convict will be entitled to deduction. Such a deduction, especially in the case of the long sentences, when it is one-sixth part of the whole, becomes an essential legal element in the sentence itself by which the convict is held; and the convict, by complying with the terms of the law in maintaining his good conduct, thereby earns a right to the promised benefit. If it be objected that this will render the subsistence of the sentences uncertain, we think not, if the provisions of the act are rightly understood and observed. The scale of deduction is not to depend on any

varying or capricious notions which any officers or superintendents of the prison may entertain of the good behavior or good disposition of a convict; it is made to depend upon a fact ascertained by a fixed rule, entered on the journals of the prison, recorded each month, that is, entered in a book permanent in its character, fixed and unchangeable when once entered; these books of record are always accessible, and, although the officers may all change, the record is there." 13 Gray, 619 (Supp.).

And in *Re Walsh*, *supra*, the supreme court of Nebraska said: "This court has held that, where a person has been convicted of several distinct misdemeanors, it is proper for the court to impose a separate sentence upon each offense of which the defendant is found guilty (*Burrell v. State*, 25 Neb. 581); and we know of no reason why the same rule should not apply in convictions for felonies. Where a cumulative sentence is imposed in case a person is convicted of several distinct offenses, the judgment should not fix the day on which each successive term of imprisonment should commence, but should direct that each successive term should begin at the expiration of the previous one (*Johnson v. People*, 83 Ill. 431); and this for the obvious reason that the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of the judgment. In which event the succeeding sentence would then take effect, in case it provided that the term of imprisonment should commence at the termination of the previous one."

If the prisoner's argument were good, it would result that a statute enacted from motives of kindness to him would have the practical effect, to a very large extent, of defeating the administration of the criminal law. The courts must not be expected, upon suggestion of merely speculative difficulties, to announce a rule which would lead to such surprising results as this. So, without further observations upon this branch of the case, we pass to the contention made upon the last clause of § 5480 of the Revised Statutes, upon which the indictments in this case are predicated. The clause is in this language: "The indictment, information, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

The prisoner's argument is that as only three separate offenses may be included in one indictment within the same six calendar months, and in case of conviction only one sentence, the consolidation of the eight indictments had the effect to make but one case, and in effect one indictment, and that the court could, under this provision of the act, pronounce but one sentence upon a conviction in the consolidated cases, and that all the sentences except the first are therefore absolutely void. The petition, with the papers attached thereto, does not state or suggest that any such question was made or decided by the court of original jurisdiction in which the cases were tried and the

sentences pronounced. The objection seems not to have been taken by motion to quash, to compel an election, by plea, request for instruction, or otherwise; and the question is apparently attempted to be raised for the first time in this collateral proceeding. It is well settled that the writ of habeas corpus cannot be made to perform the office of a writ of error, and that the inquiry in such proceeding is not whether there is error in the proceeding and judgment, but whether the judgment is a nullity. It would seem that, in any view of this question, the court has jurisdiction to pronounce such sentence as the law authorized; and, if the judgment of the court was erroneous, it could only be corrected in a direct proceeding by writ of error. The proceeding involved merely an interpretation of the law and the application thereof to the facts of the petitioner's case, and this included a determination of the question whether the effect of consolidation was as the prisoner insists. As we prefer, however, to rest our judgment on other grounds, we do not find it necessary to make a ruling upon this question. The main point in this contention, that the effect of consolidation was to make but one case of all the indictments, is an erroneous conception of the law.

In *Ex parte Hibbs*, 26 Fed. Rep. 427, the court observed: "The act authorizing the joinder of offenses in one indictment, and a consolidation of separate indictments for distinct offenses, was intended to promote the speedy and economical administration of justice in such cases, in the interest both of the government and the defendant, and not practically to merge two or more distinct offenses into one for the benefit of the latter." See also *Re Haynes*, 80 Fed. Rep. 771; Bishop, Crim. Proc. 4th ed. §§ 421, 1042, 1045; *Parker v. People*, 18 Colo. 155, 4 L. R. A. 808; *Williams v. State*, 18 Ohio St. 47.

Indeed, it would seem to require no reasoning to show that if joining separate offenses in the same indictment does not make them one offense, so as to require but one sentence, *a fortiori* a consolidation, for the purpose of trial, of separate indictments charging distinct offenses, would not have this effect. So, the very basis on which the petitioner's contention in this respect rests falls to the ground. If petitioner's counsel means by the argument to insist that there can be but one punishment for all offenses committed by a person under this statute within one period of six calendar months, the reply is that it was otherwise held in *Re Henry*, 128 U. S. 374, 81 L. ed. 175. In that case the court said: "We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment: 'The act forbids, not the general use of the postoffice for the purposes of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of a letter or packet from the postoffice, in furtherance of such a scheme. Each letter so taken out or put in constitutes a

separate and distinct violation of the act.' It is not, as in the case of *Re Snow*, 120 U. S. 274, 80 L. ed. 658, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated. It is, indeed, provided that three distinct offenses, committed within the same six months, may be joined in the same indictment; but this is no more than allowing the joinder of three offenses for the purposes of a trial. In its general effect this provision is not materially different from that of § 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offenses,' and the consolidation of two or more indictments found in such cases. Under the present statute, three separate offenses, committed in the same six months, may be joined, but not more, and, when joined, there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself." See also *Durland v. United States*, 161 U. S. 815, 40 L. ed. 712.

It may be further observed that, if the indictments consolidated for the purpose of trial laid the date of all of the twenty-four offenses as within the same six calendar months, the proof of the offense in the ordinary case need not correspond in day and year with the allegation. Any time within the statute of limitations would be sufficient, and as the statute in its terms, like § 1024, is a mere regulation of procedure, it could hardly be maintained that this rule of the common law is changed or affected by the statute. So, the inquiry whether all the offenses were within the same six months would resolve itself into a question of fact rather than one of law. It was entirely competent, according to the *Henry Case*, to charge the petitioner with twenty-four separate offenses committed within the same six calendar months in eight separate indictments containing three counts each; and upon conviction the court might pronounce eight sentences, one on each indictment, just as was done in the case at bar, and the judgments would be neither erroneous nor void.

Another and the last objection to be noticed is to the action of the court in the order consolidating the indictments. We think it is clear that this inquiry is addressed to a question of error in the proceeding and judgment, and not to the question whether the judgment and sentence are void, as without jurisdiction and authority. *Ex parte Parks*, 98 U. S. 18, 23 L. ed. 787; *United States v. Pridgeon*, 158 U. S. 48, 88 L. ed. 681; *Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787; *Re Frederick*, 149 U. S. 70, 37 L. ed. 653; Bishop, Crim. Proc. § 1410. This question could be examined only on writ of error, and in that mode only after exception duly taken and reserved in the court below. *Bucklin v. United States*, 159 U. S. 685, 40 L. ed. 806; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429.

We conclude, therefore, that there was no error in the judgment of the court below

denying the writ, and the same is accordingly affirmed.

NOTE.—In addition to the authorities referred to in the opinion, the following may be consulted with advantage, as bearing upon the different points considered and decided: *United States v. Blaisdell*, 8 Ben. 122; *Ex parte Peters*, 4 Dill. 169; *Ex parte Shaffenburg*, 4 Dill. 271; *Ex parte Peters*, 12 Fed. Rep. 461; *Wiborg v. United States*, 163 U. S. 632, 41 L. ed. 289.

[Eighth Circuit.]

ILLINOIS TRUST & SAVINGS BANK,
Trustee, etc., *Appl.*,
v.

ARKANSAS CITY.

George E. HOPPER, Receiver, etc., *Appl.*,
v.

ARKANSAS CITY *et al.*

(76 Fed. Rep. 271.)

1. A city of the second class in Kansas has power to contract with a private party for the construction and operation of waterworks and for the payment of rent for the use of hydrants, and to grant to such a party the use, not exclusive, of its streets for the purpose of laying pipes to conduct the water.
2. In the construction of the statutes of a state which measure the powers and liabilities of its political organizations Federal courts uniformly follow the interpretation of the highest judicial tribunal of the state, where no question of general or commercial law or of right under the United States Constitution or laws is involved.
3. The invalidity of the exclusive grant by a city of the right to use its streets to conduct water to its inhabitants is no defense to an action for rent which the city has promised to pay the grantee for the use of hydrants after the works have been constructed according to the contract and have been accepted by the city.
4. The remainder of a divisible contract of a municipal corporation may be enforced, although part of such contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, unless it appears from a consideration of the entire agreement that it would not have been made independently of the part which is void.
5. No one who does not infringe or threaten to infringe the exclusiveness of a grant of the right to use the streets of a city for water pipes can be heard to allege its invalidity because of its exclusiveness after the works have been constructed and the contract has been substantially performed by the grantee.
6. The rule that the members of the legislative body of a city may not so act or contract as to deprive their successors of the unimpaired exercise of the legislative or governmental power does not apply to the exercise of the business or proprietary powers of the municipality, such as the power to

contract for waterworks, but in the exercise of such power the city is governed by the same rules as a private corporation or individual, and may contract for terms longer than the duration of the terms of office of the members of its legislative body.

7. A city of the second class under the power given by Kan. Gen. Stat. 1889, § 7185, to contract for and procure the construction of waterworks, may contract for such construction and lease of hydrants for a term exceeding the single year during which the members of its council hold office.
8. A court cannot declare void a contract for the term of twenty-one years, made by a city in the exercise of discretionary power given by the legislature to determine the length of the term of such contract.
9. An ordinance which does not receive the votes of a majority of the members elect of a city council is defeated, under Kan. Gen. Stat. 1889, § 765.
10. A contract may be made upon motion or by resolution by a city council under statutes authorizing it to contract, but not requiring an ordinance therefor.
11. The presentation to a city council in open session by a private party named as grantee in a defeated ordinance of a written acceptance of the terms of the ordinance, and a bond to construct waterworks accordingly, the construction of the work and location of the hydrants by such grantee under direction of the city council, the actual acceptance and use of the works by the city when completed, and the passage by the council of a formal resolution accepting such works,—constitute a binding contract for the construction and operation of the works according to the terms of such ordinance between the city and the grantee therein.
12. No one may to the damage of another deny the truth of representations by which he has purposely or carelessly induced the latter to change his situation.
13. A city is estopped to defeat a recovery for rent of hydrants as against bondholders who loaned money on a mortgage of the plant and income of waterworks built under the direction and accepted by formal resolution of the city council and completed according to the terms of a defeated ordinance, where the city has paid rents without protest for fourteen months, either on the ground that there was no contract or that it had no power for the term mentioned in the ordinance to grant the exclusive right to the use of its streets for water pipes. [*Per Sandborn, J.*]

(September 14, 1896.)

A PPEALS by the trustee of a mortgage and by the receiver appointed in a foreclosure suit from a decree of the Circuit Court of the United States for the District of Kansas in a foreclosure proceeding which refused to compel Arkansas City to comply with its contract with the mortgagor to pay rental for hydrants used by it. *Reversed.*

NOTE.—As to the power of public officers to make contracts binding on their successors or for a term of years, see note to *Shelden v. Fox* (Kan.) 16 L. R. A. 237.

34 L. R. A. —

As to the exclusiveness of a franchise to a water company, see also *Re Brooklyn* (N. Y.) 26 L. R. A. 270.

Before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Statement by Sanborn, Circuit Judge:

These are appeals from a decree of foreclosure of a trust deed upon the waterworks in the city of Arkansas City, in the state of Kansas. The Illinois Trust & Savings Bank, the trustee in the deed and the complainant in the foreclosure suit, appeals, because the court below adjudged by its decree that the city of Arkansas City was not bound to pay the rentals for hydrants, which it undertook to pay by the terms of the contract with the mortgagor, under which the works were constructed, and in reliance upon which the money secured by the mortgage was loaned. George E. Hopper, the receiver appointed in the foreclosure suit, appeals, because the court below adjudged by this decree that, although the city had used 179 hydrants under this contract during the receivership, it was bound to pay no rental for more than 50 thereof.

The city of Arkansas City is a city of the second class under the laws of the state of Kansas. On December 28, 1885, that city undertook to pass its ordinance No. 27, to induce the construction of waterworks in that city, for the purpose of supplying the city and its inhabitants with water for public and domestic purposes. The statutes of the state of Kansas declare that no ordinance of such a city shall be valid unless a majority of the members elect of the city council vote in favor thereof on a call of the yeas and nays, and their vote is entered on the journal by the clerk. Kan. Gen. Stat. 1889, § 765. The city council of this city consisted of eight members, but only seven were present when this ordinance was put to a vote, and only four voted in its favor. It was, however, declared adopted; was approved by the mayor; was accepted by the Interstate Gas Company, to which it granted the franchise to construct and operate the waterworks; the works were constructed under its provisions at an expense of thousands of dollars; the \$150,000 secured by the trust deed was loaned by the bondholders, now represented by the bank, in reliance upon this ordinance; and the city paid the rentals it promised to pay by it until October, 1891.

The provisions of this ordinance that are material to the issues in this case are these:

By § 1 the Interstate Gas Company, its successors or assigns, are authorized to use the streets of the city to lay pipes for the conveyance of water in and through the city for the use of the city and its inhabitants.

"Sec. 2. That said Interstate Gas Company, its successors or assigns, shall have the exclusive privilege of laying down pipes for conveying water in said city for the use of said city and inhabitants for the term of twenty-one (21) years from the date of the passage of this ordinance; provided that the Interstate Gas Company, its successors or assigns, shall within sixty (60) days from the approval of this franchise, establish the best and most suitable place within the western portion of this city for the source of water supply, and submit this selection to the mayor and city council for their approval, and have the said works completed and in successful operation

within eight months of such approval, and shall keep and maintain such system of waterworks with all future additions and extensions in successful operation thereafter during the term of franchise, unavoidable accidents or delays consistent with ordinary precaution only excepted.

"Sec. 3. That said Interstate Gas Company, its successors or assigns, shall erect within the corporate limits of the city of Arkansas City, Kansas, a complete system of waterworks of sufficient capacity to furnish at all times all the water necessary for use in said city for the prompt extinguishment of fires and for sprinkling and other public and domestic purposes, and shall at all times make all additions and extensions necessitated by the increased demand.

"Sec. 4. That said Interstate Gas Company, its successors or assigns, shall at the most suitable place erect the necessary buildings and appliances for such system of waterworks, and shall erect and put up a standpipe of the dimensions of ten (10) feet diameter and one hundred and fifteen (115) feet high; there shall be two (2) duplex pumps of the most approved pattern capable of furnishing 1,000,000 gallons of water per day of twenty-four hours, also two boilers of best construction and so arranged and built that they may be fired and used separately or together and each of sufficient power to run both pumps at the same time with easy firing, and provide everything found indispensable and desirable for a complete and successful plant of water supply.

"Sec. 5. Starting from these works the Interstate Gas Company, its successors or assigns, shall lay down and maintain standard iron mains of at least three and one-half (3½) miles in length, said pipe to be of such dimensions as hereinafter set forth, and sufficient to secure at all times and at any and all places within said 3½ miles of sufficient water supply, as well for public as domestic use, and the said Interstate Gas Company, its successors or assigns, shall erect without cost to the city, fifty (50) double-discharge fire hydrants or any number of above said amount as may be ordered by the city at such points and places as the proper authorities of the city of Arkansas City may designate and shall connect such fire hydrants with the system of mains, provided that whenever the additional hydrants so ordered shall necessitate an extension of the mains beyond the 3½ miles the number of hydrants so ordered or the private consumption to be secured or jointly are sufficient to justify the additional outlay.

"Sec. 6. That the size of the mains shall be as follows: Starting out from the works there shall be not less than ten (10) inch pipe extending to Summit street, there shall be seventeen hundred (1,700) feet of eight (8) inch pipe laid in Summit street and connecting with the 10-inch main; there shall be twenty-two hundred and eighty (2,280) feet of eight (8) inch main laid as the city council may direct; the balance of the 3½ miles and any further extensions to be of any size not less than 4 inches in diameter laid as the city may direct; all pipes to be of the dimensions stated interior measure, and all the mains to be of standard cast iron and no mains

to be laid at any time less than 4 inches interior diameter; the standpipe to be of boiler iron and to be placed on a solid foundation of masonry laid in cement.

"Sec. 7. That the Interstate Gas Company, its successors or assigns shall at the request of any citizens; without unnecessary delay, put down the necessary pipes, and connect them with their system of mains to supply the property of said citizens with water for all domestic purposes under such conditions and at such annual rents as shall be agreed upon between the city council and the Interstate Gas Company before the expiration of the sixty days granted above for the establishing of water source, but the Interstate Gas Company its successors or assigns, may make with large consumers, such as railroads, hotels, mills, breweries, factories and others, special rates as they may deem proper, the cost of the connections to be borne by the respective citizens.

"Sec. 8. The Gas Company shall repair damages to the streets caused by laying or operating its mains.

"Sec. 9. The city of Arkansas City, by its mayor and city council for and in consideration of the obligations imposed on the Interstate Gas Company, its successors or assigns, by the foregoing sections, hereby agree to, and contract with the Interstate Gas Company, its successors or assigns, to accept the fifty (50) hydrants stipulated in § 5 of this ordinance for the use of the city of Arkansas City as soon as the same are erected, connected with the water mains, and supplied with water, and from that day to pay the Interstate Gas Company, its successors or assigns, the sum of sixty dollars (\$60) United States currency per annum for each and every such fire hydrant above enumerated as well as for every additional hydrant in excess of said number during the term of this contract; . . . provided, however, that the mayor and the city council of the city of Arkansas City, Kansas, shall not be bound to accept such 50 hydrants for the use of the city before a thorough test is made to prove that the works erected by the Interstate Gas Company, its successors or assigns, under this ordinance are in perfect working order and are able to throw simultaneously four (4) streams of water from any four hydrants to be designated by the mayor and city council through 100 feet of 2½ inch rubber hose and 1 inch ring nozzle at least sixty-five (65) feet high from standpipe alone and eighty (80) feet high by direct pressure of pumps."

"Sec. 17. That the Interstate Gas Company shall execute a good and sufficient bond in the penal sum of \$5,000 conditioned for the faithful completion of works as specified in § 2, said bond to be subject to the approval of the mayor and to be void after the acceptance of the works as set forth in § 9."

"Sec. 23. This ordinance shall take effect and be in force from and after its publication once in the Arkansas City Traveler, and its acceptance in writing by the Interstate Gas Company, its successors or assigns."

On February 12, 1886, the gas company, the grantee named in this ordinance, submitted its selection of water supply for the works, pursuant to § 2, to the mayor and council of the

city, for their approval, and the council by vote approved the selection. At the same time the gas company presented its written acceptance of the ordinance and the bond required by § 17 thereof, and these were received by the council in open session. On September 12, 1886, the gas company offered to extend the waterworks by the addition of 50 extra hydrants, making the whole number of hydrants 100, at one half the rental named in the original ordinance for two years, and to furnish schoolhouses and city buildings free, and this offer was accepted by vote of the city council. The gas company constructed these waterworks during the summer of 1886, and on September 17 of that year had completed them ready for operation in accordance with the provisions of the ordinance. On January 17, 1887, a committee of the city council made the following report to that body:

To the Honorable Mayor and City Council,
Arkansas City, Kansas—
Gentlemen:

Your committee on waterworks hereby beg leave to report: That the Interstate Gas Company have finished the system of waterworks contracted for with this city under ordinance No. 27, to the full satisfaction of your committee, and that the test required under said ordinance was successfully made. The Interstate Gas Company has, in our opinion, carried out its contract faithfully and conscientiously, and the works are acknowledged to be an ornament and a valuable permanent improvement for our city. We therefore beg leave to submit the following resolution, *viz.*: That the waterworks erected by the Interstate Gas Company under ordinance No. 27 be, and are hereby, accepted by the city; said acceptance to date from Oct. 1, 1886, the same having been finished and ready for operating since Sept. 17, 1886; and that the Interstate Gas Company, its successors and assigns, be, and are hereby, released from the bond and from all liabilities under such ordinance, as far as the construction of such works is concerned.

[Signed]

C. G. Thompson,
A. A. Davis,
C. T. Thuston.

On the same day the city council adopted the resolution recommended by this report. After the waterworks had been completed and put into operation, the Arkansas City Water Company, a corporation of the state of Kansas, succeeded to all the property, franchises, and rights of the Interstate Gas Company in these waterworks, and thereafter, on November 25, 1887, that company made the trust deed here in suit to the Illinois Trust & Savings Bank, to secure the payment of 150 of its bonds of \$1,000 each, dated October 1, 1886, payable October 1, 1906, with interest at 6 per cent per annum, payable semi-annually. By this deed the water company not only conveyed all the real estate, water mains, pipes, franchises, and property pertaining to these waterworks, but it assigned to the bank all its claims and demands that should arise during the existence of any part of the mortgage debt against the city of Arkansas City under ordinance No. 27, and authorized the bank to col-

lect, receive, and receipt for all sums of money so accruing from the city of Arkansas City for the rent of fire hydrants; and, in case of default in the payment of the semiannual interest upon the bonds for the space of six months, it authorized and empowered the bank, on the usual terms, to declare the whole debt due, and to "take possession of the property and franchises herein mortgaged or covenanted so to be and by itself and agents, or by a receiver of a court appointed in a suit for the enforcement of this lien, or a suit for such possession, hold, use, and operate the same for the equal benefit of the holders of all of the said bonds, and receive the income and profits therefrom." This trust deed also provided that \$100,000 in amount of the \$150,000 of bonds secured by it should be used forthwith for the retirement of bonds to that amount, which had already been issued by the water company, and that no part of the remaining \$50,000 should be issued except to pay for extensions of water mains and betterments connected therewith; to be made by the water company after September 24, 1887, and then only on the certificate of the president and secretary of the water company, satisfactory to the trustee, to the effect that the extensions and betterments had been made, and "that the revenue of the said water company from the city hydrant rental from hydrants on the said extensions amounts to at least enough to pay the interest upon the amount of bonds to be so issued." On September 12, 1887, the water company made a proposition to the city council to "extend the present system of mains 4½ miles and to erect 50 additional fire hydrants at such prices [points] as may be designated by your waterworks committee provided the city will agree to pay for said 50 hydrants the sum of \$30 per annum each for a term of five years, after which time the rentals shall be and remain \$60 per annum as provided in the original franchise. Time of rental to date from time said hydrants are erected and connected with the main and supplied with water as provided in ordinance No. 27." And the city council accepted the proposition, and ordered the mains laid and the hydrants erected. On November 21, 1887, the city council ordered that the water main be extended on First street to accommodate citizens on that street, and that a hydrant be located at the intersection of First avenue and Third street, provided the waterworks company would furnish the hydrants on the same terms as those last ordered. On May 21, 1888, the city council by vote accepted 54 hydrants erected under the last two orders. About June 1, 1888, the following certificate, signed by the city clerk and sealed with the official seal of the city, was presented to the bank:

STATE OF KANSAS, }
COUNTY OF COWLEY, } ss.
CITY OF ARKANSAS CITY.

I, J. W. Heck, city clerk in and for said city, hereby certify that 54 city hydrants have been erected since September 24, 1887, and put in, in accordance with the order of the city council of said city made on September 12, 1887, and connected with the extensions of water mains of the Arkansas City Water Company, 34 L. R. A.

and supplied with water and accepted by the mayor and city council of said city, in accordance with the provisions of § 9 of the original franchise of said company, by a resolution passed May 21, 1888, as follows: 'A motion was offered, seconded, and carried, that the city council accept 54 hydrants under the last order, on conditions that six (6) of the double hydrants be redistributed under the directions of the waterworks committee.' And I hereby further certify that from each of said hydrants said water company is now earning and will receive from the said city of Arkansas City a rental of \$30 per annum making the total revenue of the said company from the city hydrant rental from hydrants on said extensions, \$1,620 per annum. Witness my hand and official seal this 24th day of May, 1888.

[Seal]

J. W. Heck, City Clerk.

Upon the presentation of this certificate, the bank issued 27 bonds under the provisions of the trust deed to which we have referred, and they were sold by the mortgagor, and are now held by the purchasers or their assignees. Under like resolutions of the council further extensions of the mains were made, 26 more hydrants were erected, and accepted by the city council, and on similar certificates of the city, the remaining 23 bonds were issued by the bank, and sold by the mortgagor in like manner. The whole number of hydrants erected was 180. One was afterwards removed, and 179 hydrants have been in use by the city up to the time of the final hearing in this case. The hydrants on the extensions of the original plant were placed on mains 4 inches in diameter, laid as the city directed, pursuant to the provisions of § 6 of the ordinance. These hydrants were all located and erected under the direction of the city council. The city clerk testified that "there was a water committee for that purpose, and, as the people came in and asked for water, it was referred to the water committee to look the matter over, and the hydrants would be located upon the direction of the waterworks committee." On August 1, 1891, the city council of Arkansas City by a unanimous vote passed a resolution to support the proposition to purchase of the water company the waterworks and all its rights and franchises "for the sum of \$190,000; to take the property as above, subject to the mortgage of \$150,000, and issue and deliver \$40,000 of ten-year bonds, at 6 per cent, or \$40,000 of thirty-year bonds at 5 per cent, of \$1,000 each, with semiannual interest coupons thereto attached. The waterworks to pay the interest on the mortgage of \$150,000 to August 1, 1891, and Arkansas City to pay hydrant rental to same date. Waterworks to receive all moneys to said August 1, and city to receive all moneys after that date, less operating expenses." The proposition contained other provisions that are not material here. Those we have recited were accepted by the water company; and pursuant thereto it conveyed the property to the city subject to the mortgage to the bank by a warranty deed, dated September 16, 1891, which expressly described and excepted the mortgage of \$150,000, evidenced by the trust deed, from the covenant against encumbrances. On the same

date, in consideration of the \$40,000 paid to it by the city, the water company executed and delivered to the city a written consent that ordinance No. 27 might be repealed, and that the water company surrendered all "rights in, to, or under said ordinance and said contract to the city of Arkansas City, Kansas." On September 18, 1891, the city council passed ordinance No. 804, which, by its terms, repealed ordinance No. 27. The city issued its bonds for \$40,000, delivered them to the water company, and took possession of the waterworks under the latter's deed. No rental for any of the hydrants has been paid by the city since October 1, 1891, and the interest on the \$150,000 secured by the trust deed has been in default since April 1, 1892. On October 18, 1892, the bank filed a bill in the court below and subsequently made an amendment thereto. The bill and the amendment contained sufficient allegations to entitle the bank to a foreclosure of the trust deed, to the appointment of a receiver, and to a decree that, as against the trustee and the bondholders, the contract to pay rental according to the terms of ordinance No. 27 is binding upon the city, and that ordinance No. 804, which attempted to repeal it, is void. In this suit the bank made the Arkansas City Water Company and the city of Arkansas City defendants, and on the application of the complainant George E. Hopper was, on December 12, 1892, appointed receiver of the waterworks, and authorized "to operate said waterworks and property, to receive and collect from the various parties using the water from said works, and to receive and collect from the defendant, the city of Arkansas City, the hydrant rental due from said city for the use of said water." To the bill of the complainant in this case the Arkansas City Water Company interposed no answer. The city answered, and interposed several defenses, which were properly overruled by the court below, and will not be noticed. It interposed three defenses that were ultimately sustained by the decree. They were that the original contract between the water company and the city was void, (1) because by it the city attempted to grant to a private corporation an exclusive right to furnish the city and its inhabitants with water; (2) because by it the city attempted to grant to a private corporation the right to furnish the city and its inhabitants with water for twenty-one years, and to bind the city to pay rental for it for that time; and (3) because the ordinance on which the contract was based was not passed, but was rejected, by the city council. On May 21, 1894, after the case had been heard, and after a decree had been rendered that the trust deed should be foreclosed, that the city should pay to the receiver the rental fixed by ordinance No. 27 for fifty hydrants from October 1, 1891, until the further order of the court, and that the complainant or the receiver might make further application for the payment of additional hydrant rentals, the receiver made a motion that the court make an additional order that the city pay to the receiver the rental fixed by the ordinance for all hydrants used by the city from the date of its appointment to that time. A large amount of testimony was taken upon this motion relative to the efficiency of

the additional hydrants, from which it fairly appears that these hydrants have all been supplied with all the water that will pass through the pipe on which they were located by direction of the city council, but that, owing solely to the size of the pipe and the location of the hydrants, they will not stand the test prescribed by § 9 of the original ordinance as a condition precedent to the acceptance of the 50 hydrants first erected, although on the average they will throw the streams of water about one half as high as prescribed by that test. The testimony was undisputed that the city had used the water from all these hydrants during all this time, and that the supply was ample for sprinkling and all domestic and public purposes except the extinguishment of fire. Upon this evidence the court below held that the city was not liable to pay anything for the use of the 129 additional hydrants. The court then entered a decree to the effect that the trust deed should be foreclosed, and that the tangible property constituting the waterworks should be sold to pay the mortgage debt; that the city should pay \$60 a month rental for each of the 50 original hydrants as long as it continued to use the water from them, but that it was not liable to pay to the receiver any rental for the use of the water from the 129 additional hydrants; that no contract based on ordinance No. 27 was made between the city and the Interstate Gas Company, and that, if it had been made, it would have been void, because it was beyond the powers of the city, and that the city was not liable to pay for the use of the water from any of the hydrants connected with the waterworks for any longer time than it chose to use the same. This is the decree which these appeals challenge.

Messrs. L. C. Krauthoff, Charles Blood Smith, and W. H. Rossington for appellants.

Messrs. J. W. Ady, S. E. Peters, J. C. Pollock, and J. Mack Love, for appellees.

The common council of defendant city does not possess the power to grant a franchise or make a contract with a private corporation, granting the exclusive right to supply water for public and domestic use for a period of twenty-one years, and it cannot bind subsequent councils to continue to receive the services to be performed by such private corporation and to continue to pay for such services.

Wyandotte v. Corrigan, 85 Kan. 21; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1086; *Holyoke Water-Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 183; *Chenango Bridge Co. v. Binghamton Bridge Co.* ("The Binghamton Bridge"), 70 U. S. 3 Wall. 51-75, 18 L. ed. 187-143; *Rice v. Minnesota & N. W. R. Co.* 66 U. S. 858, 17 L. ed. 147; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 271, 81 L. ed. 785; *East St. Louis Gaslight & C. Co. v. East St. Louis*, 47 Ill. App. 411.

The defense here urged can be interposed in this suit.

Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529; *Dill. Mun. Corp. § 89*; *Minturn v. Larue*, 64 U. S. 28 How. 435, 16 L. ed. 574; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *Davis v. New York*, 14 N. Y.

506; *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 22; *Garrison v. Chicago*, 7 Bias. 488; *Gale v. Kalamazoo*, 28 Mich. 844, 9 Am. Rep. 80; *Brenham v. Brenham Water Co.* 87 Tex. 542; *Altgelt v. San Antonio*, 81 Tex. 486, 18 L. R. A. 888; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 15 L. R. A. 854.

So-called ordinance No. 27 of the defendant city was not enacted by the city, but was rejected.

McCracken v. San Francisco, 16 Cal. 591; *Logansport v. Legg*, 20 Ind. 815; *Rich v. Chicago*, 59 Ill. 286; *Topeka v. Huntton*, 46 Kan. 634; *Carroll v. Wall*, 35 Kan. 86; *Grogan v. San Francisco*, 18 Cal. 590; *Pimental v. San Francisco*, 21 Cal. 851; *Herro v. San Francisco*, 83 Cal. 184.

So-called ordinance No. 27, having been rejected by the council, cannot form the basis of any contract upon which the city can be bound.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; *Terre Haute v. Lake*, 43 Ind. 482; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Aichison Street R. Co. v. Nave*, 38 Kan. 744.

The things that made this contract claimed by the appellant invalid are: First, that it was never made; second, that the council had no power to make it; third, that it is unlawful and would be unlawful if executed in form.

No equitable estoppel can ever arise in behalf of one claiming under an unlawful agreement; neither can a contract that never existed and that would be unlawful if it existed, be ratified.

Thomas v. Richmond, 79 U. S. 12 Wall. 849, 20 L. ed. 458; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 182; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044; *Prickett v. Marceline*, 65 Fed. Rep. 469; *Newman v. Emporia*, 32 Kan. 456; *McCracken v. San Francisco*, 16 Cal. 591.

In the attempt to make the contract in question in this case, and grant the franchise, as provided for in so-called ordinance No. 27, the city was not engaged in a purely private enterprise, was not contracting with reference to its own property, but was attempting to engage in a public enterprise through its governmental functions, and the franchise attempted to be granted, the city was without power to grant.

Richmond County Gaslight Co. v. Middletown, 59 N. Y. 228; *Gale v. Kalamazoo*, 28 Mich. 844, 9 Am. Rep. 80; *Logan v. Pyne*, 43 Iowa, 524, 23 Am. Rep. 261; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Garrison v. Chicago*, 7 Bias. 488; *Grand Rapids Electric Light & P. Co. v. Grand Rapids Electric Light & F. G. Co.* 33 Fed. Rep. 659.

If the power did exist it could only be exercised by ordinance passed in conformity with the laws of the state of Kansas.

A resolution has ordinarily the same effect as an ordinance, and both are legislative acts, but a resolution is an order of a special and temporary character. An ordinance prescribes a permanent rule of conduct or government.

Smalley v. Yates, 41 Kan. 550; 17 Am. & Eng. Enc. Law, p. 235; *Blanchard v. Bissell*, 11 Ohio St. 96.

The common council can only contract by 34 L. R. A.

order, resolution, or ordinance passed in the manner required by statute.

Terre Haute v. Lake, 43 Ind. 482; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Aichison Street R. Co. v. Nave*, 38 Kan. 744; *Newman v. Emporia*, 32 Kan. 456; *Sloan v. Beebe*, 24 Kan. 343; *Barron v. Krebs*, 41 Kan. 838; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

Void acts cannot be ratified by ordinance afterwards.

Doughty v. Hope, 1 N. Y. 79; *People, Atty. Gen., v. Maynard*, 15 Mich. 463; *Story, Agency*, §§ 240, 241; *Dill, Mun. Corp.* §§ 75-80; *McCracken v. San Francisco*, 16 Cal. 591.

The city cannot ratify a contract which it had no power to make.

Hedges v. Dixon County, 150 U. S. 182, 37 L. ed. 1044; *Milford v. Milford Water Co.* 124 Pa. 610, 8 L. R. A. 123.

An illegal contract is not legalized by the fact that somebody who has invested money will lose it unless the contract be upheld.

Thomas v. Richmond, 79 U. S. 12 Wall. 849, 20 L. ed. 458; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 182; *Hedges v. Dixon County*, *supra*.

Sanborn, Circuit Judge, delivered the opinion of the court:

The effect of the decree in this case is that the city is not liable to pay the rental promised by it for the use of the waterworks, constructed by a private corporation, and accepted and used by the city for many years under a supposed contract, (1) because the city had no power to vest in the private corporation the exclusive right to the use of its streets for the purpose of laying pipes to conduct water to itself and its inhabitants, (2) because it had no power to grant the right to use its streets for that purpose for the term of twenty-one years, and (3) because the ordinance which expressed the terms of the supposed contract was not originally passed by the vote of a majority of the members elect of the city council.

May a municipality obtain and accept the use of expensive waterworks under a contract by which it covenants to pay annual rentals therefor, and to grant an exclusive privilege to use its streets for that purpose, and escape the performance of all its covenants, because it was beyond its power to make the privilege which it granted exclusive? This is the first question presented in this case. Paragraph 7185 of the General Statutes of Kansas of 1889, which was in force when the contract here in question was made, provided "that cities of the first, second, and third class of the state of Kansas are hereby granted full power and authority on behalf of such cities respectively to contract for, and procure, waterworks to be constructed for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires and for manufacturing and for other purposes."

It is settled by repeated decisions of the highest judicial tribunal of the state of Kansas that under this and other sections of the statutes of that state a city of the second class has authority to grant a franchise to a person or a corporation to establish waterworks to furnish the city and its inhabitants with water, to

grant the privilege of using its streets to a private corporation for such a purpose, and to agree to pay rental to it for the use of its hydrants. Kan. Gen. Stat. 1889, §§ 787, 817, 1401, 1402, 7185-7190; *Wood v. National Waterworks Co.* 38 Kan. 596; *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725; *Columbus Waterworks Co. v. Columbus*, 46 Kan. 686; *Manley v. Emlen*, Id. 655; *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 101, 15 L. R. A. 854. These decisions conclude this question here. When no question of general or commercial law, and no question of right under the Constitution and laws of the nation, are involved, the Federal courts uniformly follow the construction of the Constitution and laws of a state given by its highest judicial tribunal. This rule is adhered to with marked tenacity in the construction of state statutes, which measure the powers and liabilities of political and municipal organizations of a state. *Madden v. Lancaster County*, 27 U. S. App. 528, 538, 12 C. C. A. 566, 570, and 65 Fed. Rep. 183, 192, and cases cited; *Detroit v. Osborne*, 135 U. S. 492, 499, 84 L. ed. 260, 262.

This city, then, had the power to grant to the gas company the privilege of using its streets for water pipes, and it had power to rent hydrants of that company, when this contract was made. For the purposes of this discussion, we shall concede that it had no power to make the privilege of the gas company to use its streets exclusive, because such a grant tends to create a monopoly. The general rule is that the legislature alone has the power to make exclusive grants of this character, and that this authority does not vest in the municipality, unless it is expressly granted to it by its charter. It will be further conceded that, if a grant of a similar privilege in its streets, not exclusive, had been subsequently made by this city to another corporation, and that corporation was about to proceed to construct another system of waterworks in this city, neither the gas company nor the city itself could maintain a bill to enjoin such proceedings. Since it was beyond the powers of the city to make the grant of the privilege exclusive, that portion of the grant would not sustain a bill to restrain the violation of its terms. *Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co.* 24 Fed. Rep. 306, 310; *Omaha Horse R. Co. v. Cable Tramway Co.* 80 Fed. Rep. 824; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529, 540; *Long v. Duluth*, 49 Minn. 280; *Minturn v. La Rue*, 64 U. S. 28 How. 435, 16 L. ed. 574; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921. It was upon the principles we have conceded, and upon the authorities just cited, that the court below seems to have based its conclusion that the exclusiveness of this grant would avoid the entire contract. But these principles and decisions are far from sustaining the position that, after this contract has been substantially performed by the gas company, after the waterworks have been constructed according to its terms, and after the city has accepted and used them for years, and has thus secured the substantial benefits of its grant, it can repudiate all the obligations it had the power to assume, because it assumed one that was beyond its power. The conclusion of Judge Brewer in *Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co.* supra,—a suit to enjoin the railway company from constructing a second street railway in a city,—at page 310, "that so much of the ordinance as purported to give exclusive privileges to the lessor or complainant was beyond the powers vested in the city of Kansas, and therefore void,"—points to the true solution of the question under consideration. If the gas company stood at the initiation of the execution of this contract defending against its specific performance, on the ground that the city had no power to make its right to use these streets exclusive, that defense might deserve some consideration. But now the gas company has constructed the works. It has executed the contract on its part as far as it has been possible for it to be executed. The exclusiveness of its right to the use of the streets of the city was granted for its sole benefit. If it does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the waterworks for a less price than it agreed to pay for them. No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the receipt of the exclusive right, and recover the remainder of the consideration which the city promised to pay it. The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers. On the other hand, the true rule is, and ought to be, the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Oregon Steam Nav. Co. v. Winzor*, 87 U. S. 20 Wall. 64, 70, 22 L. ed. 315; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 395, 38 L. ed. 1014, 1022; *Western U. Teleg. Co. v. Burlington & N. W. R. Co.* 11 Fed. Rep. 1, 4, and cases cited in note at page 12; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529, 540. There is no such appearance in this case. There is nothing in this contract, or in the situation of the parties to it when it was made, to indicate that the exclusive character of the right to lay pipes in the streets of this city for the purpose of conveying water constituted a material part of the consideration for the agreement. There is nothing to show that the city of Arkansas City was a large or wealthy city, or that corporations or individuals were crowding forward to compete for the privilege of building its waterworks. Its population did not exceed 15,000, and it was probably much less, for the whole number of votes upon the proposition to buy the waterworks in 1891, five years after this contract was made, was only 292. There is but one reference to this exclusive right in the contract itself, and that consists of the mere word "exclusive" before the word "privilege," in the 2d section of the ordinance. It does not appear that this con-

terstate Rapid Transit R. Co. supra,—a suit to enjoin the railway company from constructing a second street railway in a city,—at page 310, "that so much of the ordinance as purported to give exclusive privileges to the lessor or complainant was beyond the powers vested in the city of Kansas, and therefore void,"—points to the true solution of the question under consideration. If the gas company stood at the initiation of the execution of this contract defending against its specific performance, on the ground that the city had no power to make its right to use these streets exclusive, that defense might deserve some consideration. But now the gas company has constructed the works. It has executed the contract on its part as far as it has been possible for it to be executed. The exclusiveness of its right to the use of the streets of the city was granted for its sole benefit. If it does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the waterworks for a less price than it agreed to pay for them. No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the receipt of the exclusive right, and recover the remainder of the consideration which the city promised to pay it. The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers. On the other hand, the true rule is, and ought to be, the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Oregon Steam Nav. Co. v. Winzor*, 87 U. S. 20 Wall. 64, 70, 22 L. ed. 315; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 395, 38 L. ed. 1014, 1022; *Western U. Teleg. Co. v. Burlington & N. W. R. Co.* 11 Fed. Rep. 1, 4, and cases cited in note at page 12; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529, 540. There is no such appearance in this case. There is nothing in this contract, or in the situation of the parties to it when it was made, to indicate that the exclusive character of the right to lay pipes in the streets of this city for the purpose of conveying water constituted a material part of the consideration for the agreement. There is nothing to show that the city of Arkansas City was a large or wealthy city, or that corporations or individuals were crowding forward to compete for the privilege of building its waterworks. Its population did not exceed 15,000, and it was probably much less, for the whole number of votes upon the proposition to buy the waterworks in 1891, five years after this contract was made, was only 292. There is but one reference to this exclusive right in the contract itself, and that consists of the mere word "exclusive" before the word "privilege," in the 2d section of the ordinance. It does not appear that this con-

tract would not have been made and performed, just as it has been, if this word, or the section in which it stands, had been omitted from the ordinance. On the other hand, the size and character of the city, the situation of the parties at the time the agreement was made, and the contract itself all point unmistakably to the opposite conclusion. The result is that the fact that this city undertook to grant to the gas company an exclusive right to conduct water in pipes through its streets does not avoid the entire contract, and constitutes no defense to a claim for a recovery upon the other covenants made by the city, after it has received and accepted from the gas company the benefits of the substantial performance of the contract.

Moreover, the city is in no position in this case to insist upon the invalidity of the exclusive character of this grant, if that could avoid its entire contract. The city is not endeavoring to construct waterworks or to lay pipes in its streets in violation of its exclusive grant to the gas company, nor is anyone attempting to do so under its license or by its permission. No one seeks to infringe this exclusive grant. In practical effect it stands unchallenged, and may ever continue to be so. Until it is challenged by the act or endeavor of someone who seeks to infringe it, its validity or invalidity is a moot question, on account of which the courts ought not to, and will not, avoid any part of the contract. No one who does not infringe or threaten to infringe the exclusiveness of the grant in a contract made by a municipality can, after the substantial performance of the contract by the grantee, be heard to say that the contract or the grant is void on account of the exclusive character of the latter. *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 112, 15 L. R. A. 854; *Dodge v. Council Bluffs*, 57 Iowa, 560, 566; *Bellevue Water Co. v. Bellevue* (Idaho) 35 Pac. 693, 695; *East St. Louis v. East St. Louis Gaslight & C. Co.* 93 Ill. 415, 33 Am. Rep. 97; *Decatur Gaslight & C. Co. v. Decatur*, 24 Ill. App. 544, 547; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. Rep. 339, 347; *Grant v. Davenport*, 36 Iowa, 396, 406.

But it is insisted that this contract is beyond the powers of this city, and void, because it grants the right to use the streets of the city to the water company, and promises to pay rental for the hydrants, for twenty-one years. The proposition on which this contention rests is that the members of the city council are trustees for the public; that they exercise legislative powers; and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition cannot be successfully maintained in this case:

First, it ignores the settled distinction between the governmental, or public, and the proprietary, or business, powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which

it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Corp. 8d ed. § 66, and cases cited in the note; *Safety Insulated Wire & C. Co. v. Baltimore*, 18 C. C. A. 375, 377, 378, 66 Fed. Rep. 140, 143, 144, 25 U. S. App. 169; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 468, 469; *Com. v. Philadelphia*, 132 Pa. 288; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 192; *Tacoma Hotel Co. v. Tacoma Light & W. Co.* 3 Wash. 816, 825, 14 L. R. A. 669; *Wagner v. Rock Island*, 146 Ill. 139, 154, 155, 21 L. R. A. 519; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 126, 16 L. R. A. 485; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 396, 403; *State, Read, v. Atlantic City*, 49 N. J. L. 558, 562. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp. § 27; *Cincinnati v. Cameron*, 33 Ohio St. 386, 387; *Safety Insulated Wire & C. Co. v. Baltimore*, *supra*, and cases cited under it.

Second, the powers granted to this city by the legislature of the state of Kansas to contract for and procure waterworks are plenary and unlimited save by the duty to exercise them with reasonable discretion, and it is not the province of a court to contract or clip the legislative grant. The words of that grant are, "full power and authority to contract for and procure waterworks to be constructed for the purpose of supplying the inhabitants of such cities with water." It cannot but be clear to all who are familiar with the condition of cities of the second class—cities whose population was between 2,000 and 15,000—in the state of Kansas, in 1872, when this grant was made, that it was not the intention of the legislature of that state to limit the terms of these contracts to the single year during which the terms of office of the members of the city councils continued. The cities were young and poor, but they were ambitious and sanguine. They did not have the ready money to construct the waterworks which the health and comfort of their inhabitants required. It is hardly possible that any individual or corporation could have been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the promise of rental

for its hydrants for the limited term of a single year. These facts the members of the legislature must have known and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years, and by covenants to pay rentals for hydrants for a like term. In any event, the legislature made this grant, and it thereby vested in the mayor and council of the city the right to make such contracts for such terms as, in their discretion, they thought proper. There is nothing in this record to show that the mayor and city council of Arkansas City either exceeded their authority or abused the discretion which the legislature gave them when they fixed the term of the contract in this case at twenty-one years. Ample power was granted to cities of the second class of the state of Kansas by § 7185, Kan. Gen. Stat. 1889, to grant the right to the use of their streets to lay water pipes and to pay hydrant rentals for reasonable terms longer than the year during which their mayors and councilmen held their offices, and there is nothing in this record to show that twenty-one years was an unreasonable time for the term of such a contract. *Wood v. National Waterworks Co.* 88 Kan. 590, 597; *Burlington Waterworks Co. v. Burlington*, 48 Kan. 725, 728; *Manley v. Emlen*, 46 Kan. 655; *Columbus Waterworks Co. v. Columbus*, id. 666; *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 118, 15 L. R. A. 854; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586, 591; *Long v. Duluth*, 49 Minn. 280; *Walla Walla Water Co. v. Walla-Walla*, 60 Fed. Rep. 957, 960; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 396, 407; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 124, 125, 16 L. R. A. 485.

If, upon general principles, there was any doubt that the defenses of *ultra vires*, which have been considered, could not be maintained in this suit, the repeated decisions of the highest judicial tribunal of the state of Kansas upon these questions would compel that conclusion. In *Burlington Waterworks Co. v. Burlington*, *supra*, the city of Burlington had granted to the waterworks company the right to use its streets for twenty years, but had reserved the right to buy the works at an appraised value at the end of each five years, and had agreed to pay rental for a certain number of hydrants meanwhile. The supreme court of Kansas said: "In our opinion cities of the second class have the right and the power to provide for supplying themselves and the inhabitants of such cities with water in the manner in which such right and power were exercised in the present case, and in various other ways." 48 Kan. 728.

In *Manley v. Emlen*, *supra*, the city of Atchison had made a contract in 1860 with one Watts, by which it granted to him the right to use its streets for the purpose of conducting water through them in pipes for twenty-five years, and had promised to pay rental for certain hydrants during that time. In 1887 the city levied a tax to pay these rentals, and one

Manley brought a suit to enjoin its collection. The supreme court of Kansas said: "In 1860, when the city of Atchison, which was then a city of the second class, provided by ordinance for giving to Sylvester Watts, and to his successors and assigns, the right to furnish water to the city of Atchison and to its inhabitants for compensation, and upon certain terms and conditions, the city certainly had the power to do so and to make a valid contract with Watts for that purpose."

In *Columbus Waterworks Co. v. Columbus*, 46 Kan. 666, 667, 678, the city of Columbus made a contract in 1886 with Long and Doubleday and their assigns, the waterworks company, by which it granted to them the exclusive right to construct and maintain waterworks in that city for ninety-nine years, and promised to pay them \$60 a year for the use of each of at least 50 hydrants for the term of twenty-one years. The waterworks were built and accepted under this contract, and the city levied taxes for and paid the rental for the years 1888, 1889, and 1890, but refused to levy any taxes or to pay the rental for the year 1891. The waterworks company applied for a mandamus to compel the city to levy the necessary taxes to pay this rental, and the supreme court sustained its petition, and ordered the mandamus to issue. In *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 15 L. R. A. 854, the same waterworks company applied to the court to compel the same city to levy the necessary taxes, to pay the hydrant rental under the same contract for the year 1892, and the city answered that it had refused to receive or use any of the water from these hydrants after August 15, 1891. But the supreme court nevertheless issued the mandamus, and compelled the levy of the tax and the payment of the rental. These decisions conclude the discussion of these questions. *Madden v. Lancaster County*, 27 U. S. App. 529, 536, 12 C. C. A. 566, 570, and 65 Fed. Rep. 188, 193, and cases cited.

Another objection to the validity of this contract is that ordinance No. 27, which contains the terms of the agreement, was never passed, but was, in fact, defeated, by the city council of Arkansas City because that ordinance did not receive a majority of the votes of the members elect of the council. Let it be conceded that the ordinance did not pass, and that it was defeated when it was presented to the council for action on December 26, 1885. Kan. Gen. Stat. § 765. Does this fact establish the proposition that this ordinance does not express the terms of a contract made between these parties? The ordinance was approved by the mayor. It was spread upon the records of the city council, and it was treated as evidence of the contract between the city and the gas company until after the waterworks had been constructed and accepted, until after the mortgage of \$160,000 had been placed upon it, and until after the city had paid rentals for the hydrants under it for more than four years. The ordinance provided (§ 17) that the Interstate Gas Company should give a bond for the faithful completion of the works, as specified in § 2, and that it should take effect on its publication and acceptance in writing by the gas company (§ 23). On February 12, 1886, the gas

company presented to the city council, and that body received in open session, its written acceptance of the ordinance, and its bond for the faithful completion of the work. On the same day the city council approved the selection of the water supply made by the gas company, and during the construction of the waterworks its committee located the various hydrants upon the mains. The gas company built and put the waterworks into operation, and on January 17, 1887, that body passed this resolution:

"That the waterworks erected by the Interstate Gas Company under ordinance No 27 be, and are hereby, accepted by the city; said acceptance to date from Oct. 1, 1886, the same having been finished and ready for operation since Sept. 17, 1886; and that the Interstate Gas Company, its successors and assigns, be, and are hereby, released from the bond, and from all liabilities under such ordinance, as far as the construction of such works is concerned."

Was there no contract here? A proposition made by one contracting party and accepted by the other constitutes a contract. It evidences the meeting of their minds upon the terms of their agreement, and binds them both. If ordinance No. 27 had been duly passed, it would have been nothing more than an offer by the city to make the grant and contract upon the terms set forth therein. If, after its passage, it had been accepted and acted upon by the gas company, it would have become an irrevocable contract. *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 889; *Kansas v. Corrigan*, 86 Mo. 67. It can make no difference in the legal effect of such an acceptance whether the one party or the other makes the offer. If the gas company had offered to enter into a contract with the city on the terms contained in the ordinance, and the city had accepted and acted upon that proposition, the contract would have been as binding and irrevocable. But that was exactly what these parties did. The ordinance stood spread upon the records of the council, but it had never been passed by that body. On February 13, 1887, the gas company filed with the council, and that body received in open session its written acceptance of the terms of the contract set forth in the defeated ordinance, and its bond to complete the waterworks as provided therein. That acceptance and bond constituted as perfect an offer on the part of the gas company to enter into a contract on the terms of that ordinance as it could have made. On January 17, 1887, the city council resolved "that the waterworks erected by the Interstate Gas Company under ordinance No. 27 be and hereby are, accepted by the city." That resolution and the actual acceptance and use of the works by the city, were as perfect and complete an acceptance of this proposition of the gas company as it was possible for the city to have made. It was conclusive evidence that the minds of the parties had met upon the terms of a contract set forth in the ordinance, and from that time forth, if not before, the contract became complete and irrevocable. There is no escape from this conclusion on the ground that the city could offer and accept

this contract by ordinance only. The legislature granted to the city full power and authority to contract for the construction of these waterworks, and it nowhere prescribed the mode by which the city should authorize or make the contract. It is common learning that where a statute authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion or by the passage of a resolution. *Smalley v. Yates*, 36 Kan. 519, 524; *Atchison Bd. of Edu. v. De Kay*, 148 U. S. 591, 595, 598, 599, 87 L. ed. 573-576; *Brady v. Bayonne*, 57 N. J. L. 379; *State, Courter, v. Newark Bd. of Health*, 54 N. J. L. 325, 329; *Green Bay v. Brauns*, 50 Wis. 204, 207; 1 Dill. Mun. Corp. 4th ed. § 307, and notes; *State. Van Vorst, v. Jersey City*, 27 N. J. L. 493; *State. Butler, v. Passaic*, 44 N. J. L. 171; *Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. Co.* 70 Iowa, 105, 108; *Soner v. Philadelphia*, 85 Pa. 281; *San Francisco Gas Co. v. San Francisco*, 6 Cal. 190; *First Municipality v. Cutting*, 4 La. Ann. 835; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268; *McGatock v. Omaha*, 40 Neb. 64, 82; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 870, 872; *State, Coogam, v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *Nicoll v. Sands*, 181 N. Y. 19, 28; *State v. Henderson*, 88 Ohio St. 644; *Green v. Cape May*, 41 N. J. L. 45, 47, 48. There is nothing in *Newman v. Emporia*, 82 Kan. 456, in conflict with this rule. That case simply held that where a charter requires certain acts to be done by ordinance, they cannot be done by resolution. *Atchison Bd. of Edu. v. De Kay*, 148 U. S. 591, 598, 599, 87 L. ed. 573, 575, 576. Nor is there any restriction upon the action of the city council of Arkansas City in entering into this contract in the proviso to § 799 of General Statutes, of Kansas, 1889. *Carleton v. Washington*, 38 Kan. 726. The result is that the city of Arkansas City made an irrevocable contract with the Interstate Gas Company, the terms of which are evidenced by ordinance No. 27, and that none of the provisions of that contract which are in question in this suit are invalid on the ground that the city exceeded its powers in making the contract.

A single question remains. Is the city liable to pay to the receiver any rental for the use of the 129 hydrants located upon the mains of the waterworks and their extensions after September 1, 1886, under the orders of its council? The bank, the complainant in this suit, insists that the court below erred in considering this question at all in this suit upon the application of the receiver without pleadings, and that its findings and decree in this regard should be reversed on this ground. The majority of the court are of the opinion that the court acted rightly in not allowing a recovery in this suit for any of the extra hydrant rentals, and that the question of the liability of the city for such hydrant rentals should be left to be determined hereafter unaffected by any of the proceedings in this suit, if any person shall hereafter demand against the city a right to such rentals. The writer of this opinion is unable to concur in that view, nor do the majority of the court concur with him in the views expressed in the remainder of this

opinion. It seems to him that the contention of the bank that the court erred in considering and determining this question at all without pleadings, on a mere motion of the receiver for an order of the court directing the city to pay the rentals should not now be sustained. It is made for the first time in this court. The course of proceedings in the court below was this: On the motion of the bank that court had rendered a decree which provided that the city should pay to the receiver the rental fixed by the contract on the 50 hydrants ordered by the original ordinance, and that the bank and the receiver might apply to the court for orders for the payment of the rental of the additional hydrants. Under this decree the receiver made an application for such an order by motion. No objection was made to this method of presenting the question. A large amount of testimony was taken, a full hearing was had upon the application, and the court decided it upon its merits. It is true that the record does not, in terms, state that the bank appeared at this hearing, but it does show that the receiver was appointed on its application; that the attorneys of the bank were the attorneys of the receiver; that, as such attorneys, they conducted the examination of the witnesses upon this hearing, and that no objection was interposed by them, or by any of the parties to this suit, to the disposition of this matter made by the court, either because no pleadings had been filed, or on any other ground whatever. The court below would undoubtedly have required pleadings and the framing of issues here, if any party in interest had requested it. The record conclusively shows that no one was surprised upon the trial of this issue by the lack of pleadings, that the attorneys and the parties who participated in it perfectly understood the issues, and that the receiver and the city tried the question in dispute out upon the merits, and obtained its decision. The complainant, whose attorneys, as representatives of the receiver, made the motion for this hearing, and pressed it to a decision, was bound to take notice of these proceedings, and to place its objection to them, if it had any, before the trial court. It could not lie dormant until that court had investigated and decided the issue, and then adopt the decision, if favorable, and repudiate it, if fatal, to its claim. It is now too late for it to present this objection for the first time in this court. Moreover, the question decided by the court below was germane to the issue in this suit, and its decision was necessary to a full determination of the rights of the parties to the suit in the subject-matter of the action. The mortgage provided that, in case of default, the trustee, by itself or a receiver appointed by the court, should take possession of the waterworks, operate them, and collect the income thereof. The bill prayed that the receiver should have power to collect of the city the rentals due under ordinance No. 27. The order appointing the receiver directed him to collect all hydrant rentals due from the city for the use of the water. The question as to the amount of these rentals due arose between the defendant city and the receiver. Perhaps the latter might have brought an action against the de-

fendant to recover these rents, but the necessary parties to such an action were already in the court below, and another suit to determine that question was certainly unnecessary. Possibly, the defendant city might have objected to this method of treating this question, but it did not do so. It consented to its trial by the court below, and now demands its decision here upon the merits. The receiver and the defendant very properly tried the dispute upon its merits before the court, which already had jurisdiction of the subject-matter and of the parties, and that court heard and decided it. The settled rule in equity is that, "having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law." *Taylor v. Merchants' F. Ins. Co.* 50 U. S. 9 How. 380, 404, 18 L. ed. 187, 192.

I turn to the merits of the question. The city of Arkansas City made a contract with the Interstate Gas Company for the lease of hydrants from the system of waterworks to be constructed by the latter company. The gas company agreed to erect the necessary works, to lay $8\frac{1}{4}$ miles of water pipes of specified dimensions, and to connect 50 hydrants therewith, or any number above that amount that should be ordered by the city council, and to place them wherever the city should direct, "provided, that whenever the additional hydrants so ordered shall necessitate an extension of the mains beyond $8\frac{1}{4}$ miles, the number of hydrants so ordered or the private consumption to be secured or jointly are sufficient to justify the additional outlay." Sections 2, 5. The contract provided that the water pipes on the extensions beyond the $8\frac{1}{4}$ miles should "be of any size not less than 4 inches in diameter, laid as the city may direct." Section 6. The city agreed by the contract to pay the sum of \$80 per annum for each of the first 50 hydrants to be erected, "as well as for every additional hydrant in excess of said number during the term of this contract." Section 9. From time to time, after the original works were erected, the city ordered these works extended, and directed additional hydrants to be erected, or duly accepted offers to extend the works, and to erect additional hydrants made by the gas company, or by its successor, the water company, until there were about thirteen miles of pipes and 179 hydrants in the system. The extensions were made with pipes 4 inches in diameter and each of the additional 129 hydrants was located and erected by the order of, and under the direction of, the city council, and every one of them was duly accepted and used by the city. Some of the orders for these additional hydrants provided that the city would pay but \$30 per annum rent for the first three or five years of their service, and the city paid rent for each of them from the time of their acceptance until the 1st day of October, 1891. Since that day it has continued to use the hydrants as before, but it refused to pay any rent for them on the ground that they were not efficient in extinguishing fires. The evidence on which this claim is based conclusively shows that, if they were not efficient, it was not because the waterworks were not

maintained in as efficient a condition as when these hydrants were accepted, but it was solely because the mains on the extensions were too small, and the hydrants were badly located. The city is driven by this evidence to this position: To defend against its liability for these rents, it must maintain that if, on account of the size of the mains and the improper location of the hydrants, they cannot stand the test prescribed by § 9 of the ordinance, as the condition precedent to the acceptance of the original plant and the first 50 hydrants, the city is under no obligation to pay for their use. The evidence was, in effect, that streams of water could be thrown from these hydrants to only about half the height required of the first 50 hydrants by § 9, and upon this ground the court below held that the city was not liable to pay for the use of the additional hydrants. Is this the legal effect of this contract? Could this city order the extension of these 4 inch mains of the water company, $\frac{9}{4}$ miles, and the erection of 120 additional hydrants, under the contract evidenced by ordinance No. 27, accept them all as sufficient and efficient, and after acquiring the benefit of the extension, and paying rent for the hydrants two or three years, continue to use them without any liability to pay for their use? It is undoubtedly true that if, after the construction and acceptance of the extension, and the additional hydrants, they deteriorated in value or usefulness, the damage sustained from that fact might be offset against the rental, and, if they became utterly useless, the damage would be more than if the deterioration was small. But, even in such an event, the city could hardly entirely offset the rental by damage, as long as the extensions supplied sufficient water to the inhabitants for domestic and sprinkling purposes. In such a case, as the city would have obtained the benefits of a substantial performance of the contract, it could not make an absolute defense against the payment of the rental. The complainant would be entitled to its rental less the damage sustained by the failure of the water company to completely perform the contract. *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.* 17 C. C. A. 34, 87, 70 Fed. Rep. 146, 150, and cases cited; *Wiley v. Athol*, 150 Mass. 426, 435, 6 L. R. A. 342, and cases cited. But this question does not arise in this case. The testimony is undisputed that the hydrants are as efficient and the extensions are as sufficient as they were when the city accepted them, and that their inefficiency results from the fact that the pipe used for the extensions was too small to supply the large number of hydrants located upon them under the direction of the city, and that some of the hydrants were located on dead ends of the mains, where it is impossible to drive a forceful stream through them. Now, how can this fact relieve the city from liability for the rent when it was the city itself that directed the laying of the 4-inch pipe, located the hydrants upon it, accepted the hydrants as sufficient, and obtained the use of most of them for some years at half price?

There is another consideration that must not be overlooked in construing this contract. It is not contended that the extensions and hydrants are not sufficient to furnish all the water required for sprinkling and all domestic pur-

poses and for all public purposes except the extinguishment of fires. Now, the extinguishment of fires in a city is not usually the main inducement for, or the chief benefit of, a system of waterworks. Such a system conduces to the health, comfort, and pleasure of the inhabitants of a city a thousand times where it extinguishes a fire once. I venture to say that it was not so much the need of water to extinguish fires on the streets along this $\frac{9}{4}$ miles of extensions as it was the want of water by the residents upon those streets for domestic purposes that induced the city council to order them. Nor can there be much doubt that they never would have been laid without the contract of the city to pay rental upon these additional hydrants. There are generally many streets in a small city where the private consumption of the water will not warrant the necessary expense of extending the mains, and yet the health and comfort of the inhabitants compel the city to make the extension. In such cases it became necessary for the city under this contract to locate and pay for such a number of hydrants as would yield to the water company a sufficient revenue to warrant the expenditure, even though the hydrants were unnecessary for the extinguishment of fires. That this course might be, and probably would be, pursued, was evidently contemplated by the parties to this contract, for it provided, by § 5 of the ordinance, that, in case extensions were directed, the number of hydrants ordered, or the private consumption, or both, should be sufficient to justify the expense. A careful reading of all the testimony in this case points unmistakably to the conclusion that the real objection to the payment of the rental for these hydrants is that the city now finds that it ordered more hydrants than it is now willing to pay for. But it made its own bargain, and it is no defense to its enforcement that it bought too much, or promised to pay too high a price for its lease.

Bearing in mind now how important a part of the consideration for this rental the supply of water for domestic purposes for the residents along these extensions must have been, and the fact that the supply for those purposes was ample, that the extensions and additional hydrants are as efficient for the extinguishment of fires as they were when the hydrants were accepted, and that the only reason they are not more efficient is because the extensions were made with pipe that was too small and the hydrants were improperly located under the direction and with the approval of the city itself, let us inquire what provision of this contract required the water company to maintain a higher degree of efficiency, or relieved the city from paying for the water it used from these additional hydrants. On this subject the contract provides that the gas company is given the exclusive privilege of laying its pipes in the city to conduct water on condition that it maintains its works and additions in successful operation (§ 2); that it shall erect a complete system of waterworks of sufficient capacity to furnish at all times all the water necessary for use in said city for the prompt extinguishment of fires and for sprinkling and other public and domestic purposes (§ 3); that it shall lay three and one-

half miles of pipe of the dimensions specified in the ordinance, sufficient to secure at all places within said three and one-half miles a sufficient water supply, as well for public and domestic use, and shall erect 50 hydrants thereon, and as many more as may be ordered by the city under certain restrictions, and shall place them where the city authorities direct (§ 5); that the pipe used on the extensions may be of any size not less than 4 inches in diameter (§ 6); that for twenty-one years the city will pay the sum of \$60 per annum for each of the 50 hydrants required to be placed on the original system "as well as for every additional hydrant in excess of said number during the term of this contract; . . . provided, however, that the mayor and city council of Arkansas City, Kansas, shall not be bound to accept such 50 hydrants for the use of the city before a thorough test is made to prove that the works erected by the Interstate Gas Company, its successors, or assigns, under this ordinance, are in perfect working order and are able to throw simultaneously four (4) streams of water from any 4 hydrants to be designated by the mayor and city council through 100 feet of 2½ inch rubber hose and 1-inch ring nozzle at least sixty-five (65) feet high from standpipe alone and eighty (80) feet high by direct pressure of pumps." These are all the provisions of the contract upon this subject. They have all been substantially performed, except that the additional hydrants will not stand the test prescribed in the proviso just quoted. But there is nothing in that proviso, or elsewhere in the contract, which makes the compliance with that test a condition precedent to the acceptance of, or the payment of the rental for, the additional hydrants. On the other hand, the proviso expressly restricts this test to the first 50 hydrants, and by its very terms excludes all others from it. Moreover, it reads that the city "shall not be bound to accept such 50 hydrants," and, even if it covered the additional hydrants, their acceptance by the city would have waived this proviso. It provided only that the city was not bound to accept them unless they complied with the test. But the city did accept them, and that was an end of the matter, and the liability for the rent accrued. It seems clear, however, upon a view of the entire contract, that this proviso had no reference to the additional hydrants. This conclusion is forced upon the mind by the fact that the proviso is expressly limited by its terms to the original 50 hydrants, by the fact that it is practically impossible to extend such a system of waterworks, as that here in question, nine and one-half miles, with mains only 4 inches in diameter, and with as many large hydrants upon them as were ordered in this case, and then to maintain throughout the efficiency prescribed in this proviso by the fact that the city obtained the use of many of these hydrants from three to five years for one-half the rental of the original 50, and a lower price imports less efficiency, and by the fact that the city ordered the extensions so made and accepted the hydrants so constructed, although they never were more nearly able to

comply with the test than they now are. The last consideration alone ought to be conclusive of this question. These parties construed this contract themselves before any controversy arose over it. One party constructed, and the other accepted, under the contract, pipes and hydrants which could not stand the test of § 9 of the ordinance. They thereby themselves held that such test had no relevancy to the extended pipes and additional hydrants, and their view was undoubtedly right. "In an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50. 54, 19 L. ed. 594, 596; *Topliff v. Topliff*, 123 U. S. 121, 181, 80 L. ed. 1110, 1114; *Leavitt v. Windsor Land & I. Co.* 12 U. S. App. 193, 4 C. C. A. 426, and 54 Fed. Rep. 439, 444.

What, then, was the effect of the acceptance by the city of the extensions and additions to these works and its use of the hydrants since 1887 or 1888, upon its defense to these rentals that the size of the pipe ordered to be laid by it was too small, and that the hydrants located by it were improperly placed? It was absolutely fatal to any such defense. The faults in the construction of these extensions and hydrants were patent. They were apparently due as much to the action of the city as to that of the water company. The acceptance and use for years without protest of a building, a system of buildings, or a plant, under a contract for its construction and lease, is a complete waiver of all patent defects in the location or construction thereof. In *National Waterworks Co. v. Kansas City*, 10 C. C. A. 653, 666, 62 Fed. Rep. 853, 866, 27 U. S. App. 165, 27 L. R. A. 827, Mr. Justice Brewer, speaking for this court, said of a claim by the city for damages in that case on account of the inefficiency of the waterworks furnished by the lessor:

"It [the city] has for many years recognized and accepted this waterworks system as having been constructed in full compliance with the demands of the contract, and it is now too late to repudiate such recognition."

In *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725, the supreme court of that state held that the city could not defend against an action for the rental of waterworks on the ground that the water was not good after it had accepted the works and the water had been used by the city and its inhabitants for about a year without protest. In *Comstock v. Sanger*, 51 Mich. 497, 502, the supreme court of that state said of a defense to an action for the price of lumber, that the contracted quantity of the special sizes had not been delivered. "Any difference between what they had a right to demand and what they had actually received was waived by the reception without protest. This is a rule of justice as well as of law. *Parker v. Palmer*, 4 Barn. & Ald. 387; *Chapman v. Morton*, 11 Mees. & W. 534; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Barton v. Kane*, 17 Wis. 38, 84 Am. Dec. 728; *Watkins v. Paine*

57 Ga. 50. The contract in law had been complied with; and though the performance was not exact, it had been accepted."

There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which, the gas company and the water company constructed and extended the waterworks, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud. *Paxon v. Broten*, 27 U. S. App. 49, 60, 10 C. C. A. 185, 143, and 61 Fed. Rep. 874, 881; *Pence v. Arbuckle*, 22 Minn. 417; *Cairncross v. Lormer*, 3 Macq. H. L. Cas. 827, 829; *Dickerson v. Colgrove*, 100 U. S. 578, 582, 25 L. ed. 618, 620; *Faxon v. Paxon*, 28 Mich. 159; *Kirk v. Hamilton*, 102 U. S. 68, 75, 26 L. ed. 79, 81; *Evans v. Snyder*, 64 Mo. 516. This principle is as applicable to the transactions of corporations as to those of individuals. As Mr. Justice Campbell well said in *Zabriske v. Cleveland, C. & O. R. Co.* 64 U. S. 23 How. 881, 400, 401, 16 L. ed. 488, 497, 498, in which the supreme court held that a corporation was estopped to question the validity of its void guaranty; because it had permitted the circulation of the bonds that carried it: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced."

Re Omaha Bridge Cases, 10 U. S. App. 98, 188, 190, 2 C. C. A. 174, 289, 240, and 51 Fed. Rep. 309, 326, 327; *Butler v. Cockrill*, 20 C. C. A. 122, 73 Fed. Rep. 945.

In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations. *Safety Insulated Wire & C. Co. v. Baltimore*, 13 C. C. A. 375, 377, 378, 66 Fed. Rep. 140, 148, 144, 25 U. S. App. 166; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, 463, 469, 471; *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 113, 15 L. R. A. 354; *Fergus Falls Water Co. v. Fergus Falls*, 65 Fed. Rep. 586, 591; *National L. Ins. Co. v. Huron Bd. of Edu.* 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. Rep. 778; *National Tube Works Co. v.*

Chamberlain, 5 Dak. 54; *Com. v. Philadelphia*, 132 Pa. 288; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 192, *Tacoma Hotel Co. v. Tacoma Light & W. Co.* 8 Wash. 816, 325, 14 L. R. A. 669; *Wagner v. Rock Island*, 146 Ill. 189, 21 L. R. A. 519; *Vincennes v. Citizens Gaslight Co.* 132 Ind. 114, 126, 16 L. R. A. 485; *Indianapolis v. Indianapolis Gaslight & C. Co.* 68 Ind. 896, 403, *State, Read, v. Atlantic City*, 49 N. J. L. 558, 562.

The city of Arkansas City spread upon the records of its city council an ordinance, approved by its mayor, which purported to be an offer to the gas company to pay the rentals whose recovery is sought in this suit, in consideration that the company would construct and operate these waterworks. The company accepted the supposed offer, and at the expense of thousands of dollars constructed and operated the works according to the terms of the ordinance, under the express direction of the city council. The city accepted the original plant by a resolution spread upon its records, by which the city council enacted that "the waterworks erected by the Interstate Gas Company under ordinance No. 27 be, and hereby are, accepted by the city." By this ordinance the city had promised to pay the gas company and its successors \$60 per annum as rental for each hydrant erected thereunder. After 100 hydrants had been erected and connected with the works, and when the city was paying rental for them, according to this contract, the Arkansas City Water Company, the then owner of the waterworks, mortgaged them, and pledged these accruing rentals to secure the \$150,000, to collect which this suit was brought. The trust deed which secures this money provided that only \$100,000 of the bonds secured by it should issue upon the existing security, but that bonds to the amount of \$50,000 more might be issued upon certificates that the works had, subsequent to September 24, 1887, been so extended that the revenues from the hydrant rentals on the extensions would pay interest on the additional bonds. Bonds to the amount of \$100,000 were immediately issued and sold in open market, upon the faith of this contract by the city, its performance by the mortgagor evidenced by the acceptance of the city council and by the fact that the latter had paid the rentals under it for fourteen months without protest. How can that city now be heard to say to the holders of these bonds that all these representations were false, that it had no power to make this contract, or that it never made it, or that it was never performed, when it still continues to take and use the water from the hydrants? It cannot. The supreme court of Kansas, in placing its seal of condemnation upon a proposition to sustain a like defense in *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 113, 15 L. R. A. 354, said: "To hold to the latter proposition, when the parties cannot be placed in the same condition they were in before the contract was executed, would be a violation of the plainest rules of good faith."

But this is not all. After this mortgage was made, the city council of this city, by motions duly carried and resolutions properly passed, accepted 75 additional hydrants, erected upon extensions of these works made under its orders,

and its city clerk certified over the seal of the city that these hydrants had been erected and accepted by the city upon extensions of the plant made after September 24, 1887, according to the provisions of the original ordinance, and that certain rentals had accrued thereon from the city, which were sufficient in amount to pay the interest on the remaining \$50,000 of bonds. These certificates were presented to the trustee under the trust deed, and in reliance upon them, and upon the records of the city council upon which they were based, it issued the remaining bonds, and they have been purchased by their holders. The city has used these hydrants to the present time. How can it be heard to say to these bondholders that it is liable to pay no rent for this use, because the pipe on the extensions was too small, and the hydrants were improperly located? The city and the mortgagor fixed the size of the pipe. The city located the hydrants, and when all was done it induced the trustee and the bondholders to part with the money that was used to pay for them by its representations that they were properly constructed to make it liable for the rentals it agreed to pay for their use. Upon every principle of justice and of equity, it is too late now for it to deny the truth of these representations, while it retains the benefits they procured for it. It must return the \$50,000 and interest which its acts and conduct induced the bondholders to part with before it can be heard to say that the representations they made were false.

All the issues presented in this case that are worthy of extended consideration have now been disposed of. The questions presented by the appeal of the receiver have become immaterial, and need no consideration, because the decree must be reversed, and the questions he sought to present have been determined in the consideration we have given to the appeal of the bank. All questions concerning the validity of the mortgage and the title to be acquired under it are foreclosed by the purchase of the property from the mortgagor, subject to the mortgage, by the city. The city now stands in the shoes of the mortgagor as to all the mortgaged property, and is bound in good

faith to preserve, maintain, and apply the waterworks and their income as a primary fund sacredly pledged to the payment of the mortgage debt. *Kilpatrick v. Haley*, 27 U. S. App. 752, 13 O. C. A. 480, 483, 484, and 66 Fed. Rep. 183, 186, 137; *Drury v. Holden*, 121 Ill. 130; *Byington v. Fountain*, 61 Iowa, 512.

The ordinance No. 304, by which the city in terms repealed ordinance No. 27, on which the contract for the waterworks was founded, was, of course, void as against the trustee and the bondholders, because it impaired the obligation of a contract.

The court is unanimous in the opinion that the decree below must be reversed, and that, in addition to the ordinary provisions for the foreclosure of a trust deed and the sale of the property covered by it, the decree should adjudge the existence and validity of the contract between the city and the gas company and its successor, the water company, the terms of which are disclosed by ordinance No. 27, the erection by the gas company, the due acceptance by the city, and its liability to pay the rental for the original 50 hydrants, according to the terms of that ordinance. It should adjudge that the receiver is entitled to receive the rents of these 50 hydrants from the city of Arkansas City from October 1, 1891, until he delivers the plant to a purchaser under the decree. It should determine the amount of those rents to the time of the entry of the decree, and should order their immediate payment to the receiver by the city. In accordance with the opinion of the majority of the court, the decree should leave the question of the liability of the city for the rental of the additional 129 hydrants undetermined and unaffected by these proceedings, so that it may be subsequently litigated by the receiver, the purchaser at the sale, or any other person who shall demand of the city the right to these rentals.

Let the decree be reversed, with costs against the city of Arkansas City in No. 672, and against Hopper, receiver, in No. 673, and let the case be remanded, with directions to the court below to enter a decree in conformity with the opinion of the court.

TENNESSEE SUPREME COURT.

R. L. BRUNER *et al.*, Appts.,

v.

FIRST NATIONAL BANK OF JOHNSON CITY *et al.*

(.....Tenn.....)

1. A cash deposit fraudulently received by an insolvent bank after its officers

know of its insolvency cannot be reclaimed from its receiver when it went into the general funds of the bank and cannot be identified and separated from other funds on hand when the receiver took charge.

2. Checks and drafts fraudulently received by a bank after its officers knew of its insolvency can be reclaimed if they can be found and are not yet collected and credited when the bank closes its doors.

NOTE.—Trust in deposit in insolvent bank.

Few of the cases upon this subject treat the question as one of trust. It is quite generally recognized that in case the bank is hopelessly insolvent to the knowledge of its directors when it receives the deposit, there is fraud which will entitle

the depositor to rescind the contract; and a few of the cases then settle the rights of the parties as though the case was one of trust *ex maleficio*. But the majority of the cases do not go expressly upon the ground of trust, but simply upon the ground of the right to rescind and recover back the property which may be found. The cases in which the

3. Crediting checks and drafts to a bank which has failed, although done by a correspondent which does not yet know of the failure, cannot prejudice the rights of persons who deposited such paper in the insolvent bank to recover back their paper or its proceeds, when the deposit was received after the officers of the bank knew it to be insolvent.

4. The identical proceeds of a check or draft fraudulently received on deposit by an insolvent bank are sufficiently traced by the depositor when it appears that they are included in a fund paid over to the receiver of the bank by a correspondent as the proceeds of credits made after the bank failed but before notice thereof to the correspondent.

5. Fraud in receiving a deposit of checks or drafts after bank officials know that it is insolvent will not give the depositor a preferential claim against assets in the hands of the receiver of the bank, if the bank before its failure had received the proceeds of such paper or credit therefor from a correspondent, although the bank had on hand when it failed and always after the deposits were made more than the amount thereof in cash.

(October 31, 1894.)

APPPEAL by complainants from a decree of the Court of Chancery Appeals reversing a judgment of the Chancery Court for Washington County in their favor in a suit brought to reach assets in the hands of defendants which were alleged to be impressed with a trust in favor of complainants. *Reversed in part.*

The facts are stated in the opinion.

Messrs. Kirkpatrick, Williams, & Bowman, for appellants:

The procurement of credit by false representations as to solvency renders a transaction rescindable for fraud.

Blding v. Frankland, 8 Lea, 67, 41 Am. Rep. 680; *Fechheimer v. Baum*, 37 Fed. Rep. 107, 2 L. R. A. 153, and *notes*.

And the rule is yet more rigidly applied to

banker was in fact a trustee, as where he held a fund which was to be applied to at particular purpose, which cases will form the subject of a future note, would seem to indicate that if the question was treated as one of trust the fund might be pursued further than it is under the present rule.

Receiving deposit when insolvent a fraud.

If the banker is in an irretrievable condition of insolvency when he takes the deposit of his customer the transaction may involve an implied representation or concealment which characterizes it as fraudulent on the part of the banker. *Rochester Printing Co. v. Loomis*, 45 Hun, 93.

If the bank is insolvent at the time of receiving the deposit it is guilty of fraud, and the depositor may recover his deposit unless it is in the meantime passed into the hands of a bona fide holder. *New York Breweries Co. v. Higgins*, 79 Hun, 280.

No knowledge by the officers of the bank of its insolvency is sufficient to avoid transactions between the bank and its customers on the ground of fraud, unless the evidence clearly shows that the directors also had such knowledge. *Balbach v. Freilighuysen*, 15 Fed. Rep. 675.

If the officers of the bank do not know of the insolvency at the time the deposit is made, there will be nothing to prevent its getting title to the deposit. And the mere fact that the bank is soon

representations, express or implied, by bankers doing business in a state of hopeless insolvency.

St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 33 L. ed. 683; *Cragie v. Hadley*, 99 N. Y. 131, 59 Am. Rep. 9; *Beal v. Somerville*, 50 Fed. Rep. 650, 5 U. S. App. 14, 17 L. R. A. 291; *Wasson v. Hawkins*, 59 Fed. Rep. 234.

As to deposits made on Monday before the bank's doors closed at noon that day, it will be presumed that they went into the hands of the receiver.

Ex parte Dale, L. R. 11 Ch. Div. 772, as construed by *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Wasson v. Hawkins*, *supra*.

The relation of trustee and *cestui que trust* being established, the proceeds of all the pension checks having come to the hands of the receiver after insolvency may be recovered.

Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 37 L. ed. 863; *Lafort v. Carpenter*, 91 Hun, 76; *Illinois Trust & Sav. Bank v. Smith*, 21 Blatchf. 275.

The New York correspondent had no right to credit and mingle the proceeds of such checks after the hour of insolvency, noon of Monday, whether the condition was known to it or not.

Old Nat. Bank v. German-American Nat. Bank, 155 U. S. 563, 39 L. ed. 262; *First Nat. Bank v. Strauss*, 66 Miss. 479; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 2 L. R. A. 699.

Messrs. E. C. Reeves and Robert Burrow also for appellants.

Messrs. W. W. Faw and T. A. Cox for appellee.

Wilkes, J., delivered the opinion of the court:

This bill is filed to recover from the defendant, Cox, as receiver of the First National Bank of Johnson City, \$1,163.83, balance to their credit in the bank when it closed its doors, November 12, 1894. There was a demurrer to the bill, and it was amended so as to

afterwards closed by the bank superintendent is not sufficient to show such knowledge. *People v. Saint Nicholas Bank*, 77 Hun, 159.

If the officers of the bank do not know that it is insolvent when the deposit is received the depositor will have no equity to be paid in full to the exclusion of other depositors. *Terhune v. Bank of Bergen County*, 34 N. J. Eq. 367.

If the officers of the bank do not know of its insolvency the relation of debtor and creditor between the bank and its depositor is not altered by the fact that the bank is at the time insolvent. *Williams v. Cox* (Tenn.) 37 S. W. 232.

The mere fact that the money is received when the firm is insolvent is not such fraud as will prevent the debt being barred by a discharge in bankruptcy if the banker at the time believed that by reason of his experience or otherwise he was able to carry his business through its difficulties. *Sheldon v. Clews*, 13 Abb. N. C. 40.

In *St. Louis & S. F. R. Co. v. Johnston*, 23 Blatchf. 430, 27 Fed. Rep. 243, it is said that if the officers of the bank supposed that they could maintain its credit and surmount its difficulties they were under no legal duty to disclose the state of its affairs to its customers, and that silence in regard to that fact which was not its duty to disclose could not be held to be fraud.

The mere fact that the bank fails soon after re-

charge that the deposits made November 10 and November 12, 1894, were traceable into, and formed part of, the fund on hand when the bank failed, and that the fund in bank was, all the time after the deposits, more than the amount of these deposits. The chancellor held that the bank officials obtained the deposits through fraud, knowing the bank to be insolvent when they were received. He was of opinion that \$276.82 of the deposits could be traced into the funds on hand when the bank suspended, and the remainder, of \$886.86, could not be so traced. He gave a decree for the former sum, as a preferred debt, but, as to the latter amount, held that the complainants could only share *pro rata* in the assets of the bank. Complainants and the receiver both appealed, but, the record failing to show an appeal granted, the appeals were by this court dismissed. Afterwards the cause was brought to this court by writ of error on part of the bank and its receiver, and, errors being assigned, the case has been heard by the court of chancery appeals, and the chancellor's decree reversed and the bill dismissed. The facts, as found by the court of chancery appeals, are that the bank officials were guilty of fraud in obtaining the complainant's deposits now in controversy, in not only withholding knowledge of the bank's insolvency, which was well known to them, but in active misrepresentation that the bank was in a safe and solvent condition. That court also finds that there is no evidence that the checks deposited were on hand when the bank failed, or that their proceeds constituted a part of the cash turned over to the receiver. The question presented in the case is simply whether the complainants can reclaim, as against the receiver and the other creditors of the bank, the amount of the checks deposited on November 10, 1894, of \$18, and November 12, 1894, of \$30 and \$36, aggregating \$84, upon the theory that the bank had on hand when it failed, and always after the de-

posits were made, more than that amount in cash, the deposits having been secured by fraud of the bank officials.

The right of a vendor to reclaim specific personal property from a vendee or his assignee, when it has been obtained by fraud and the property can be identified, cannot be disputed. *Belding v. Frankland*, 8 Lea, 67, 41 Am. Rep. 630. But does a similar rule apply in a case like the present, when the property is paper or its proceeds, and cannot be identified in kind, and can only be traced into a common fund with which it has been commingled? The deposits made by the complainants, whether of paper or money, were received as cash by the Johnson City Bank, and credited up to complainants as cash; and the paper was remitted to and received by the New York bank as cash, and so credited up by it to the Johnson City bank. As to the actual cash deposited on the 10th and 12th of November, it appears that it went into the general funds of the bank, being credited as cash, and there is no claim that it could be identified and separated from the other funds on hand when the receiver took charge, and the right to reclaim this is lost. *Akin v. Jones*, 98 Tenn. 353, 25 L. R. A. 523; *Sayles v. Cox*, 95 Tenn. 579, 32 L. R. A. 715. But it appears that on the 10th of November, 1894, there was deposited a check or draft on the United States treasury for \$18, and on the 12th of November, 1894, two other government checks for \$30 and \$36. These were forwarded, for credit as cash, to the Southern National Bank of New York before the Johnson City bank closed its doors, at noon on the 12th of November, 1894. When they were received by the New York bank they were credited as cash to the Johnson City bank, but the exact date when thus received and credited is not made to appear. It is absolutely certain, however, in the natural course of events, that the checks sent on November 12, 1894, the same day the Johnson City bank

ceiving the deposit will not, in the absence of fraud, entitle the depositor to rescind the contract and stop payment of the paper which was deposited. *Metropolitan Nat. Bank v. Loyd*, 25 Hun. 101.

In *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, it is suggested that the depositor after the credit was given left the deposit with the bank for his own convenience when he might have withdrawn it immediately, and that therefore it was not necessary to consider whether or not the deposit received by the insolvent bank could be recovered under any circumstances.

In *Anonymous*, 67 N. Y. 566, the court held that an order of arrest was proper where the banker knowing that he was hopelessly insolvent received money on deposit.

But that was a case of the sale of a bill of exchange, and not the case of a deposit. *Roebing v. Duncan*, 8 Hun. 507.

In order to sustain an attachment for receiving the deposit with intent to defraud the actual intent must be proved. It is not sufficient that the deposit is received when the bank is insolvent which the statute makes fraudulent. *Hughes v. Lake*, 63 Miss. 557.

How far trust exists.

In *People v. Saint Nicholas Bank*, 77 Hun. 159, the court intimates that the receipt of the money when insolvent is not sufficient to create a trust which

will be governed by the principles applicable to that relation, saying that in order to do so there should be a specific appropriation of a particular fund for the payment of a particular claim.

In *Massey v. Fisher*, 62 Fed. Rep. 958, which was a case of payment of money to take up a note, the court distinguishes that case where the bank had no right to use the money but was bound to apply it to the note, from those of a deposit where the understanding of the parties is that it should commingle the money with its own and use it as such.

Although the fact that the deposit was obtained by fraud gives the depositor the right to recover the deposit if he can trace it, does not give him a right to have precedence out of the general fund of the bank over other creditors, nor does it give the bank a right to pay him in violation of the statute forbidding trespasses by a corporation in contemplation of insolvency. *Atkinson v. Rochester Printing Co.* 114 N. Y. 168.

In *Re Bank of Madison*, 5 Biss. 515, the court said, in speaking of a case of collection by an insolvent bank, that it is not exacting too much to require that a party dealing with an insolvent bank in the ordinary way should make out a very clear case before a court should sustain a preference in his favor over other creditors.

The tendency of the above cases seems to be to deny the application of the trust doctrine to this class of cases.

failed, could not have reached the New York bank and been credited on the same day; but it is not certain that the check sent on the 10th could not have reached the New York bank and have been credited by it before the Johnson City bank closed its doors, on the 12th at noon. As to these checks a very nice question arises. It appears that the New York bank paid over to the receiver of the Johnson City bank, after he took possession, about \$5,000, retaining a further sum of \$771.63 to meet certain indorsements upon re-discounts made for the Johnson City bank. This fund embraced the checks referred to, but, they having been entered up to the general credit of the Johnson City bank after its failure, the question is, can the amount be reclaimed out of the money paid over to the receiver by the New York bank? It has been held that when a bank ceases to do business the status of each and every creditor is immediately fixed. After that time a correspondent bank has no power to so deposit or credit funds received for the account of the insolvent bank as to affect the rights of the customers or creditors of the insolvent bank. Unquestionably the complainants, in view of the fraud practiced upon them by the bank, had the right, when it closed its doors, to reclaim the government checks deposited on the 12th, and which were not yet collected or credited, if they could be found. Nor could the New York bank, by afterwards collecting these treasury checks, and depositing their proceeds to the general account of the Johnson City bank, deprive complainants of their right to such proceeds. The New York bank, after the closing of the doors of the Johnson City bank, could make no further credits to it that could or would in any way affect the right of the complainants to the checks or their proceeds. And this is true whether the New York bank had notice of the failure of the Johnson City bank or not when it made the credits. In other words, all checks and drafts received by

the New York bank after the Johnson City bank closed its doors should have been kept separate, and accounted for to the receiver, for the true owners, and not credited to the Johnson City bank; and such credit, if given, could not prejudice complainants' right to rescind their contract for fraud, and recover back the proceeds not credited when the insolvent bank failed. It is evident that these identical proceeds were embraced in the \$5,000 paid over. This holding is sustained, as we think, by sound reason, and is supported in principle by the following authorities: *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 2 L. R. A. 699; *St. Louis & S. F. R. Co. v. Johnston*, 138 U. S. 566, 33 L. ed. 683; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 37 L. ed. 363; *Old Nat. Bank v. German-American Nat. Bank*, 155 U. S. 563, 39 L. ed. 262; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9; *Morse, Banks & Banking*, §§ 589, 590b, 629-631.

It may be that none of the authorities present the question in the exact shape here presented, but the principles decided are, we think, conclusive in this case.

It follows that the decree of the Court of Chancery Appeals must be reversed, as to the checks deposited by complainants in the Johnson City bank on the 10th and 12th of November, 1894, aggregating \$66, and for this amount complainants are entitled to a judgment against the receiver, to be paid as a preferential claim, and the remainder of said decree must be affirmed. There being no proof or presumption that the \$13 pension check was not received and credited by the Southern National Bank before the Johnson City bank closed its doors, complainants have not made out their right to reclaim or recover the proceeds of it. The costs of the appeal will be paid by the receiver; the other costs, as heretofore adjudged.

Right to follow money.

If the fund remains in a separate package, which comes to the hands of the receiver, the depositor may recover it. *Re Commercial Bank*, 1 Ohio N. P. 353.

If the money is kept in a separate package the depositor may recover it from the hands of the receiver. *Chaffee v. Fort*, 3 Lans. 81.

If money is deposited a few minutes before a bank closes its doors, and together with the deposit ticket put to one side, where it remains when the bank closes its doors and so passes into the hands of the receiver, the owner may maintain replevin for it. *Furber v. Stephens*, 35 Fed. Rep. 17.

If the money is paid in after banking hours, and is put by itself, and the bank never opens for business again, the owner may recover the deposit. *Sadler v. Beicher*, 3 Moody & R. 439; *Threlfal v. Giles*, Id. 492.

A deposit of money made in a bank on the day and at the very hour when its suspended payment may be returned to the depositor. *Exchange Bank v. Montreal Coffee House*, M. L. R. 28 C. 141.

But if the money has not been kept separate the majority of the cases deny a recovery.

If the funds deposited have been commingled with the other funds of the bank, and are incapable of identification, the depositor will not be entitled to recover from the receiver the full amount of his claim in preference to other creditors. *Blake v. State Sav. Bank*, 12 Wash. 619.

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A deposit which cannot be traced is a simple debt, and the depositor is not entitled to a preference. *Lotze v. Hoerner*, 25 Ohio L. J. 81.

A deposit cannot be recovered if it is passed into the hands of the assignee mingled with other funds of the bank. *Wilson v. Coburn*, 35 Neb. 580.

Where money was paid after office hours, and on the same evening one of the partners in the bank made a declaration of insolvency which was afterwards acquiesced in by the other partner, and the bank never afterwards opened for business but was adjudicated bankrupt, the money so deposited was held to pass to the assignees. *Ex parte Clutton*, 1 Foub. N. R. 167.

The rule of the above cases is, however, not universal. In one case, in which the rule of trust *ex maleficio* is applied, it is held that if money and checks are deposited a few minutes before the doors of the bank are closed, and the checks are subsequently collected so that the specific money deposited and the proceeds of the checks come to the hands of the receiver, the owner may recover them from his hands. The fact that the money cannot be identified will not prevent its recovery if it is still in the mass in the receiver's hands. *Wasson v. Hawkins*, 59 Fed. Rep. 237. That case was followed in *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank*, 65 Fed. Rep. 690.

So, it has been stated that in order to recover from the receiver money deposited with an insolvent bank the owner must show that it was held by

T. B. KLEPPER, *Appt.*,
v.

John I. COX, Receiver of Johnson City First
National Bank.

(.....Tenn.....)

A credit for a draft given by one bank to another on the same day that the latter failed will not be presumed, in the absence of proof, to have been given after the failure, in order to entitle one who deposited the draft in the insolvent bank after its officers knew it was insolvent to reclaim the proceeds of the draft out of the assets in preference to other creditors who seek to have them distributed *pro rata*.

(October 31, 1896.)

APP^{EAL} by plaintiff from a decree of the Court of Chancery Appeals reversing a decree of the Washington County Chancery Court in his favor in a suit brought to recover from the possession of the defendant, receiver, certain assets which were alleged to have gone into his possession impressed with a trust in complainant's favor. *Affirmed.*

The facts are stated in the opinion.

Messrs. Isaac Harr and Burrow Bros. for appellant.

Messrs. W. W. Faw and T. A. Cox for appellee.

Wilkes, J., delivered the opinion of the court:

This bill was filed to recover from the defendant, as receiver of the First National Bank of Johnson City, \$316.36, proceeds of a draft

or check of the bank on its correspondent bank in Louisville, Kentucky, and the further sum of \$41.75 deposited in cash in the Johnson City bank on the day of its failure. The chancellor granted the relief prayed as to the check, but declined to give any relief as to the \$41.75 cash. The court of chancery appeals reversed the decree of the chancellor and dismissed complainant's bill, denying him any relief, and he has appealed and assigned errors.

The theory of the bill is that the bank at Johnson City was hopelessly insolvent when it issued its check on the Louisville bank and received the cash deposit of \$41.75, and this fact was well known to its president and officers, and constituted a fraud upon complainant, and that he has a right to rescind the transaction and recover back the money from the receiver, inasmuch as there was more than enough cash in the vaults of the bank, which went into the receiver's hands when it failed, to repay the amounts claimed, or that it may reclaim the draft given in exchange for the check on Louisville. The court finds as a fact that the officers of the bank did know of the insolvency of the bank at the time of the transaction. The facts, so far as material to be stated, are that on the 10th of November, 1894, complainant delivered to the Johnson City bank a draft of the United States Leather Company, drawn on a New York bank, for \$307.10, and with this and \$9.06 in cash it obtained and received from the Johnson City bank its check or draft on the German National Bank of Louisville for \$316.36. It immediately transmitted the draft of the leather company to its New York correspondent, and it was placed to its credit in

the receiver *in specie*, or constitute part of the gross sum which went into his hands, or had been invested by the bank in tangible property which came to the hands of the receiver. *St. Louis Brewing Assn. v. Austin*, 100 Ala. 313.

So, if the bank closes two hours after the deposit is made the depositor cannot recover his deposit unless he shows that it was not paid out during the time the business continued, and that it came to the hands of the receiver. *Re North River Bank*, 60 Hun, 91.

Right to follow commercial paper.

If a bank receives checks on deposit when it is hopelessly insolvent, it is such fraud that a depositor may recover them from the bank or may recover their proceeds in case they are not collected until after the bank closes its doors. *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683.

If checks are received for deposit when the bank is hopelessly insolvent, and not collected until after it closes its doors, the owner may recover the checks or their proceeds. *Somerville v. Beal*, 49 Fed. Rep. 790, *Affirming Beal v. Somerville*, 50 Fed. Rep. 647, 5 U. S. App. 14, 17 L. R. A. 291.

If the deposit consists of a check, and is made within thirty days of insolvency, the bank is, under the Illinois statutes, guilty of fraud; and if the check comes to the hands of the assignee it may be recovered back again. *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 386, *Affirming Gueder & P. Mfg. Co. v. American Trust & Sav. Bank*, 51 Ill. App. 349.

A bank which is insolvent and contemplating suspension, and whose assets are far less than its liabilities, acquires no title to a check deposited by one to whom its condition is unknown. *Fisse v. Dietrich*, 3 Mo. App. 584.

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One who deposits paper with an insolvent bank may rescind the transfer and stop payment of the paper. *First Nat. Bank v. Strauss*, 66 Miss. 479.

If the bank is hopelessly insolvent when it receives paper on deposit, and closes its doors before the paper is collected, the depositor may reclaim it from the hands of the assignee. *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9.

Or from the hands of a third person who did not give value for it. *National Citizens' Bank v. Howard*, 3 How. Pr. N. S. 511.

If the bank fraudulently procures possession of a check on deposit neither it nor its assignee with notice can enforce payment of it. *Grant v. Walsh*, 145 N. Y. 502.

If a national bank is insolvent when it receives a deposit of a check, its proceeds may be recovered by the depositor if they remain distinct from the general funds of the bank. *Craigie v. Smith*, 14 Abb. N. C. 409.

The paper cannot be followed if it has passed into the hands of a bona fide purchaser.

If the check deposited has been turned over to a bona fide purchaser for value without notice of the fraud it cannot be reclaimed by the depositor. *Grant v. Walsh*, 81 Hun. 449.

If the checks have been sent to a third bank and credited to the account of the deposit bank they cannot be recovered by the depositor. *Hoffman v. First Nat. Bank*, 46 N. J. L. 607.

In that case the deposit bank was indebted to its correspondent and the paper was credited on account.

In order to recover the deposit its identity must be traced in the hands of the receiver. If a draft is not paid until after the bank closes its doors, so that the proceeds come to the hands of the receiver, it may be recovered by the depositor. But

the New York bank, in its usual course of business, on November 12, 1894, but at what hour does not appear. About noon on that day the Johnson City bank ceased to do business, closed its doors, and went into the hands of defendant as receiver. The draft on the Louisville bank was not paid, but protested. The deposit of \$41.75 was made about an hour before the bank suspended. The New York bank was indebted to the Johnson City bank when the latter closed its doors in the sum of \$5,644.67, and afterwards paid the receiver \$4,873.03 of this amount, retaining \$771.64 on account of some redcounts on which the Johnson City bank was indorser. When the draft was drawn on the Louisville bank, November 10, 1894, the Johnson City bank was overdrawn with it \$51.55, but on November 12, when the failure occurred, it had to the credit of the Johnson City bank \$113.65. The court of chancery appeals finds as a fact that the parties treated the deposit of the leather company's draft and the issuance of the draft on Louisville as cash transactions, and the leather company's draft was remitted by the Johnson City bank to its New York correspondent as cash, and for its credit, and not simply as a collection. The real matter presented and insisted upon in this court and in the court of chancery appeals is that the Johnson City bank was hopelessly insolvent, and known by its officers to be so, when the transaction took place with it; and the contention is made that this constituted fraud, and that complainant is entitled to recover the amount of the leather company's check out of the proceeds which came into the hands of the receiver from the New York bank. Put into

other language, the contention is that it was a fraud to receive the check, under the circumstances, and hence the receiver holds the fund in trust, and complainant has a right to follow and reclaim the amount of the check in preference to other creditors. We have held in cases somewhat similar to this that by the transaction as there detailed the relation of debtor and creditor was created between the customer and the bank, and in such cases the customer cannot follow and reclaim the proceeds of the check or the money when it has been collected or credited before the bank closed. *Akin v. Jones*, 93 Tenn. 353, 25 L. R. A. 523; *Sayles v. Cox*, 95 Tenn. 579, 33 L. R. A. 715. An earnest argument is made, however, that the question and effect of the fraud practised in making such transaction when the bank was in a known state of utter insolvency was not passed upon or considered in those cases, and that the consequence of such fraud must be to warrant the customer in rescinding the transaction and reclaiming his property. It is likened to the case of a vendor who has been induced by fraud to part with his goods. In such case he may reclaim them in the hands of the vendee, if he can find and identify them (*Belding v. Frankland*, 8 Lea, 67, 41 Am. Rep. 630), or against an assignee under a voluntary assignment for the benefit of creditors and to secure pre-existing debts (Id.). This rule obtains upon the idea that the identical goods or property can be traced in kind into the hands of the assignee, and that they have not been mixed or confused with other goods or property of like kind. But does the rule apply in a case like the present? The transaction be-

if the proceeds are appropriated by the bank before it closes its doors, the depositor cannot recover them. If the deposit is money it must be identified in the hands of the receiver. *Re Commercial Bank*, 2 Ohio N. P. 170.

Moreover the paper must have increased the assets of the bank.

In order to entitle the owner to a preference it must appear that the funds in the hands of the receiver were increased or benefited by the proceeds. Hence, if a draft is deposited which is forwarded to a correspondent, and credited to the forwarding bank, the depositor cannot claim a preference out of the funds of the deposit bank in case of its insolvency. *City Bank v. Blackmore*, 75 Fed. Rep. 771.

So, a person who makes a deposit with a bank after it has suspended, consisting of checks drawn on and accepted by the bank in which the deposit is made, is not entitled to a preference over other creditors of the bank. *Ontario Bank v. Chaplin*, 20 Can. S. C. 152, Affirming M. L. R. 5 Q. B. 407.

The difference in the result when the trust doctrine is applied, and when it is not, is illustrated by the following cases:

If at the time the check is deposited the bank is hopelessly insolvent the depositor may reclaim the proceeds until they have been mingled with the funds of the bank so that they cannot possibly be traced. And if the check was forwarded to a correspondent for collection and the proceeds placed to the credit of the deposit bank and the general account drawn against, it will be presumed that the funds of the deposit bank were the subject of the drafts; and if the amount of the trust fund was always intact the owner may recover it from the possession of the correspondent. *Importers & T. Bank v. Everett Bros.* 21 N. Y. S. R. 96.

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That case applies the trust doctrine as established in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732, where one having trust funds in his hands deposited them in his own account at his banker's, and the court held that the owner could follow them and had a charge on the general balance in the banker's hands, and that it would be considered that the checks afterwards drawn upon the funds were upon his own share, and not upon that of the *cestui que trust*.

In Tennessee the doctrine of a trust is expressly repudiated in ordinary cases of this kind, and in that state it is held that if the check is forwarded for collection and credited to the deposit bank as cash before it closes its doors the right to follow, and reclaim the proceeds, is lost, although they remain in the hands of the correspondent, and are, together with other funds, turned over by it to the receiver. *Friberg v. Cox* (Tenn.) 87 S. W. 233.

And in *KLEPPER v. COX* it is held that if the credit is given the same day upon which the bank closes its doors it will not be presumed in favor of the depositor to have been after the failure. But the depositor must show that such was the fact in order to be entitled to the proceeds. It would seem that *Friberg v. Cox*, *supra*, and *KLEPPER v. COX* carry the refusal to recognize the depositor's rights further than any other case, and are somewhat inconsistent with the rule prevailing elsewhere.

As to trust in proceeds of collection made by bank when insolvent, see *note* to *Sayles v. Cox* (Tenn.) 33 L. R. A. 715.

H. P. F.

tween the complainant in this case and the bank was, in effect, that complainant sold to the bank the check of the leather company, and purchased from the bank its own check upon the Louisville bank. At the same time the Johnson City bank became by the same transaction the owner of the leather company's check, and at once remitted it, for credit on its own account, to its New York correspondent, and it was received and credited as cash by the New York bank upon its arrival. There is no question now made as to the real cash passing in the transaction, but the effort is to reclaim the proceeds of the leather company's check out of funds turned over to the receiver by the New York bank after he took charge. There are two determining questions arising under the statement of facts: (1) Whether the proceeds of the check can be traced and identified; and (2) whether the credit was given to the Johnson City bank by the New York bank before the failure of the former. If such credit was entered before the Johnson City bank failed, then the proceeds became mingled with the general funds of the bank, and cannot be reclaimed. *Akin v. Jones*, 98 Tenn. 358, 25 L. R. A. 528; *Sayles v. Cox*, 95 Tenn. 579, 33 L. R. A. 715. In such case the proceeds cannot be followed, separated, or identified. The credit in this case was given by the New York bank on the same day the Johnson City bank failed. Which was first in point of time does not appear.

Under this state of facts, in the absence of proof to the contrary, the identification not being made out, and in favor of the other creditors of the bank seeking a *pro rata* distribution of its assets, we must presume that the credit was given before the Johnson City bank failed; and, this being so, the proceeds of the check cannot be identified or separated, and the right to reclaim them is lost, and the decree of the Court of Chancery Appeals is affirmed.

Cynthia A. COWAN *et al.* Appts.

v.

L. W. MURCH *et al.*

(.....Tenn.....)

Two members of the court of chancery appeals may hear, consider, confer together, and decide the causes before them in the absence of the other member of the court from sickness or other reason, although the act creating the court makes no provision as to the number which may act or constitute a quorum, but *MILL & V. Code*, § 56, while not applicable to the court, provides generally that a majority of three or more officers to whom joint authority is given may exercise it, unless otherwise declared.

(November 11, 1896.)

APPEAL by complainants from a decree of the Court of Chancery Appeals modifying a decree of the Chancery Court for Cocke County in complainant's favor in a suit brought to enforce a vendor's lien. *Affirmed.*

NOTE—As to what constitutes the quorum of a court, see also *Williams v. Benet* (S. C.) 14 L. R. A. 25.

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The facts are stated in the opinion.

Messrs. Washburn, Pickle, & Turner, for appellants:

There is a distinction between the exercise of such authority by such a body for public and private purposes. In the former case all must meet and confer, but a majority may decide; but in the latter case all must not only meet and confer, but also concur in the decision.

2 Am. & Eng. Enc. Law, 2d ed. p. 645; Eodlich, Interpretation of Statutes, 605; Kent, Com. 663; *McCoy v. Curtice*, 9 Wend. 17, 24 Am. Dec. 115; *Cooley v. O'Connor*, 79 U. S. 12 Wall. 398, 20 L. ed. 448; *Crocker v. Crane*, 21 Wend. 211, 84 Am. Dec. 229; *Ex parte Rogers*, 7 Cow. 529; *Grindley v. Barker*, 1 Bos. & P. 229; *Billings v. Prinn*, 2 W. Bl. 1017; *Atty. Gen. v. Davy*, 2 Atk. 213; *Scott v. Detroit Young Men's Soc.* 1 Dougl. (Mich.) 119; *Downing v. Rugar*, 21 Wend. 178, 84 Am. Dec. 223; *First Nat. Bank v. Mount Tabor*, 53 Va. 87, 36 Am. Rep. 734.

The cases where a decision may be rendered by a judicial body upon the consideration (not concurrence) of less than the whole number are cases where by constitutional or statutory enactment it is provided that a less number than the whole body shall constitute a quorum for the transaction of business.

McCoy v. Curtice, 9 Wend. 17, 24 Am. Dec. 113; *Keeler v. Frost*, 23 Barb. 401; *Memphis & C. R. Co. v. Pillow*, 9 Heisk. 248; 1 Am. & Eng. Enc. Law, pp. 688, 694; Story, Agency, ¶ 42.

Under the Code of 1858 a majority, and under a later act three fifths, of the justices of a county are essential to constitute a quorum for the transaction of business of a quarterly court.

Under these provisions it has been held that the action of such court is void if the record fails to show that the required number of justices, to wit, a quorum, were present when action was taken.

Conleman v. Smith, Mart. & Y. 36; *Mankin v. State*, 2 Swan, 206; *Brooks v. Claiborne County*, 8 Baxt. 43.

Mr. H. N. Cate also for appellants.

Messrs. W. J. McSween and Shields & Mountcastle, for appellees:

If this court should concur with complainants in their position that all of the judges of the court of chancery appeals must be present and join in the consideration and decision of every case, this case cannot be heard upon the facts in this court. No valid decision having been rendered by the court of chancery appeals, the appeal is premature, and the case would still be in that court.

Austin v. Harbin, 95 Tenn. 600.

The exception of the complainants to the consideration and decision of the case by the court in the absence of Judge Neill came too late. They waived his absence and the want of a full bench by not objecting to the opinion when it was filed and the decree when it was entered.

Ridford Trust Co. v. East Tennessee Lumber Co. 92 Tenn. 186.

The absence of one of a number of arbitrators is even waived by not making the objection at the proper time.

Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085

The majority of the court had authority to hear, consider, and decide the case.

Mill & V. Code, § 56; *Radford Trust Co. v. East Tennessee Lumber Co. supra*; *Crofoot v. Allen*, 2 Wend. 495; *Ex parte Rogers*, 7 Cow. 529; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98.

Mr. W. O. Nums also for appellees.

Wilkes, J., delivered the opinion of the court:

This bill was filed to enforce a vendor's lien for judgment on the purchase-money notes, and to set aside a subsequent conveyance of the land covered by the lien, upon the ground of fraud, and notice that the lien of the vendor was outstanding. The chancellor granted the relief prayed, and defendants appealed and assigned errors. The case has been heard by the court of chancery appeals, and the decree of the chancellor reversed so far as it decreed that the conveyance of the land be set aside. The complainants are allowed, however, to sell the lands, and to take the surplus proceeds after the payment of the amounts due to defendants Stead & Carver, the subsequent grantees, which amounts are declared a first lien or encumbrance on the property. Complainants have appealed to this court, and assigned errors.

The court of chancery appeals finds, as facts, that complainants sold the lands to Murch, and made him an absolute conveyance of the same, retaining a lien in the purchase-money notes, but none in the conveyance; that Stead & Carver, without any notice of any lien, on the faith of the absolute deed to Murch, made him a loan of \$3,500, and took a deed of trust on the land to secure the same; that complainants knew of this deed of trust, and made no objection to the same until nearly a year afterwards, and when the scheme for which the land was bought proved a failure, and hence they were not entitled to set aside the conveyance in trust, but must take in subordination to it. It follows from the finding of facts that the court of chancery appeals was correct in granting the decree it did, and, if there were nothing else in the case, their decree must be affirmed. It is insisted, however, that only two members out of the three judges composing the court of chancery appeals considered the case, and rendered the finding of facts and final decree in the cause, and this is assigned as error.

It appears that argument of the case was had before the full bench on the 7th of October, 1895; that the cause was kept under advisement until November 5, 1895, when an opinion was filed, signed by two of the judges of the court. A decree was entered in accordance with the opinion, and without exception, on November 6, 1895. On November 8, 1895, complainants filed a petition to rehear the cause, assigning, as one of the grounds for rehearing, that, while the cause was heard by the full court, still it had been considered by only two members of the court, and the opinion rendered had been concurred in by only two members, and it was asked that the cause be reconsidered by the full bench. This petition was presented to the court while only two members were on the bench the third being absent, on account of sickness in his family; and the petition

was dismissed November 9, 1895, by the same two judges. At this time, upon entering the decree dismissing the petition, complainants excepted to the action of the court, because only two members had considered and concurred in the conclusion. These facts appear from the recital in the opinion on petition to rehear, and finding of the two judges, and in the decision rendered by them, and in the decree as entered upon the minutes of the court.

The question presented under this state of the record and the assignment of errors is this: Can the decision and findings of the court of chancery appeals be sustained over objection, when the argument of the case has been heard by the full bench of three judges, but only two have conferred and consulted in regard to it, and only two have engaged and concurred in the findings and final determination of the case, the third member being unavoidably absent? It is insisted that the question has been, in principle, virtually settled by the cases of *Radford Trust Co. v. East Tennessee Lumber Co.* 92 Tenn. 136, and *Austin v. Harbin*, 95 Tenn. 600. The first of these cases arose in the supreme court, and it was held that, under the constitutional and statutory provisions relating to that court, three members constituted a quorum to transact business. The case further holds, referring to special judges, that objections to the competency of a court or any member of it must be made on the hearing, or when the action complained of is had. Unquestionably, this is so, but is that principle decisive of this case? Here the argument was heard before a full court, and no objection would lie. Neither counsel nor litigant could know in advance whether the deliberation over the case would be made by the full court, or only a portion of it, and hence there was no opportunity for exception. When the finding of facts and opinion of the court were promulgated, neither litigant nor counsel could know whether all or only a part of the members had participated in the consideration of the case until after the opinion was delivered and handed down; for one member of the court may and always does deliver the opinion, even when all deliberate and concur. No objection would have lain to the delivery of the opinion with only two members on the bench if all concurred in the consideration. As a matter of fact, only one could deliver the opinion, and no objection would lie to his doing so if two members were present. Complainant therefore had no alternative but to wait, and no remedy but to petition for a rehearing, so soon as he came into a knowledge of the facts, and cannot therefore be considered as having waived any rights, or as having given his consent to the hearing of the case by a part of the court. In the case of *Austin v. Harbin*, 95 Tenn. 598, it was held that a majority of the court (or two members) might concur in the findings and opinion, and the decree would not be invalid for that reason, and that it was not required by the act to be signed at all. But the question as to whether the entire court must consider and confer over the case, though a majority concurring might decide it, was not considered or passed upon. We do not therefore understand the question raised in this case

to have been decided in either of the cases referred to and relied upon by appellees, and the question is an open one.

It is said that § 56 of Milliken & Vertrees' Code should be considered as indicative of the spirit and policy of our legislation. This section is in the following terms: "All words giving a joint authority to three or more persons or officers give such authority to a majority of such persons or officers, unless it is otherwise declared." This section is by its terms and context applicable only to the Code and the body of laws embraced in it; but it is insisted, and properly so, that it should be considered in the construction of all subsequent statutes, so as to build up a uniform and harmonious system. The act creating the court of chancery appeals does not in terms provide that any number of the members of the court shall constitute a majority or quorum, and that any specified number must concur in the consideration or in the decision of any case. It does provide that, in case of the sickness or incompetency of any one or more of the judges of the court, such vacancy may be filled by appointment of the governor; and unquestionably, the parties might, by consent, fill the vacancy in any case in which it thus becomes necessary, and the party thus selected by consent could act as a judge. The Constitution, in article 6, § 2, provides that "the concurrence of three of the judges of the supreme court shall in every case be necessary to a decision;" and the necessary implication is that a decision may be reached if a majority, or three, of the members concur in the decision, but less than that number cannot reach a decision. Undoubtedly, that decision, when thus reached, may be announced, as has been the invariable rule, by only one member of the court. It was held in *Austin v. Harbin*, 95 Tenn. 598, that this provision of the Constitution and the act conforming thereto (Mill. & V. Code, § 342) does not apply to the court of chancery appeals, but only to the supreme court, but that a decision and finding by two members, constituting a majority of the former court, would be valid and legal, without the concurrence or over the dissent of the third judge.

It is insisted that it is a general rule of law and construction that, whenever a body is by law constituted for the decision and determination of matters committed to them, in the absence of any provision directing otherwise all must join in the consideration of the matters to be decided, and must confer together over the matters, although a majority may decide after such conference. There appears to be quite a broad distinction in such cases between matters of private and public concern. The rule contended for is tersely stated in the text in 2 Am. & Eng. Enc. Law, 2d ed. p. 645, under the general head of "Arbitration," that in matters of private concern all must concur in the decision, and it is added: "It is different in matters of a public character, because where persons, as a bench of judges, are appointed to discharge public duties, the decision of a majority is generally sufficient, yet then they must all act together in the proceedings prior to the judgment or award." In Endlich, Interpretation of Statutes, p. 605, the rule is stated as

follows: "An act which empowers two or more justices, or other persons, to do any act of a judicial, as distinguished from a ministerial nature, impliedly requires that they should all be personally present and acting together in its performance, whether to hear the evidence, or to view when they are to act on personal inspection; to consult together, and form their judgment." In *Sutherland*, Stat. Constr. § 890, it is said: "Where any number of persons are appointed to act judicially in a public matter, they must all confer; but a majority may decide." In *McCoy v. Curtice*, 9 Wend. 17, 24 Am. Dec. 115, and note, which was a case where two school trustees acted and issued a warrant to collect taxes, it was said that when power is delegated to two or more individuals for a mere private purpose, in no respect affecting the public, it is necessary that all should join in the execution of it; thus arbitrators must all unite in an award. But in matters of public concern, if all are present, the majority can act, and these acts will be the acts of the whole. The same principle is announced in *Cooley v. O'Connor*, 79 U. S. 12 Wall. 396, 20 L. ed. 446, which involved the action of two of the commissioners of direct taxes; and in *Crocker v. Crane*, 21 Wend. 311, 84 Am. Dec. 228, which was a case where commissioners were authorized to distribute stock in a corporation for its best interests. In the latter case it is said: "It has long been perfectly well settled that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may decide,"—citing *Ex parte Rogers*, 7 Cow. 529, and notes, which was a case of a board of canal commissioners. See also note to *Crocker v. Crane*, 84 Am. Dec. 235; *Grindley v. Barker*, 1 Bos. & P. 229, a case of leather commissioners; *Atty. Gen. v. Davy*, 3 Atk. 212, a case of commissioners to choose a chaplain; *Scott v. Detroit Young Men's Soc.* 1 Dougl. (Mich.) 119, a case of power delegated to trustees; *Downing v. Ruger*, 21 Wend. 178, 84 Am. Dec. 298, a case of overseers of the poor; *First Nat. Bank v. Mount Tabor*, 53 Vt. 87, 86 Am. Rep. 784, which was a case of town commissioners to issue bonds. None of the cases cited are cases in which "courts," strictly speaking, are considered; but they are cases involving bodies, such as boards of school directors, boards of canal commissioners, boards for the issuance of bonds, boards for the distribution of stock, and other bodies exercising judicial or quasi judicial functions. We have been cited to no case involving the power of a majority of a court of judges to consider and decide causes submitted to them, or a majority of them; and we have been able to find none directly upon the point, when there is no statutory or constitutional provision authorizing a majority to act. The case cited of *Atty. Gen. v. Davy*, 3 Atk. 212, appears to recognize a distinction between individuals exercising judicial functions and a regularly constituted court of judges.

It is insisted that the rule contended for by appellants would place the court of chancery appeals most nearly in harmony with the practice of this court; that three judges of this

court must consider every case; and that it would be unwise and incongruous for like cases to be decided by two members of that court. And it is suggested, by way of illustration, that two cases may be upon the same equity docket. One may be assigned to the court of chancery appeals, and be considered and determined by two judges, as to the facts; while the next case, not assigned, must be considered by not less than three members of this court. But this reasoning, if carried out to its end, will result in this: that, while not less than three members of this court must concur in every decision, only two will be required in that court. Another result would be that law cases could be decided only by three members of this court, while chancery causes would be decided by only two members of that court; at least, as to the facts. By parity of reasoning, if all of that court must consider and confer in every case, but two may decide, it would follow that all the members of this court must consider and confer in every case, though three may concur in the decision, and make it valid. It has already been held that the constitutional provisions and act relating to this court do not apply to the court of chancery appeals (*Austin v. Harbin*, 95 Tenn. 600), and any attempted analogy seen between the courts must fail in many particulars. The courts are different, the powers different, and the jurisdictions different. One is a supreme, and the other an inferior, court, in the legal and constitutional sense. It has never been held indispensable that all the members of this court should confer together in the consideration of every case; but, under this reasoning, the constitutional and statutory provisions do not stand in the way of such construction, inasmuch as they simply provide that three shall concur in the decision, without laying down any rule for the consideration of cases. It was held in *Radford Trust Co. v. East Tennessee Lumber Co.* 93 Tenn. 186, that a decision of this court, concurred in by three members, would be valid, although it may have been considered by less than the full court of five members, and less than that number had conferred in regard to it.

We are of opinion that in the absence of one member of the court of chancery appeals, from sickness or other reason, the two remaining members may hear, consider, and confer together, and decide, the causes before them. While it is always best to have a full bench at every stage of every proceeding, it will not vitiate the decision if, for any reason, only two of its judges consider and join in the determination of the question. It has been held that two may decide in the absence of the third, or over the dissent of the third; and we can see no valid reason why two may not consider, and reach the decision which two are competent to make. That court does not sit as arbitrator under selection of the parties, and under a power conferred by agreement, for special cases or purposes, but as a court provided by general statutes for all causes properly coming before it. We are of opinion, therefore, that the finding and decision in this case are valid and legal, and, under the facts as found, the proper legal conclusion has been

reached; and the decision of the Court of Chancery Appeals is affirmed.

If this court were of the opinion that the finding was not legal, it would only remand, in order that the cause might be considered by the full bench of the court of chancery appeals, when it is evident that the same two judges could reach the same result, and render the same decision, even if the third one should be of a different opinion.

J. C. A. BURNETT *et al.*

v.

G. L. MALONEY *et al.*

(.....Tenn.....)

1. A statute giving a certain county power to issue bridge bonds and levy taxes to pay them does not violate Const. art. 11, § 8, prohibiting the suspension of general laws for the benefit of a particular individual and the granting to any individual of special rights, privileges, immunities, or exemptions.
2. Counties are not included among the corporations referred to in Const. art. 11, § 8, prohibiting the creation or increase of the power of corporations by special laws.
3. The limitation on the taxing power of counties by the general revenue law of Tennessee, passed at the extra session of 1895, does not repeal the provision of the special act of 1895, p. 122, chap. 80, relating to the power to tax to pay bridge bonds of Knox county.
4. Power to issue bonds payable in gold coin of the United States of the present weight and fineness is not conferred upon a county by a statute authorizing the issue of bonds without prescribing the kind of money in which they may be paid.

(Snodgrass, Ch. J., and Beard, J., dissent.)

(November 14, 1896.)

CROSS-APPEALS from a judgment of the Circuit Court for Knox County in an action to enjoin the issuance of bonds for the erection of a bridge; the plaintiffs appealing from so much of the decision as upheld the power to issue the bonds, and defendants appealing from so much as denied authority to make them payable in gold. *Affirmed.*

The facts are stated in the opinions.

Messrs. Trent & Ford, for plaintiffs:

The act of the general assembly of April 30, 1895, chap. 80, 1st Sess., is unconstitutional and obnoxious to art. 1, § 8, of the Constitution of Tennessee, which expressly prohibits the passage of "special laws" creating a corporation or increasing or diminishing its powers.

The act of June 15, 1895, 2d Sess. chap. 4, § 14, expressly prohibits counties from levying special taxes, the aggregate amount of which shall exceed the amount limited in said act to them for current expenses.

The holding that the action of the county

NOTE.—As to contracts calling specifically for payment in coin, including cases of municipal bonds, see *Skinner v. Santa Rosa* (Cal.) 29 L. R. A. 512.

court attempting to authorize the gold clause in said bonds should be affirmed.

A county is the lowest order of corporate existence.

1 Dill. Mun. Corp. § 28; *Soper v. Henry County*, 26 Iowa, 264.

They cannot borrow money, issue bonds or negotiable paper, except when and in the manner they may be specially authorized so to do.

4 Am. & Eng. Enc. Law, p. 382; *Taxpayers of Milan v. Tennessee C. R. Co.* 11 Lea, 334.

There can be no dispute as to the words of the act. No authority is there given to issue gold bonds.

The court had no discretion outside of the terms of the act, except necessary discretion.

To assume that the power to issue gold bonds was a necessarily implied power is against reason and against public policy.

The rule is:

First, strict construction.

Taxpayers of Milan v. Tennessee C. R. Co. supra; *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 681, 62 Am. Dec. 424; *Grant v. Lindsay*, 11 Helsk. 666; *Nashville & K. R. Co. v. Wilson County*, 89 Tenn. 604; *Rodemer v. Mitchell*, 90 Tenn. 65.

Second, that county courts have no powers in creating county debts like the one in question, except such as are expressly conferred or necessarily implied.

1 Dill. Mun. Corp. 4th ed. § 509, p. 576.

A court of chancery will restrain public officers *in limine* from the consummation of a contract against which the court would give no relief, if once accomplished.

In *Lucas County Comrs. v. Hunt*, 5 Ohio St. 488, 67 Am. Dec. 303, the court refused injunction because of existing moral obligations on the part of the county to reimburse citizens.

10 Am. & Eng. Enc. Law, p. 877.

Messrs. Comfort & Spilman, for defendants:

In *Lauderdale County v. Fargason*, 7 Lea, 153, it was held by this court that the act was constitutional. The same conclusion was reached in *Williams v. Nashville*, 89 Tenn. 487.

The constitutional prohibition that "no corporation shall be created, or its powers increased or diminished, by special laws," does not apply to municipal corporations.

State v. Wilson, 12 Lea, 246; *Ballentine v. Pulaski*, 15 Lea, 683; *Williams v. Nashville*, supra.

The object of the general act was to regulate those taxes only which, by previous general laws, all counties had the right to levy. It will not be presumed to have any reference to the special act passed to meet the peculiar needs of a single county.

Endlich, Interpretation of Statutes, § 223; *Brown v. Philadelphia County Comrs.* 21 Pa. 37 (quoted in Endlich, Interpretation of Statutes, p. 299); *Nashville, C. & St. L. R. Co. v. Franklin County*, 5 Lea, 707.

All the details not expressly defined must be taken as left to the discretion of the court, with the qualification that the instrument be of such character as to fall within the legal definition of the term "bond," and must contain no stipulations contrary to public policy.

84 L. R. A.

A stipulation to pay a contract in gold is not contrary to public policy, but is legal and enforceable.

Wills v. Allison, 4 Helsk. 396.

A contract having otherwise the essential characteristics of a bond does not lose its legal identity by being made payable in gold.

Judson v. Bessemer, 87 Ala. 240, 4 L. R. A. 742; *Moore v. Walla Walla* (1894) 60 Fed. Rep. 961; *Farson v. Louisville Sinking Fund Comrs.* (1895) 97 Ky. 119; *Heilbron v. Outhbert* (1895) 96 Ga. 312; *Pollard v. Pleasant Hill* (1874) 3 Dill. 195; *Young v. Montgomery & E. R. Co.* (1875) 2 Woods, 606; *Woodruff v. Mississippi*, 162 U. S. 291, 40 L. ed. 973.

Wilkes, J., delivered the opinion of the court:

The legislature of this state, on the 30th of April, 1895, passed an act entitled "An Act to Authorize the County Court of Knox County to Issue Bonds of Said County for Building a Bridge across the Tennessee river at the South End of Gay Street, Knoxville." Acts 1895, p. 123, chap. 80. The 1st section thereof authorized the quarterly county court of Knox county, three fifths of its number concurring, to issue bonds of the county, not exceeding in the aggregate \$225,000, and bearing a rate of interest not in excess of 6 per cent, for the accomplishment of the purpose indicated in the caption. The 2d section provided that the interest on these bonds should be payable semiannually, represented by coupons attached to each bond, and maturing at the proper date; and by the 6th section it was made the duty of the quarterly county court "to lay and levy a tax sufficient for the payment of the coupons of said bonds as they matured, and also to create a sinking fund for the retirement of the said bonds by the levy of an additional tax, sufficient to pay the principal of said bonds as they mature, which sinking fund shall be sacredly kept and applied for this purpose." Acting under the authority of this statute, the quarterly court of Knox county, by a vote much larger than three fifths of the whole court, passed a resolution authorizing the construction of the bridge contemplated therein, and subsequently entered into contract with the Youngstown Bridge Company to construct this bridge for the sum of \$310,000. On the day of the closing of this contract the county court passed a resolution authorizing the defendant Maloney, as county judge and as county clerk, to issue the bonds of the county in the amounts in the aggregate and of the description found in the statute, the proceeds of which, when sold, were to be used for the erection of this bridge; and at the same time it levied a tax of 5 cents on the \$100 on all taxable property in Knox county, for the purpose of meeting the interest on these bonds. Afterwards the court passed a resolution directing the bonds to be made "payable in United States gold coin of the present standard of weight and fineness." All three resolutions were passed by the court, three fifths of its members concurring. The present is an agreed case, made up under §§ 4187 et seq. of Milliken & Vertrees' Code, by and between plaintiffs in error, who are citizens and taxpayers of Knox county, on the one hand, and the judge of the

county court, the clerk of that court, and the county trustee, by which certain matters of controversy between them, growing out of this act of the legislature and the proceedings of the county court, were submitted to the determination of the circuit court of Knox county. In the submission the plaintiff's affirming and the defendants denying the following propositions: (1) That the act of the legislature hereinbefore referred to is repugnant to art. 11, § 8, of the Constitution of this state, and therefore void. (2) That the levy of the tax of 5 cents on the \$100 of taxable property, to pay the interest on these bonds, was unauthorized, because the quarterly court had previously exhausted its power to levy taxes for the year 1896, as that power was conferred by chapter 4, same session, of the legislature of 1895. (3) That under this act, the quarterly court had not the power to issue these bonds payable, principal and interest, in gold coin. On the trial below, the circuit judge held the first two of these propositions against plaintiffs and the third against the defendants, and entered up a judgment in accordance with this holding. Both parties, being dissatisfied, have appealed to this court, and thus there is opened up for consideration all three of the propositions.

Is the act in question obnoxious to the constitutional objections which plaintiffs make to it? These objections are: First, that it was passed for the benefit of Knox county alone, granting to it a right or power not extending to any other county; and, secondly, that it is an effort to increase the powers of this county by a special law, and it is assumed that they are sustained by § 8 of art. 11 of our Constitution. So much of this section as affects the first of these objections is as follows, *viz.*: "The legislature shall have no power to suspend any general law for the benefit of any particular individual, . . . nor to pass any laws granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law." This provision, as set out above, corresponds exactly with § 7 of art. 11 of the Constitution of 1834, save that the latter has this as a concluding clause: "Provided, always, the legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good." In the room and stead of this proviso found in the Constitution of 1834, the second clause of § 8 of art. 11 of our present Constitution is as follows: "No corporation shall be created, or its powers increased or diminished by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter created," etc. The objection here raised has been set at rest by this court, and against the contention of the plaintiffs. In the case of *Lauderdale County v. Ferguson*, 7 Lea, 153, it was considered and determined, the court saying: "It has never been contended by anyone that a municipal corporation could not be authorized by a special law to make contracts and levy taxes to meet them." So it was held in that case that certain acts of the legislature provid-

ing that the county court of any county through which the line of the Mississippi River Railroad was proposed to be run, might, under certain conditions, subscribe to the capital stock of the company, were not amenable to § 7 of art. 11 of the Constitution of 1834. This decision has never been disturbed by any subsequent holding. On the contrary, if not by direct reference, yet by necessary implication, it was approved in the case of *Williams v. Nashville*, 89 Tenn. 487, arising under the present Constitution.

The second of these objections, going to the unconstitutionality of this act is disposed of in *State v. Wilson*, 12 Lea, 246; *Ballentine v. Pulaski*, 15 Lea, 623, and *Williams v. Nashville*, *supra*.

2. We think that the second assignment of error, on the trial judge's holding that the quarterly court properly exercised its power in levying the tax of 5 cents to meet the interest on these bonds, is equally untenable. We have already set out the 6th section of chapter 80 of the Acts of 1895, under which this special tax was levied. The agreed case shows that at the January term, 1896, this court had levied property taxes for various purposes for the year 1896, amounting to 79 cents on the \$100. It will be remembered that these bonds were authorized and this tax was directed by an act passed at the regular legislative session of 1895. Subsequently, and at an extra session of the same legislature, a general revenue bill was passed (p. 579, chap. 4) by the second section of which the counties of the state were limited in the levy of a county tax to a rate not exceeding 30 cents on the \$100 of taxable property, "exclusive of the tax for public roads and schools and interest on the county debt, except as hereinafter otherwise provided." Section 14 of the same act is as follows: "Be it further enacted that the aggregate amount of special taxes levied by counties shall not exceed the amount limited to them for current expenses." The contention now is that the effect of this general statute is to fix a limit to the taxing power of the county, and, as the agreed case shows that this had already been reached at the date of the levy of the tax, as provided for in chapter 80 of the special act in question, the action of the county court in making such levy was *ultra vires* and void. We do not think so. The power to issue these bonds and the duty to levy this tax to meet the interest on them were correlative in character. The act makes them inseparable. The duty to pay this interest as it matures is no more a part of the obligation of the contract than the duty to provide the means of paying it by the exercise of this especially provided taxing power. Knowing that the value of the bonds in the markets of the world depended upon the existence of carefully guarded statutory provisions for the levy of taxes to meet both principal and interest, it is inconceivable that the legislature would, while leaving the act authorizing the issuance of the bonds on the statute books, yet by indirection take from it that which gave it its only vital force. In addition, however, sound and well-settled rules of statutory construction are opposed to this insistence. The purpose of § 6 of chap 80 was special. It was to give Knox county the right,

and to make it its duty, to levy a tax for the purpose of providing a fund to meet the interest on these bonds, and this without regard to its right or duty with respect to other taxes. The revenue act, on the other hand, was general in its character, and its provisions relate to and govern the general powers of taxation of all the counties of the state. It will not be presumed that this subsequent general legislation, in the absence of reference to it, was intended to either repeal or qualify the power of taxation given in and essential to the integrity of this special act. "A general later [affirmative] law does not abrogate an earlier special one by mere implication. . . . It is usually presumed to have only general cases in view, and not particular cases, which have been otherwise already provided for by the special act." Endlich, Interpretation of Statutes, § 228. Or as is said by the author in Black on the Interpretation of Laws (p. 116): "It has come to be an established rule in the construction of statutes that a subsequent act treating a subject in general terms, and not expressly interdicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. This rule is founded upon or expressed by the maxim, *Generalia specialibus non derogant*."

8. The defendants assigned for error so much of the judgment of the trial judge as held that the county court of Knox county lacked power, under chapter 80, to issue its bonds payable in gold. While this act defines many of the features of the bonds to be issued under it, and limits their aggregate amount to \$225,000, it does not prescribe the kind of money in which the bonds and interest coupon are to be paid. The quarterly court directed that principal and interest be made payable in gold coin of the present standard of weight and fineness, and upon this feature the principal contention in this case arises. We have been cited by counsel to some cases claimed to bear upon the subject. The first is the case of *Moore v. Walla Walla*, 60 Fed. Rep. 968. The report of this case is quite meager, but the court uses this language: "I hold that the authority given by the laws of the state to municipal corporations to provide means for constructing works of public utility by issuing and selling negotiable bonds includes authority to redeem such bonds in money of equal value to that which they shall have received." It is apparent from this statement that the general laws of the state gave municipal corporations authority to issue bonds, but under what restrictions or limitations does not appear. It is fairly inferable from the statement that the city of Walla Walla was authorized to issue bonds, and did issue bonds payable in gold, and sold them for gold, in order to obtain the funds necessary to make the improvements. The next case is that of *Illibron v. Cuthbert*, 96 Ga. 312, decided April, 1895. In this case, by the charter of the city, the mayor and council were given authority to do all things necessary for the benefit of the city, and all things not in violation of the Constitution and laws of the state. It was very appropriately said by 34 L. R. A.

the court that the "general welfare" clause in this charter was very broad and liberal in its terms. The court in passing upon the question now under consideration, in view of this charter said: "No reason now occurs to us, nor was any stated, why it would be unlawful to make the proposed bonds payable in gold or lawful money of the United States, at the option of the holder." This is the only deliverance given upon the subject. It is evident the question was not seriously considered in the case, and was allowed to go by default. The case of *Pollard v. Pleasant Hill*, 3 Dill. 197, is also cited and relied on. In that case the bonds were payable in legal-tender notes, and the interest coupons were payable in gold coin. The bonds were issued in payment of a subscription to the Pacific Railroad of Missouri. The bonds were in the hands of an innocent holder for value before maturity of the coupons sued on. The court held that the matter was one purely of contract, and when its terms appeared the court would enforce it. What the provisions of the charter of the city of Pleasant Hill were, or what the provisions of the general law, does not appear. This decision was rendered in 1874. The next case is that of *Young v. Montgomery & E. R. Co.* 9 Woods, 606. It this case the governor for the state of Alabama indorsed the first-mortgage bonds of the railroad company, and the court held that the act of the general assembly authorized the indorsement of bonds bearing interest at the rate of 8 per cent per annum, and that the fair construction was that it meant 8 per cent in any legal-tender currency on which the parties might agree. It is well to note that this case does not involve the power or right of a city or county to make such agreement, but the act done and liability incurred were those of the state. None of these are cases well decided by courts of last resort except the Georgia case, and in none of them was the matter fully presented and passed upon.

The case of *Judson v. Bessemer*, 87 Ala. 240, 4 L. R. A. 742, is also relied on. In that case there was a provision authorizing the city of Bessemer to issue bonds for municipal purposes, and it was held that a general power given the city to issue negotiable bonds in the absence of any legislative restriction carries the implied power to make them payable in currency which is constitutionally a legal tender, as in gold coin. The court held that under the rulings of the courts in that state corporations having power to issue securities might exercise such power in the same mode and manner as natural persons may under similar circumstances, there being no legislative restriction nor specifications of a particular mode; citing *University of Alabama v. Moody*, 62 Ala. 389. It is distinctly stated in this case that the city had express and general power to issue bonds, and under such express power the city of Bessemer had authority to make them payable in gold. The case of *Farrison v. Louisville Sinking Fund Comrs.*, decided by the court of appeals of Kentucky, reported in 97 Ky. 119, is also cited and relied upon. This was a case where the city of Louisville issued its bonds payable, principal and interest, in gold coin. The act authorizing their issuance did not specify in what currency they were to

be made payable. The court quoted approvingly the Alabama case above cited, as well as the other cases cited, and lay down the doctrine that powers must be implied such as are incidental to the powers expressly granted, and that the city must be granted discretion, and would not be restricted to the actual powers granted strictly construed. The court treated the matter of the kind of currency as simply one of contract, and at the discretion of the maker or borrower. The case of *Woodruff v. Mississippi*, reported in 162 U. S. 292, 40 L. ed. 973, should also be noticed. It was a case of levee bonds issued under act of the legislature of Mississippi by a levee board, which was a body corporate under the laws of that state. The authority given to that board was to issue bonds to be sold in the market, the proceeds to be used in building levees against the Mississippi river. The bond issued was in somewhat peculiar form, and uses this language: The levee board "hereby acknowledges themselves indebted to bearer in the sum of \$1,000 in gold coin of the United States," but it contained no express promise to pay the amount in gold, or any other special currency. The coupons, however, stipulated to pay the bearer \$20 in currency of the United States, being the semiannual interest. The supreme court of Mississippi held that the bonds were payable in gold coin, and that the board of levee commissioners had no power or authority to make them so payable, and that they were void. The Supreme Court of the United States, Chief Justice Fuller delivering the opinion, held that upon a proper construction of the language of the bond it could not be held that it was payable only in gold; that the bonds were not expressly payable in gold coin. The court continues: "It is true that, as they acknowledged an indebtedness in gold coin, and as the coupons were payable specifically 'in currency,' the argument is not unreasonable that the corporation intended the purchasers to expect payment in the money in which the indebtedness was stated to have been contracted; but the agreement to pay the designated sums did not specify any particular kind of money, and the obligation was to pay what the law recognized as money when the payment was to be made. The bonds were therefore legally solvable in the money of the United States, whatever its description, and not in any particular kind of that money, and it is impossible to hold that they were void because of want of power." That the decision in this case rested upon the ground that the bonds were payable in any legal currency, and not alone in gold, though the bond acknowledged an indebtedness in gold, clearly appears throughout the entire case; and Judges Peckham, Brewer, and White were of opinion the holding of the supreme court of Mississippi was a finality upon this point, and the case presented, therefore, no question of Federal jurisdiction.

The resolution of the county court in regard to the bonds in controversy allows no latitude for construction. It provides that both the principal and interest of the bonds shall be payable in gold coin of the United States of the present standard of weight and fineness. The form of the bond and coupon is also prescribed,

and there is an express promise, in unequivocal language, to pay both bond and interest coupon in gold coined money of the United States of the present standard of weight and fineness. There is, as will be seen, no latitude for holding that, if the standard of the gold coin of the United States should hereafter be changed, the county could get the benefit of it, but the identical gold now coined, of the present weight and fineness, must be paid, even if the government should change its standard, and no longer issue coins of the present weight and fineness.

It is proper to call attention to the fact that all of the cases cited involve bonds issued by municipal corporations, except one, in which the power and liability of a state is involved; but none of them involve bonds issued by counties. That there is a wide difference between the powers of municipal and county corporations under similar acts of the legislature is well supported by reason and authority. In the case of *Soper v. Henry County*, 28 Iowa, 284, Dillon, Ch. J., author of the noted work on Municipal Corporations, said: "Counties owe their creation to the statutes," and the statute confers on them all the powers which they possess, prescribes all the duties they owe, and imposes all the liabilities to which they are subject. . . . Considered with respect to their powers, duties, and liabilities, they stand low down in the scale or grade of corporate existences. It is for this reason that they are ranked among what have been styled quasi corporations. This designation is employed to distinguish them from private corporations aggregate, and from municipal corporations proper, such as cities acting under general or special charters, more amply endowed with corporate life and functions, conferred in general at the request of the inhabitants of the municipality for their peculiar and special advantage and convenience. The decisions of the courts in every state in the Union recognizing this distinction, hold incorporated cities and towns to a much more extended liability than they do counties, etc. In his work on Municipal Corporations he says (vol. 1, 4th ed. p. 596, § 509): "In respect to municipal or chartered corporations, our opinion . . . is that they also have no such inherent power and no power whatever, except so far as conferred expressly or by fair implication. This is an important principle, and it results therefrom that there is no presumption in favor of . . . quasi corporations." In 4 Am. & Eng. Enc. Law, p. 382, it is said counties cannot borrow money, issue bonds or negotiable paper, except when and in the manner they may be specially authorized so to do. A county has been defined to be a local organization which, for the purpose of civil administration, is invested with a few functions of corporate existence. *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109. It is again said: "Counties being merely parts of the state government, they partake of the state's immunity from liability. The state is not liable except by its own consent, and so the county is exempt from liability unless the state has consented. Counties are not liable to implied common-law liabilities, as municipal corporations are." *Browning v. Springfield*,

17 Ill. 143, 68 Am. Dec. 345; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431. Counties do not hold and operate under charters as do cities and other municipal corporations. They have no franchises. They make and can make no by-laws. They have the same powers and duties throughout the state. They do not have to provide waterworks and fire departments and lights and the hundred and one necessities for cities and towns. Their ordinary expenses are met by issuance of county warrants, payable out of a general fund collected for all purposes. The occasions for extraordinary expenditures are few, such as the building of jails, court-houses, bridges, and hospitals; and if it becomes necessary to incur a debt for these purposes, which cannot be at once met out of the usual revenues, they must get their authority to create such debts from an enabling act of the legislature, which at the same time gives them the power to provide for its payment by a special tax; and no doctrine is better settled in this state than that the power thus conferred must be strictly construed and exactly followed. In *Taxpayers of Milan v. Tennessee C. R. Co.* 11 Lea, 334, it is held that a county court cannot issue bonds unless authorized so to do, and then only in the manner and form authorized. It is further held that the power to issue bonds and incur extraordinary debts can only be derived in the way pointed out in the Constitution and laws of the state, and the powers thus conferred must be strictly construed and clearly followed. See also *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 681; *Grant v. Lindsay*, 11 Heisk. 686; *Taxpayers of Milan v. Tennessee C. R. Co.* 11 Lea, 334; *Nashville & K. R. Co. v. Wilton County*, 89 Tenn. 604; *Colburn v. Chattanooga W. R. Co.* 84 Tenn. 50.

And this is the general trend of authorities. Thus it is said: The statute authorizing a county contract must be strictly pursued or the contract will not bind the county, and the requirement of the statute must be fulfilled; and a contract, unless made pursuant to statutory authority, will not bind, and a contract *ultra vires* may always be defended against. 4 Am. & Eng. Enc. Law, p. 359, and note. As an illustration, in *Skinner v. Santa Rosa*, 107 Cal. 464, 29 L. R. A. 512, it was held that when the statute provides that bonds may be made payable in gold coin or lawful money of the United States, they cannot be made payable in gold coin of the United States of the present standard of weight and fineness. It has been tersely said: "The limits of all powers, therefore, except those necessarily implied from the county entity, must be found within the four corners of the statutory provisions made by the legislature." 4 Am. & Eng. Enc. Law, p. 359. The cases cited from Kentucky, Alabama and Georgia clearly show that in those states the rule of liberal construction prevails, but such does not apply in Tennessee nor generally, and certainly does not apply to county or other quasi corporations.

It may be granted that individuals and private corporations aggregate may make contracts to pay in gold, and it has been so held in this state (*Wills v. Allison*, 4 Heisk. 386); but it by no means follows that county corporations have the same power. As an origi-

nal proposition it may well be doubted whether it is consonant with the highest and broadest public policy to allow individuals to make gold contracts, but this question we are not called upon to consider. We are of opinion there is neither express nor implied authority conferred by the act in controversy in this case to make the bonds of the county payable, either principle or interest, in gold coin of the present weight and fineness. The act providing for the issuance of bonds also provides for a special tax for the payment of the bonds, principal and interest. Obviously the act contemplates that the bonds and the special tax shall be paid in the same money, for both are authorized in the same act, in similar language, and without distinction as to the money to be raised in the one case and paid out in the other. The act affords no more authority for the issuance of gold bonds than for the assessment and collection of special gold tax for their payment. It certainly cannot be insisted that gold can be collected from the taxpayer to meet the payments as they fall due, and yet this power may as well be implied as that of making the bonds payable in gold. Where can the gold be had unless collected from the taxpayers? The theory of the law is that the fund collected to pay upon these bonds shall be kept separate and apart from all other funds, and a special tax is authorized and provided for that purpose by the same act which provides for the bonds. While the identical money received may not be kept intact, and paid in kind, still the county can only demand from the banks and other custodians of the fund money similar to that collected and deposited. It will then become necessary for the county authorities to go into the market and buy the gold necessary to meet the payments. It matters not whether gold is at a premium or at par or at a discount. In any event, there must be an exchange of funds collected in order to secure it. There is no authority, under the statute or elsewhere, for the county officials to make such exchange. In the contingency that gold may go to a premium, the county must suffer the burden of obtaining it. It is said that the policy of the general government is to keep all legal tender funds at the same value, and that we cannot presume the different kinds of legal-tender money will ever have different values. But evidently this is exactly the contingency that prompts the gold feature in the bonds. Unless there were some advantage to the purchaser or holder of the bonds in having them payable in gold, then there would have been no occasion for the gold feature. It is apparent that, if an advantage accrues to the bondholder because of this provision, it follows inevitably that such an advantage is gained at the expense of the county and taxpayer. It is evident also that, while the general policy of the government may be to-day to keep all of its legal-tender money at par, and of the same value, such may not be its policy next year, or five years or ten years from now, while the bond is still outstanding. If gold should go to a considerable premium, it would increase the burden of the taxpayer. If Knox county can make her bonds payable in gold,

so can every other county in the state or in the United States, and then gold would become the only solvable currency in such transactions, contrary to the general policy of the government and to the broadest public interest. In this case not only is it provided that the bond, principal and interest, shall be payable in gold, but it must be gold of the present standard of weight and fineness. If, therefore, the government shall change its standard, and cease to coin its gold of the present standard of weight and fineness, yet the county must still comply with its bond, and obtain, as best it can, and at its own expense, gold coin of the present standard of weight and fineness.

It is said the right to pay in legal tender involves the right to pay in any money that is legal tender, and gold, possessing that quality, can be stipulated for; but the error in this is that requiring payment in gold, and in gold alone, deprives the debtor of the right to pay in other legal tender, and compels him to pay in one thing, discriminating against the others, and thus subjecting the debtor to the danger of being placed in a position of embarrassment and peril.

The judgment of the court below is affirmed, with costs.

Beard, J., dissenting:

Not being able to concur with the majority in their conclusion that under the act of 1895 the county lacked the power to issue its bonds payable in "gold coin of the United States of the present standard of weight and fineness," I think it proper to state very briefly the reasons of my dissent. It is true, as is said in the majority opinion, this act fixes many of the features of the bonds which it authorizes the county to issue, and limits their amount to \$225,000, yet it does not prescribe the kind of dollars in which they may be made payable. This seems to have been left to the discretion of the county court, the legislature no doubt assuming that it would be exercised with an eye to the best interest of the public. No satisfactory reason has been suggested why this was not a proper and legal exercise of this discretion by that body in the selection of gold as the money in which these bonds and the interest upon them were solvable. Gold is a part of the circulating medium of business, and, with silver and United States notes, constitutes the legal tender money of the country; so that, if these securities were issued payable in "dollars" generally, there is no doubt but the county would have the right to pay, and the creditor would be bound to accept, either of these three kinds of money so tendered to him. That an individual may legally obligate himself to pay his creditor in gold is unquestionable, and we can see no reason why the county of Knox, in the absence of legislative inhibition, and under the terms of this act, may not bind itself to do the same.

This is a question of power, and not of policy. But, if it was the latter, yet, as it has been the declared policy of the United States government since the resumption of specie payment in 1878, to maintain at an equality all of the various kinds of money, gold, silver, and legal-tender notes, it could not be assumed by the

courts that this policy would be reversed, so as to bring about a difference in the value, in these various kinds of money. The diligence of able counsel, aided by the investigation of the court, has been able to discover but a few cases involving this question. In these, however, the holding of the courts has been in accord with the view already indicated. In *Judson v. Bessemer*, 87 Ala. 240, 4 L. R. A. 742, it is held that a power to make city bonds payable in gold is included in the general power to issue them, as this implies the right to make them payable in any constitutional legal tender. In *Moore v. Walla Walla*, 60 Fed. Rep. 953. It was held that under municipal authority to issue and sell negotiable bonds they could be made payable "in gold coin of the present standard of weight and fineness." Where the governor was authorized to indorse railroad bonds on behalf of the state, it was held that he might lawfully indorse such bonds with interest payable in gold. *Young v. Montgomery & E. R. Co.* 2 Woods, 606. In a suit to enjoin the issuance of municipal bonds "payable in gold or lawful money of the United States, at the option of the holder," it was said by the supreme court of Georgia, "No reason now occurs to us, nor was any stated, why it would be unlawful" to make the proposed bonds so payable. *Heilbron v. Cuthbert* (1895) 96 Ga. 812. In *Parson v. Louisville Sinking Fund Comrs.* (1895) 97 Ky. 119, it was insisted that municipal bonds were void because payable in gold coin of the United States while the act under which they were issued was silent as to the character of the money in which they might be discharged. To this the court of appeals said: "These bonds are to be offered on a market in which there is current more than one circulating medium, but one which is regarded more stable and less subject to fluctuation than any other, which is the recognized standard of value, and which is the equivalent of and corresponds in value with, that which the borrower is to receive from its bonds. Can there be any legal reason why the borrower, in case it should seem, in the exercise of a sound discretion, both prudent and advantageous to stipulate for the payment of the loan in that particular medium of circulation, . . . should not be allowed to so contract? It seems not to us." In *Skinner v. Santa Rosa*, 107 Cal. 464, 29 L. R. A. 512, while the court avoided the bonds in question in that case on account of an amendatory act passed by the legislature of California in 1893, they held that prior to that act "the power to make the bonds payable 'in gold coin of the present standard of weight and fineness,' or in any other kind of coin or currency, could not be controverted. . . . The power to determine that question is as ample as that of a natural person to stipulate in what his personal obligations should be paid." In *Woodruff v. Mississippi*, 162 U. S. 201, 40 L. ed. 978, while the question upon which that case turned was jurisdictional, yet the one now being discussed was to some extent involved, and the majority opinion quotes fully and approvingly from the Alabama and Kentucky cases already referred to, and I do not think there can be any error in assuming that the whole argument of that opinion on this fact is in accord with those cases.

The force of these concurring opinions cannot be broken by the suggestion that we are not in possession of the statutes and Constitutions prevailing in the jurisdiction where these cases arose. The courts which have met and decided this question have not appealed to any provision of the charter of the municipal corporations claiming the right to issue gold bonds, or to any constitutional provisions peculiar to the particular state, but they have rested their decisions on the broader and more satisfactory ground that the legislative authority to pay in "dollars" generally—that is, in all kinds of legal-tender money—includes the right to pay in any one kind of such money. Not a single case involving this special question has been found as authority for the majority opinion, and in the face of these decisions I submit that this court should not place itself in a state of judicial isolation, unless forced into it by the stress of a strong, if not irresistible, logical necessity; and this, I respectfully suggest, does not exist in this case.

But it was said in argument, and we understand it to be the opinion of the majority of the court, that, even if the grant in question had been to a municipal corporation (as was the fact in several of the cases already cited), yet it would hardly, if at all, be sufficient to authorize the issuance of gold bonds, and that, *a fortiori*, it will not warrant the county in placing such bonds on the market. This is upon the idea, universally admitted, that, while the former is a corporation proper, the latter is less than such a corporation; that is, it is a public quasi corporation. Without consuming time in pursuing the authorities which so clearly and uniformly draw the line between the two, I think a single suggestion disposes of this objection. Both a county and a municipal corporation, when they propose to issue negotiable securities, payable *in futuro*, and likely to pass into the hands of purchasers who will seek to rely upon a bona fide title to cut off all equities, must be prepared to point out the legislative act granting such power, either in express terms or by necessary implication. One, no more than the other, has the inherent power to bind itself by an issue of negotiable bonds. The full-fledged municipal corporations must appeal to the legislature for this authority, quite as earnestly as this body, called a "public quasi corporation." If it be that both must look to the same source for their authorization in this regard, then whenever either claims that it is within the provisions of an act of the legislature, in the exercise of such a power, the courts will, of necessity, apply the same rules of construction in the one case as in the other. This proposition is so elementary that it requires no citation of cases to support it. Nor do I at all agree that to hold that the county, under this legislative grant of authority, can issue its bonds solvable in gold, involves the necessity of holding that the county, to meet these bonds and the maturing coupons, could levy a tax on the property of its citizens, payable specially in gold. The bonds can be made payable in gold only because the act authorizes their issuance payable in "dollars," and this generic term includes gold, as well as all other kinds of United States money; but the act does not direct a tax to be levied

collectible in "dollars." Should these bonds be issued, their holders could stand on their contract rights, and could insist upon payment in gold in accordance with the terms of the bonds. But the taxpayer would stand in no contractual relation, with either these bondholders or the county. His obligation to pay his proportionate part of the tax levied to meet these bonds and interest would rest alone on the statute. It would grow out of the duty imposed upon the county to provide for the payment of these bonds and coupons by the levy of a tax. As to this, the authority given is coextensive with the duty imposed, and that is "to lay and levy a tax sufficient for the payment of the coupons of said bonds as they mature, and also to create a sinking fund," etc. The county is to levy this special tax, but it is to be laid upon the citizens, as it lays all other taxes, collectible in any of the legal-tender funds of the United States. There is not a single word in § 6 of this act (where alone is the taxing power found) that by any rule of interpretation accepted by the courts will warrant the contention that this county, in performing this duty, would have any other or different power from that which it has in levying and collecting any other tax. In this, as in all other cases, the tax would be levied and collected in the money of the country, the citizen paying his proportion in any kind or species of that money which he might select. And the objection that has been made, that the time may come, before the maturity of these bonds, when, the taxes having been paid in the ordinary currency of the country, the county might find itself compelled to go into the market to buy gold to meet its maturing obligations, goes not to the question of a proper interpretation of the statute, but to that of expediency, and as such is of no force, unless it be that the government should change a policy fixed with the resumption of specie payment, as has been before stated, and this we do not think a court is authorized to assume. Entertaining these views, I cannot agree with the majority.

I am authorized to say that Chief Justice Snodgrass concurs with me in this dissent.

James THOMPSON *et al*

v.

W. C. GIBBS, *Appt*.

(.....Tenn.....)

1. A reservation of the right to annual all contracts every fourth month, stamped across the face of a contract with a school teacher, does not entitle the school directors to dismiss him without charges or notice or testimony, under Mill. & V. Code, § 1192, subsec. 3, empowering them to dismiss a teacher "for incompetence, improper conduct, or inattention."
2. An injunction to prevent a school teacher from attempting to teach in a school—

NOTE.—As to the right to remove officers summarily, see *Traylor v. Wayne County Auditors* (Mich.) 15 L. R. A. 95.

house after an ineffectual attempt to dismiss him arbitrarily will not be granted to school directors, although they have by statute the charge and control of the school property.

(October 24, 1896.)

APPEAL by defendant from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Knox County enjoining defendant from attempting to teach in a schoolhouse which plaintiffs claimed to control. *Reversed.*

The facts are stated in the opinion.

Messrs. Lucky, Sanford, & Tyson, for appellant:

To hold that school directors can unlawfully dismiss a teacher, and then come into a court of equity and obtain its aid in making effective the unlawful act, would violate fundamental principles governing that tribunal, principles so thoroughly established as to have become maxims, to wit:

"He who comes into equity must come with clean hands."

"No one can take advantage of his own wrongs."

Gibson, Suits in Chancery, §§ 53, 62.

The court of chancery appeals in its holding followed Chancellor Frank T. Reed, who refused to dissolve an injunction upon bill and answer in a similar case "upon the ground that the directors were entitled to the custody and control of the schoolhouse of the district, and that the remedy of the defendants was by action for the compensation agreed on." However that case was never appealed to the supreme court, and Chancellor Reed on final hearing dissolved that injunction.

Morley v. Power, 5 Lea, 694.

If the directors have the power given by the reservation clause it would be dangerous and fatal to the good name and reputation of every teacher.

Our statutes give no such power, but expressly restrict directors from dismissing teachers except for "incompetency, improper conduct, or inattention to duty" and after a fair hearing.

Morley v. Power, 10 Lea, 219.

Messrs. Trent & Ford for appellees.

Beard, J., delivered the opinion of the court:

The complainants are school directors in one of the common-school districts of Knox county, and they filed the bill in this cause seeking to enjoin the defendant from attempting to teach any longer in one of the schoolhouses of that district which was under their control, and from interfering with its occupancy by a teacher whom complainants had employed to take charge of the school as the successor of defendant. The facts are these: The defendant, Gibbs, had been elected to the presidency of an academy in this county, and was in the act of accepting that place, when, induced by complainants, he declined it, and entered into an agreement with them to take charge of and teach the district school with regard to which this controversy occurs. This school was to be opened on the 30th of August following, and for his services as such teacher he was to receive a salary of \$50 per month. At the time of making this agreement, the defendant

was led to believe that his employment would extend through a period of eight months, it being assumed, no doubt, that the fund available for that district would enable the directors to keep the school open for that length of time. On the 27th of August—just three days before his term of service was to begin—the complainants presented to defendant for his signature a paper writing evidencing the contract between the parties, in which it was recited that the defendant was engaged as the teacher of the school in question "from the 30th day of August, 1895," at the rate of \$50 per month. This writing, already signed by complainants, as school directors, contained the usual stipulations authorized by law, but fixed no definite term of employment. Across the face of the writing, however, complainants had caused to be stamped the following words: "The directors reserve the right to annul all contracts every fourth month." Knowing that this clause was upon it, the defendant signed it, and on the day designated took his place, and opened up the school. At the end of four months, without any charge being made against him, and without offering any excuse for their action, the complainants notified the defendant that they no longer required his service, and immediately employed another party in his stead. Complainants, undertaking to induct into office the new teacher, found the defendant in possession of the schoolroom, with his pupils around him, denying the right of the directors summarily and without cause to terminate his employment, and insisting that under the contract he was entitled to continue as teacher until the fund appropriated to that school for that scholastic year was exhausted. This position of the defendant led to the filing of the bill in this cause. The chancellor, on the trial of the case, sustained the bill, upon the ground that the clause above set out was a part of the contract, and that it gave the directors the right arbitrarily to terminate this contract at the end of four months; and he made perpetual the injunction originally issued against the defendant. The cause was recently heard on appeal by the court of chancery appeals, and, while disagreeing with the chancellor as to the ground of his decree, that court affirms his decree, but upon the ground that under the law complainants, as school directors, were the custodians of the schoolhouse, and entitled to its possession, and that upon the dismissal of defendant he had no right to retain control of the property, and thus disturb the further harmony of the school or its operations under the supervision of the directors, but his duty was to surrender the schoolhouse, and seek his remedy, if any, elsewhere.

If public directors can legally import into their contracts of employment of public teachers a clause such as the one in question, this case illustrates the wrong and injustice which may be done under cover of law; and we agree with the solicitor of defendant that "such an injustice should not be sanctioned by the courts unless the law clearly permits it." But, independent of the injury that may be done to the individual, public policy would forbid the recognition of such a power unless it is distinctly conferred by the statutes. As has been well urged, if school directors can provide, as

in this case, for annulling contracts at the end of four months, they can also reserve the right to terminate them at the end of one month, or at their own pleasure. It is apparent, if they possess such a power, that there will likely be, in the caprice of the directors themselves, or in the real or fancied grievances of the pupils, or of their oversensitive parents or guardians, continually recurring temptations to its abuse. A system which gave such arbitrary authority to school directors could not result otherwise than in lowering the character of teachers and in demoralizing the public schools. It will be observed that the contract which gives rise to this controversy does not limit the term of employment of the defendant, Gibbs, to four months. It is in the usual form prescribed by the regulations adopted under the statute by the superintendent of public instruction, and sent out by him for the use of school directors in the various counties of the state. This form is left indefinite as to the time of the employment, because the length of the period during which common schools are to be kept open depends upon the amount of public funds which come into the hands of the county trustees to which the particular district is entitled. This is always uncertain at the beginning of the scholastic term. What complainants have done in this case is to take this approved form, and supplement it with the reservation to themselves of the right to terminate the contract at the end of four months. This they had no warrant in the law for doing. Under subsec. 8, § 1192, Mill. & V. Code, school directors have the power to employ teachers, and "to dismiss them for incompetence, improper conduct, or inattention." This right of dismissal, however, is limited to the causes of removal specified in the statute. And even for these causes their power is not unlimited, but can only be exercised after charges made against and upon full notice given to the accused, and after hearing the testimony of witnesses given under the sanction of an oath. *Morley v. Power*, 5 Lea,

691. To permit school directors, under the cover of a reservation, such as the one in question, to dismiss a teacher without charges or notice or testimony, would be to approve an evasion of this statute, as already construed by this court, and to tolerate a practice that would be, in the end, extremely hurtful to our common-school system. We therefore disagree with the chancellor in the view that he took of this stipulation.

But we equally disagree with the court of chancery appeals in their conclusion. It is true that it is the duty of school directors "to take charge of, manage, and control public school property of the district" (Mill. & V. Code, § 1192, subsec. 10); but that is not only for the purpose of preservation, but also with the view of making successful the operation, of the system, which has been carefully organized for the accomplishment of great public good. They have the supervision of it for school purposes, purposed to be subserved only by its occupancy by the teacher properly installed by them, and not yet legally removed, and the qualified pupils of the district. Their right to possession will be protected in all proper cases, but this right is not unlimited, nor is it arbitrary. Now, having exceeded their authority, as we have held, can complainants come into a court of equity, and ask its active aid in assisting them to the accomplishment of an unauthorized end? We think not. To give such aid would be for that court to disregard the well-settled principle that a complainant must show that the transaction from which his claim arises is fair and just, that there is nothing unconscientious in his conduct relative thereto, and that the relief he seeks is equitable, and not harsh or oppressive upon the defendant. *Gibson, Suits in Chancery*, §§ 53, 62.

The result follows that the decrees of the Court of Chancery Appeals will be reversed, and the bill will be dismissed, at the cost of complainants.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Charlotte H. WAIT *et al.*

v.

J. N. O'NEIL *et al.*

(76 Fed. Rep. 406.)

1. A lessee's agreement to keep in repair a roadway which is below high-water mark and is a mere incident to the right of mooring, loading, and unloading at a leased river front and so-called landing which has no wharf, dock, or pier, and to deliver the premises in "good order and repair" and "make good all damages to said premises except the usual wear and proper use thereof," does not obligate the lessee to protect the bank against an extraordinary peril from a sudden change in the current of the river which washes away a bank that had stood in the same condition for centuries.

2. The destruction of the property extinguishes the liability for rent under a lease of a river front and landing consisting of a narrow footing at the base of a bluff without any wharf, dock, or pier, when the unprecedented ravages of the river effectually destroyed the use of the landing by washing away all but a shallow fragment of the lot, especially when, with the lessor's consent and participation, works were constructed in front of the shore line which destroyed safe access to the landing.

(October 5, 1906.)

CROSS-APPEALS from the Circuit Court of the United States for the Western District of Tennessee, in an action brought to recover damages for breach of covenants to repair contained in a lease and to recover rent

NOTE.—As to implied covenants as to the fitness of leased property for the purpose intended, see note to *Clifton v. Montague* (W. Va.) 83 L. R. A. 449, 84 L. R. A.

As to the effect of a partial eviction upon liability for rent, see also *Edmison v. Lowry* (S. D.) 17 L. R. A. 275.

alleged to be due and unpaid; the plaintiff appealing from so much of the decree as refused to enforce the covenants, and defendants appealing from so much as held them liable for rent. *Affirmed on plaintiff's appeal. Reversed on defendants' appeal.*

Before Taft and Lurton, Circuit Judges, and Stevens, District Judge.

Statement by Lurton, Circuit Judge:

This is a bill in equity to enforce the specific performance of certain covenants in a lease, and for the collection of rents in arrear. The suit was begun in 1886 by a bill filed by the complainant, as lessor, in the chancery court of the state, at Memphis, Tennessee, and was subsequently removed to the circuit court of the United States by the complainant upon the ground that the defendants were all citizens of a state other than Tennessee. After removal the cause was docketed and tried as an equity suit. A motion made upon final hearing by the complainant to have the suit transferred to the law docket, and for a reformation of the pleadings, was disallowed. The subject-matter of the lease is described as "the river front and landing in front of lots numbers 1, 2, 3, and 4 in block 1, South Memphis, with ample space for a roadway along the landing in all stages of the water, and no more. The said landing to be used by the said lessees for the mooring, storing, and unloading of coal, wood, and ice barges or boats." The lease began November 1, 1882, and was to continue until October 1, 1889. Eighty-three notes for \$75 each were executed, one being payable each month during continuance of the lease. The rent notes, up to and including that due April 1, 1886, were paid at maturity. The notes falling due in May, June, July, and August, 1886, were due and unpaid when the bill was filed. The subsequent instalments of rent fell due pending the suit and, by a supplemental bill filed after expiration of the lease, relief was sought upon them. The prayer of the bill was for a specific performance of certain covenants touching the repair and construction and preservation of the roadway mentioned in the lease, and for an account for waste resulting from the caving in of the bank of the river at the landing, and for a decree for rents past due. The defendants abandoned the premises in April, 1886, claiming that the "landing" referred to in the lease had been destroyed without their fault, and the lease thereby terminated. They further claimed that all possibility of beneficially using the said landing, if otherwise available, was destroyed by the conduct of the lessor in aiding and abetting in the obstruction of access to the lessor's remaining river front by the construction of certain sunken dikes, extending from the shore perpendicularly for several hundred feet, and effectually preventing barges from being safely brought to the shore line. Touching these defenses it is necessary to state certain other facts. The lessor owned four town lots, contiguous. Each had a width of 40 feet and a depth of 150 feet. These lots fronted on Tennessee street, which ran parallel with the Mississippi river, and were bounded on the rear by the river. Mrs. Wait had two residences on these lots, fronting on and near

to Tennessee street, and lived in one of them. The river bank was a high bluff of earthy material, known geologically as "loess." The height of this bluff above low-water mark was from 60 to 80 feet. Between the base of this bluff and the margin of the river at low water was a narrow "footing" along which the roadway mentioned in the lease was maintained. Whether this footing, as it is called by the witnesses, was natural, or the result of an artificial cutting away of the bluff, does not appear. Its material was identical with that of the bluff, and it was as subject to caving by action of a strong current, and was under water when the river was at a high stage. This footing was the only basis for a road giving access to the river, and constituted the landing referred to in the lease, there being no wharf, dock, or pier whatever. The landing had long before this lease been used as a place for mooring and unloading coal barges. The manner in which the unloading was done both before and after the lease is described by the witness C. B. Byran as follows: "A long float was moored against the bank, on which the teams of C. B. Bryan & Co. were driven, and the barges or boats of coal were on the outside of said float, and the coal thrown from those boats or barges into the carts, driven on the float as before stated. Then the teams were driven off the float onto the roadway leading up from the river, and along and under the bank onto Beal street; thence up into the city. A lot of ground having a river front, belonging to the city of Memphis, which extended from the south of Linden street to Beal street, enabled C. B. Bryan & Co. to have a continuous way and outlet from the float and barges moored in front of Mrs. Wait's property." Prior to May, 1886, this landing and roadway had been kept in proper repair, and in like condition to that in which it was at date of the lease. Although prior to that month there had been an occasional caving in of the roadway, it had not been serious, and the ravages of the river had been easily repaired. In the spring of 1886, and during the months of April and May, certain government works protecting Hopefield point, above and across the river, gave way, by reason of the force of the current and high stage of the river. The result was that an uncontrollable current was thrown directly against the river bank in front of Mrs. Wait's property, and the property contiguous to hers above and below.

This sudden and surprising change in the force and direction of the current of a swollen and mighty stream resulted in undermining the bluff, and causing it to fall down in great masses. So destructive was the force of the flood that when the river fell and the current somewhat abated nothing remained of complainant's property but a narrow and ragged fringe from 15 to 30 feet in depth. This remnant clinging to Tennessee street presented to the river an almost vertical bank from 60 to 80 feet above the ordinary stage of the river, its surface showing great cracks indicative of further caving. At its foot was deep water, against which a strong and almost resistless current was beating. Against this irregular bluff it was dangerous to moor water craft, both because further caving was plainly indicated,

and because the force of the current was so great as to make it dangerous and impracticable. The evidence is convincing that it was impracticable to construct a footing at the base of the bluff for a new road. The remaining portion of complainant's property was not deep enough to permit the cutting away of the bluff in such manner as to protect a new road against the overhanging masses of the shattered bank. It was therefore impossible to reconstruct a practical and safe landing upon her water front; for, without access to and from the public streets of the city, barges could not be there loaded and unloaded. To moor, land, or unload became impossible when the landing referred to in the lease was destroyed, and the bluff's footing carried into the river. To lie under a bluff that was caving in great masses was perilous and practically impossible, in view of the great current sweeping against it. Under these circumstances the lessees treated the lease as terminated, and found a harbor and landing elsewhere. Certain works subsequently constructed in the river for the purpose of breaking the force of the current added to the unavailability of the lessor's remaining water front as either a mooring or landing place. These works consisted in a series of large cribs filled with rock and sunken in lines perpendicular to the shore, and extending some 300 feet beyond low-water mark. One crib was sunken upon top of another, the crest of the line being at about high-water mark. Five of these dikes were constructed along the river front. The distance between each was about 800 feet. Until by accretion the water front of her shore property should be extended to the outer end of the dikes, access to the shore was so seriously obstructed by the presence of these sunken cribs of rock as to be substantially impossible for such crafts as laden coal barges. It has been contended that these dikes were constructed by the United States government as a part of its scheme of river and harbor improvement. We do not find this contention supported by the facts. It is true that some government material was used, and that the work was done under the plans and direction of Capt. S. S. Leech of the engineer corps, and that the fleet and plant belonging to the government had been used in the prosecution of the work. The enterprise was, however, a private conception, and for the protection of private interests imperiled by the sudden change in the current of the river. The scheme was put on foot by a railroad company whose tracks occupied Tennessee street, which offered to subscribe \$40,000 if private persons having interests likewise endangered would give half that amount. The emergency was a great one, and the secretary of war, under his discretionary powers, allowed Capt. Leech to supervise the work and use the government fleet and material in his charge. The enterprise was in all its essentials a private matter, for private purposes and benefits, and the fund used in doing the work was voluntarily contributed by those whose interests were benefited. That the complainant Mrs. Wait was one of those who actively aided and induced the construction of these works is clear on this record. It is true that she feebly denies that she agreed to contribute to the fund, but ad-

mits she approved and encouraged the work. The weight of the evidence establishes that she not only approved and encouraged the scheme, but that she promised a large contribution, which she has since refused to pay. Upon these facts defendants insist that if the lease was not terminated by the destruction of the landing through the action of the current of the river, they have been evicted as a necessary result of being excluded from the shore by obstructions in the river, placed there through the aid and consent of the lessor. Upon final hearing the circuit court sustained the jurisdiction, and held that the lease had not been terminated by the destruction of the landing or roadway mentioned in the lease, and that the lessees continued liable for rents accruing until the end of the term fixed by the lease, and gave judgment accordingly. That court further held that the covenants of the lease touching the repair of the roadway, and against waste, had not been breached, and refused all other relief prayed. Both parties have perfected appeals and assigned error.

Messrs. William M. Randolph & Sons,
for plaintiffs:

O'Neil & Co. were not relieved by the sudden and irresistible flow of the current of the Mississippi river against the front of the landing, and the consequent destruction thereby of the leased premises, from the performance of the contract on their part contained in the lease.

Ingle v. Jones, 69 U. S. 2 Wall. 1, 17 L. ed. 762; *Paradine v. Jane*, Aleyn, 27; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock & A. Canal Nav. Co. v. Pritchard*, Id. 750; *Adams v. Nickols*, 19 Pick. 275, 31 Am. Dec. 137; *Brumby v. Smith*, 3 Ala. 123; *Trenton Pub. Schools v. Bennett*, 27 N. J. L. 513; *Gates v. Green*, 4 Paige, 355, 27 Am. Dec. 68; *Holtzapfel v. Baker*, 18 Ves. Jr. 115; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625; *Robson v. Mississippi River Logging Co* 61 Fed. Rep. 893; *Mississippi River Logging Co. v. Robson*, 69 Fed. Rep. 773; *Banks v. White*, 1 Sneed, 613; *Bryan v. Spurgin*, 5 Sneed, 681; *Stover v. Allen*, 1 Helsk. 496; *Louvy v. Naff*, 4 Coldw. 370.

The covenants contained in the lease amount to a covenant by O'Neil & Co. to repair and keep the premises in repair during the term of the lease, and to return them in as good condition as they were when leased at the end of the term.

Wood, Land. & T. § 378.

There is no implied warranty in a lease that the leased premises will remain in the condition they were when leased, or shall remain fit for any particular use, or shall remain or be in any particular condition during the lease.

Wood, Land. & T. § 382; Tiedeman, Real Prop. §§ 187, 195, 196, 854; 2 Kerr, Real Prop. § 1302; Taylor, Land. & T. §§ 303, 308, 309.

In the lease which Mrs. Wait for herself and her children made to O'Neil & Co. there was an express reservation of the right to make such repairs at any time as were necessary to the security or preservation of the leased premises. This reservation gave Mrs. Wait and her children the right to do the work done under the supervision of Capt. Leech, provided it was

necessary to the preservation of the premises, and properly done.

Wood, Land. & T. § 369.

Contracts for building or for the construction of works, and the like, falling within the exceptions to the rule that contracts for the erection or repair of buildings, the construction of works, and the conduct of operations requiring time, special knowledge, skill, and personal oversight, will not be specifically enforced, may be specifically enforced.

Pom. Spec. Perf. Cont., § 23, and the cases referred to. See also §§ 808, 812.

The Code, § 3387 (3515), declares: "No guardian shall let or farm out any land of his ward for a longer term than until the majority of such ward, or in any manner but by lease in writing stipulating, (1) that the tenant shall improve the same; (2) that he keep the houses, orchards, and fences already on or to be erected on the same in sufficient repair, and so leave them at the expiration of the lease; (3) that he shall not commit, but shall prevent all kinds of waste; and (4) that he shall not employ timber for any other purpose than for the immediate use of the plantation."

The covenants in the lease made by Mrs. Wait for herself and her children, so far as she made them as guardian, were therefore made in obedience to the express requirements of the statute.

Ross v. Blair, Meigs, 525; *Sawyers v. Zachery*, 1 Head, 21; *Barrett v. Cocke*, 12 Heisk. 566; *Huggins v. Moore*, 3 Head, 427; *Talbot v. Protine*, 7 Baxt. 502; *Hobbs v. Harland*, 10 Lea, 268; *Anderson v. Ammonett*, 9 Lea, 1.

As the lease was made in obedience to the law, and the covenants and agreements which the present bill seeks to have specifically performed are simply those the law required should be put in the lease, they do not belong to the class which the court has the discretion not to enforce.

2 Story, Eq. Jur. § 750; 3 Pom. Eq. Jur. § 1405; *Viterbo v. Friedlander*, 120 U. S. 712, 30 L. ed. 777; *Waterman*, Spec. Perf. Cont. §§ 165, 170; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 856, 857, 19 L. ed. 960, 961; *Webb v. Direct London & P. R. Co.* 9 Hare, 129; *Nims v. Vaughn*, 40 Mich. 356; *Adams v. Weare*, 1 Bro. Ch. 567; *Lord Stuart v. London & N. W. R. Co.* 15 Beav. 513; *Wood, Land. & T.* § 191, p. 275; *Helling v. Lumley*, 3 De G. & J. 493; *Erans v. Walshe*, 2 Sch. & Lef. 519; *Lowder v. Blackford*, Beatty, 522; *Revell v. Hussey*, 2 Ball & B. 280; *Low v. Treadwell*, 12 Me. 441; *Cook v. Waugh*, 2 Giff. 201; *Long v. Bowring*, 33 Beav. 585; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 460, 36 L. ed. 776; *Wilford v. Tayloe*, 78 U. S. 8 Wall. 557, 19 L. ed. 501; *Davis v. Hone*, 2 Sch. & Lef. 348; *Tasker v. Small*, 3 Myl. & C. 69; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843; *May v. Le Claire*, 78 U. S. 11 Wall. 218, 20 L. ed. 50; *German Sav. Inst. v. De La Vergne Refrigerating Mach. Co.* 70 Fed. Rep. 146; *Louisville & N. R. Co. v. Mississippi & T. R. Co.* 92 Tenn. 681.

If there is now any impracticability in O'Neil & Co.'s specifically performing the covenants contained in the lease, or in the way of the court by the proper decree now enforcing such specific performance, such impracticability has arisen out of the facts which have 34 L. R. A.

transpired since the suit was begun, and while it was pending in the court below. Certainly Mrs. Wait and her children cannot suffer any injury or loss by reason of such change of circumstances after they had come into court for the redress of their grievances.

Mobile County v. Kimball, 103 U. S. 691, 26 L. ed. 238; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 564-567, 36 L. ed. 537, 542, 543; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 474, 36 L. ed. 776, 781; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 80 L. ed. 83.

Messrs. Turley & Wright, for defendants:

Is it reasonable to suppose that the defendants would have obligated themselves to turn the current of such a river as the Mississippi, involving as it necessarily would, if not an impossibility, the expenditure of a large sum of money? Certainly no such obligation is expressed in the lease. A covenant to restore in good order and condition, wear and tear excepted, is not breached where the thing perishes from inherent defect.

Hess v. Neucomer, 7 Md. 325; *Arden v. Pullen*, 10 Mees. & W. 321; *Smith v. Stagg*, 15 Jones & S. 514.

Nor does such a covenant mean more than that the lessee will use the premises in a proper manner and not hold over beyond his time.

Pollard v. Shaffer, 1 Dall. (Pa.) 210, 1 Am. Dec. 239; *Warren v. Wagner*, 75 Ala. 200, 51 Am. Rep. 446; *Maggort v. Hansburg*, 8 Leigh, 532; *Warner v. Hitchins*, 5 Barb. 666; *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec. 538.

Contracts whose performance depends upon the continued existence of a specified thing are discharged by the destruction of the thing from no fault of either party.

3 Am. & Eng. Enc. Law, p. 901; *Price v. Pepper*, 13 Bush, 42; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *School Dist. No. 1 v. Daucy*, 25 Conn. 530, 68 Am. Dec. 871; *Wells v. Calman*, 107 Mass. 514; *Thomas v. Knowles*, 128 Mass. 22; *Loring v. Buck Mountain Coal Co.* 54 Pa. 291; *Ellis v. Atlantic Mut. Ins. Co.* ("The Tornado"), 108 U. S. 842, 27 L. ed. 747; *Walker v. Tucker*, 70 Ill. 527; *Brumby v. Smith*, 3 Ala. 123; *Taylor v. Caldwell*, 3 Best & S. 826.

Where the tenant of rooms in a house or building is sought to be held liable for rent after the destruction of the building, such an action cannot be maintained.

Graves v. Berdan, 29 Barb. 100, 26 N. Y. 498; *Hart v. Windsor*, 12 Mees. & W. 79; *Kerr v. Merchants' Exchange Co.* 3 Edw. Ch. 315; *Winton v. Cornish*, 5 Ohio, 477; 2 Bl. Com. 41; *Gilbert, Rents*, §§ 9, 182; *Co. Litt.* 142a; *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220; *Comyn, Land. & T.* 218; *Porter v. Tull*, 6 Wash. 403; *Ainsworth v. Ritt*, 39 Cal. 89; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Gates v. Green*, 4 Paige, 855, 27 Am. Dec. 68; 2 *Taylor, Land. & T.* 8th ed. § 520.

Where the tenant is evicted by the landlord, or where the latter does anything which injures or destroys the lease, the contract is at an end.

Banks v. White, 1 Sneed, 613; 1 *Taylor, Land. & T.* 8th ed. § 377.

Messrs. Stephens, Lincoln & Smith also for defendants.

Lurton, Circuit Judge, delivered the opinion of the court:

Nine years after this cause had stood at issue as an equity cause, and when being finally heard, the defendants objected to the jurisdiction of a court of equity upon the ground that the remedy at law was plain and adequate, and moved to have the pleadings recast and the cause transferred to the law docket. This motion was denied upon the ground that the case belonged to a class of cases where a court of equity might exercise jurisdiction; one object of the bill being to obtain the specific performance of an alleged covenant obligating the lessees to construct and keep in good repair a roadway along the river bank, and by which access to the landing might be had. Although the court refused a decree for specific performance, or damages in lieu thereof, it does not follow that jurisdiction did not exist to hear and decide the contention that complainant was entitled to that relief. The result reached was in large part a consequence of a construction of the covenants of the lease in the light of the peculiar character of the thing leased, and of the extraordinary cause which had destroyed the roadway and landing which it was sought to have reconstructed under the covenants in question. A case was stated on the face of the pleadings which fairly and reasonably appealed to a court of equity as affording ground for applying for the extraordinary, though discretionary, remedy of specific performance, and required evidence and a patient hearing before determination. Even though specific performance might be refused, yet the court might retain the case, and grant under the prayer for general relief some other relief, as at law. The principle applying was well stated by the learned trial judge when he said: "If this bill be of that class often appearing, whether for specific performance or what not of other equitable appearance, in which a court of equity might maintain and grant relief as at law, although denying the equitable relief which has been prayed, the rule that the case would be dismissed because there was an adequate and complete remedy at law would not apply, unless it were taken at the earliest opportunity." 72 Fed. Rep. 354.

This rule, considered and applied by this court in *Reynolds v. Watkins*, 22 U. S. App. 83, 9 C. C. A. 273, and 60 Fed. Rep. 824, seems to be as applicable here as in that case. It is true that in that case, as well as in those upon which it is founded, the objection to the jurisdiction was first taken in the court of appeals or in the supreme court. Still the principle applying is so far the same as to require objection to be taken seasonably, and if for fault in that regard, the trial court refuses to entertain the motion, and the case be one of a class over which a court of equity may, under proper circumstances, entertain jurisdiction, this court will not be readily moved to disturb the action of the lower court. The discussion of this question found in the opinion of the learned trial judge is so full and satisfactory that we find no necessity of further elabora-

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tion. The objection to the jurisdiction must be overruled.

The contention of the complainant is that the lessees were bound to protect her property against the ravages of the Mississippi river, and to this end were bound, if necessary, to construct in the river such a system of mattresses and dike work as that which subsequently proved sufficient to prevent further encroachment and caving. They say that, for failure to do this before the flood came, they must now compensate the lessor for all the injuries wrought by the flood, or restore the property to the condition it was in when let, by specifically performing the obligation to keep the "roadway thereon" in repair, and the covenant which bound them to deliver the premises in "good order and repair," and "make good all damages to said premises, except the usual wear and proper use thereof." They further insist that defendants are liable for the covenanted rental to the end of the term. It is clear upon the proof that there is not enough left of the complainant's property on which to construct and maintain a road. The grading necessary could not be done without cutting down Tennessee street. It is further made perfectly clear that no amount of mattressing and diking done in front of complainant's lots alone would have been of any avail. To protect her front from this sudden and uncontrollable current, it was essential that a comprehensive system of diking should be constructed, extending above and below her water front. Defendants had no right to occupy riparian property of other abutters on the river, or obstruct access to their shore line by the works necessary to protect Mrs. Wait's property. Her front only extended along the river for a distance of 240 feet. The protective work deemed necessary to protect the shore line, including Mrs. Wait, covered the river front for a distance of 2,200 feet. Her landing and roadway had safely stood against the ordinary currents of the river for an indefinite time, and the bluff over the roadway had been unaffected, possibly for centuries. The usual abrasions of the shelf or footing along which the road ran had been easily repaired, and this roadway and landing, confessedly in "good order and condition" when the lease was made, was preserved in like condition down to the sudden and unexpected change in the great current of the river resulting from the giving away of Hopefield point, on the Arkansas shore, and above Memphis. The restoration of her property is physically impossible, and the prayer for specific performance must be refused.

Is she entitled to an account for damages as for waste, or a judgment for rents accruing after the termination of the landing and roadway? Her claim for relief in one form or another, as well as for rent, is founded upon a construction of the covenants of the lease which we think cannot be supported. This lease appears to have been filled out on one of the usual blank forms sold by stationers for the leasing of lands and tenements, and contains the covenants proper to a common-law demise of improved premises. The covenants material to be considered are these:

(a) "And the said first party [the complainant] covenants that she will keep and secure said second parties in the peaceful use and possession of said premises during the time of this lease, unless default of payment of rent or other condition of this contract be made." (b) "The second parties [defendants], for and in consideration of the use of said premises, agree to pay said first party or her assigns the sum of \$6,325, payable in eighty-three monthly installments." (c) "The second parties [defendants] agree to deliver up to said first party [complainant], or her assigns, the said premises, at the expiration of this lease, in good order and condition, and to make good all damages to said premises, except the usual wear and proper use of the same, and to keep the roadway thereon in good repair." (d) "It is further agreed by the parties of the second part that they will, if necessary, construct at their own expense a roadway of boats, piling, or plank along the river front of said lots, and to construct the same without unnecessary digging of the ground on said lots, and to maintain the same during the continuance of this lease. Said second parties stipulate not to commit, but to prevent, waste." (e) "It is further agreed that no alterations or repairs shall be done on any part of said premises by said second parties without the first party's consent in writing, under penalty of double the cost necessary to put the premises in the condition they were when leased to said second parties; and the second party shall not at any time remove any permanent repairs, improvements, additions, or fixtures put on said premises, but the first party shall have and hold all the same at the end of said lease. Said first party reserves the right to make such repairs at any time as are necessary to the security or preservation of said premises."

The line italicized in paragraph c and the whole of paragraph d were inserted by interpolation.

The construction of all grants, deeds, contracts, and leases must be made with reference to their subject-matter. As well observed by his honor, the trial judge, in the opinion filed in this case: "The court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, and the state of the thing granted, and that every grant of a thing necessarily imports a grant of it as it actually exists, unless the contrary is provided for." In the case of *Doe, Freeland, v. Burt*, 1 T. R. 703, it was said by Ashhurst, J., "that the construction of all deeds must be made with a reference to their subject-matter, and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country." This language was quoted and approved by the supreme judicial court of Massachusetts in *Stockwell v. Hunter*, 11 Met. 448-456, where the lease under consideration was a demise of a cellar and basement in a house three stories in height, the court saying: The principle authorized "a construction of leases of lower or upper rooms, demised separately, in reference to the termination or destruction of the interest, different from that usually applied to leases of entire buildings."

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And although the court in that case reached the conclusion that the lessee of a room or apartment in a building in which there were other rooms or apartments did take an interest in the adjacent land on which the building stood, yet the circumstances were so peculiar as to justify the inference that "the lessee's right of occupation of the land is an interest, for the time being, defeasible by the destruction of the building by fire." In *Winton v. Cornish*, 5 Ohio, 477-479, the construction of a lease like that in *Stockwell v. Hunter* was under consideration. Touching the meaning and intent of the agreement, the court said that "what passes depends upon the intention of the parties, to be collected from the lease;" that "by the term 'land' anything terrestrial may pass, but by any other term, nothing else passes but what falls with the strictest propriety within the meaning of the term used." The lessee's interest in the land supporting the building was held to terminate when the building was destroyed. This lease was not an ordinary demise of land and tenements, but was a lease of "the river front and landing in front of lots numbers 1, 2, 3, and 4, block 1, South Memphis, with ample space for a roadway along the landing at all stages of the water, and no more." This included no tenement, wharf, dock, or pier, for no such improvement existed, or had ever existed. The use to which the thing or interest leased was to be put is stated and defined. It was "to be used by the lessees for mooring, storing, loading, and unloading coal, wood, and ice barges or boats." Clearly, Mrs. Wait did not demise her lots, or any other interest than her rights as a riparian proprietor. These leased rights were such as were appurtenant to her land on the shore, and would pass by a conveyance of those lots, as an appurtenance. Such an interest is not "land," in its full legal sense, because land cannot be appurtenant to land. *Harris v. Elliott*, 35 U. S. 10 Pet. 25-54, 9 L. ed. 333, 344; *East Haven v. Hemmingway*, 7 Conn. 203; *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 685, 27 L. ed. 1074; *Linthicum v. Ray*, 78 U. S. 9 Wall. 241, 19 L. ed. 657. The rights of a riparian proprietor whose land is bounded by a navigable stream were defined in *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497-504, 19 L. ed. 984-986, to be "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." In *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, Lord Cairns describes such appurtenant riparian rights as "a form of enjoyment of the land, and of the river in connection with the land." In *Potomac S. B. Co. v. Upper Potomac S. B. Co.*, cited heretofore, this interest is described as not a seisin of the submerged land between high and low water, but as "right of occupation merely, properly termed a 'franchise.'" 109 U. S. 685, 27 L. ed. 1074.

The subject-matter of this lease was not Mrs. Wait's land, or any interest in it other than that riparian right, franchise, or enjoyment which was appurtenant to her lots, and would

pass by a deed conveying them. The "ample space for a roadway," "and no more," mentioned in the second paragraph of the lease, is further specifically designated in the next paragraph as the "roadway thereon," and this "roadway thereon" the lessees undertook to keep in repair. This roadway was below high water, at base of the bluff, and was a mere incident to the right of mooring and loading and unloading. It was the means of access to the landing or river; a way of necessity, without which the essential thing granted could not be enjoyed. The right to occupy or use this "road thereon," either as a means of access to or egress from the "landing," though an interest or right in land, was a mere right of use and occupation, defeasible by the destruction of the landing to which it was an incident. Construing the covenants in the light of the peculiar property demised as the thing granted actually existed, it is not possible that the parties intended that the lessees should undertake the protection of Mrs. Wait's land on shore against the extraordinary perils from a sudden change of the currents of the Mississippi river, nor was any such peril within the reasonable expectation of the parties. This bluffy bank had stood in substantially the same condition for centuries. Its base was subject to such abrasion as was usual from high stages of the river, and to the extent that such ordinary tides might be guarded against, or its ravages repaired, the covenants may properly be held to apply. The event which operated to throw down the bluff and destroy her shore line as a landing, and cut off access to the river by the roadway at the base of the bluff, was one of those fortuitous calamities which it is unreasonable to suppose was within the meaning of covenants appropriate to leases wherein lands and tenements are the subject of the demise. We are therefore in entire agreement with the learned trial judge in holding that "the parties did not intend anything more than that the lessees should keep the landing in such repair and condition of usefulness as was required for the uses to which they were to put it, and as then held, as against the ordinary destructive influences operating to abrade the bank or displace the appliances serving that use." That no such extraordinary works were to be constructed by the lessees as were ultimately found necessary to hold what remained of her shore line is not only evident from the intrinsic nature of the case, but is indicated by the provision of the lease prohibiting alterations or repairs to the premises without the consent in writing of the lessor and by the right reserved to the lessor to make such repairs as should be necessary "to the security or preservation of the premises." As we have already seen, the mattressing and diking done to protect the fragment of her shore line effectually destroyed access to the shore during the remainder of the term. It could not be expected that the beneficial use of the landing should be destroyed in order to guard it against caving, and if such protective works had been constructed by the lessees it is easy to conceive that the lessor would have sought to hold the lessees liable upon the covenant against waste for having destroyed her landing and harbor by works which for many years were likely

to make access to it perilous and impracticable.

Upon the remaining point for decision we find ourselves unable to agree with the trial court, which held that the covenant to pay rent was not extinguished by the destruction of the property. In support of this position the opinion cites *Taylor, Land. & T.* §§ 329, 347, 860, 878, 886; 8 Kent, Com. 465; *Balfour v. Weston*, 1 T. R. 810; *Doe, Ellis, v. Sandham*, Id. 705; *Hallett v. Wylie*, 8 Johns. 44, 3 Am. Dec. 457; *Fowler v. Bott*, 6 Mass. 63; and the observation of Mr. Justice Gray as to the distinction between the rule of the civil and common law in *Viterbo v. Friedlander*, 120 U. S. 707-712, 30 L. ed. 776, 777. It will be found upon examination that these authorities correctly state the rule of the common law where lands are the subject of the demise and the buildings or improvements are accidentally destroyed before the term ends. In such cases the destruction of buildings by fire, tempest, or flood does not discharge the covenant to pay rent, in the absence of a stipulation to that effect. The reason for this severe rule is that the land is deemed the subject of the demise, and the buildings a mere incident. If the land remained to the tenant after the buildings were destroyed, and he had a right to occupy and use it, his liability for rent, without abatement, was held to continue. To the authorities cited by the learned trial judge we may add *Banks v. White*, 1 Sneed, 618, a Tennessee case, in which the common-law rule was held applicable to such leases. In view of the fact that rent is a compensation for the use of the thing demised, it has been regarded as a harsh rule, and contrary to natural justice, that liability for rent should continue after the possibility of beneficial use had been destroyed by accident, and at an early day some of the judges struggled against its severity. *Richards le Taverner's Case*, 1 Dyer, 56a. These early efforts to mitigate it were unavailing, and the rule was finally settled as stated. *Gates v. Green*, 4 Paige, 855; *Fowler v. Bott*, 6 Mass. 63. But the very foundation upon which the old rule was rested is removed if the subject-matter of the demise is destroyed. This exception is noticed by Justice Gray in his statement of the common-law rule in *Viterbo v. Friedlander*, when he adds, "unless at least the injury is such a destruction of the land as to amount to an eviction." Where the subject-matter of the lease is a room or an apartment in a building, and the building is destroyed, the lease is terminated, the interest of the tenant is at an end, and the covenant to pay rent extinguished. This rule is bottomed upon the fact that under such leases it is to be presumed that the interest of the tenant in the subject land was to continue only so long as the subject matter of the lease existed. This doctrine is well settled and is clearly stated by Mr. Taylor in his admirable work upon *Landlord and Tenant*, at § 520. As stated by him, it has never been repudiated or questioned in cases where it was applicable, so far as our researches have extended, and has been applied in many well-reasoned cases; among them, we cite *Winton v. Cornish*, 5 Ohio, 477; *Kerr v. Merchants' Exchange Co.* 8 Edw. Ch. 815; *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220; *Mo-*

Millan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; *Graves v. Berdan*, 26 N. Y. 498. In the case at bar we have already determined that the subject-matter of this lease was the landing, as it existed at date of lease. A "landing" implies a place where vessels can be moored and loaded or discharged. This landing was effectually destroyed by the ravages of the river. If the effect of the force of the current had been limited to merely moving the shore line back, and the new shore line had been substantially as useful as the old, it might well be held that the leasehold continued in existence. But this was not the case. The bank of the river, as it existed after the caving had been arrested, was a vertical bluff, from 60 to 80 feet high. Against this a vessel could not be moored, and her cargo could not be discharged. The physical aspects of the river bank had been so changed, as a consequence of the uncontrollable current of the river, that, although complainant continued to be a riparian proprietor, she no longer had a "landing," in the sense in which the parties had used that term, nor was it possible by reasonable effort to make a landing. The shallow fragment of her lot clinging to Tennessee street was insufficient in depth to permit the construction of a landing and roadway at its base. Aside from this, the construction of mattresses and dikes in front of her shore line effectually destroyed safe access to her shore line from the navigable parts of the stream. It is true that she reserved the right to make such "repairs" as should be "necessary to the security and preservation of

the premises." But this did not authorize the construction of works which would make the use of the landing perilous and useless to her lessees. The diking which was done was done with her consent, and legally by and through her procurement, in co-operation with others. This improvement operated to destroy the landing, if it can be said to have had an existence after the caving of her bank had been arrested. In a legal sense, her conduct amounted to an eviction. When the wrongful acts of a lessor upon or in regard to the leased premises are such as to deprive the lessee of the beneficial enjoyment of them, and the lessee in consequence abandons the premises, it amounts in law to an eviction, without other evidence that the landlord intended to deprive the tenant of the possession. *Skally v. Shute*, 183 Mass. 867. Where repairs are not ordinary, but of a character to deprive the tenant of the beneficial enjoyment of the premises, they will amount to an eviction, if the tenant elects to abandon the premises. *Hoessler v. Fleming*, 91 Pa. 822. The defendants did not assent to the so-called "repairs." They foresaw that the effect would be to exclude them from the beneficial use of the river front, and made unavailing protest in order to save their rights.

The decree must be affirmed in so far as it refused a decree for waste or specific performance, and reversed in so far as it held defendants liable for rents. The costs of both courts will be paid by complainants.

MINNESOTA SUPREME COURT.

Francis P. RYDER, *Appt.*,

v.

Plummer R. KINSEY, *Respnt.*

(62 Minn. 35.)

***1. The owner of a building is not an insurer against accident from its condition.**

*Headnotes by STARR, Ch. J.

NOTE.—Individual Liability for falling walls or buildings.

In most of the cases upon this subject, absence of negligence has not been shown, so that *RYDER v. KINSEY*, in which such absence appears to the satisfaction of the court, is a valuable addition to the law upon the subject. The cases in most marked contrast with *RYDER v. KINSEY* are from Louisiana, where the statute renders the owner liable for the fall of a building, and it seems that the absence of negligence is not a defense. It would seem that the circumstances should be very peculiar to deprive a person of compensation for injuries received while on a public highway, and caused by the fall of an adjoining building, and recovery has been permitted in a large majority of the cases. The question of most difficulty in all cases of injuries caused by the fall of buildings has been, Upon whom does the liability rest?

Liability of owner or occupier.

The mere fact that a person is owner and proprietor of a building does not render him liable for 34 L. R. A.

but, so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not, by any insecurity, or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it.

2. Where a building falls without any apparent cause, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing

injuries caused by its fall. The liability may be on the occupier. *Chauntler v. Robinson*, 4 Exch. 163, 19 L. J. Exch. N. S. 170.

The occupier of a house which becomes so out of repair that it is liable to fall into the highway may be indicted for failure to repair, although he is but a tenant at will. *Reg. v. Watts*, 1 Balc. 357.

If while a building is in possession of a tenant it is destroyed by fire so that the walls become a nuisance to the public, and while in that condition the tenant gives a third person the right to remove the metal from the premises so that thereafter the premises are in the joint possession of the two parties, they are liable if the walls fall and injure persons on the street adjoining it, and not the owner of the building. *Grogan v. Broadway Foundry Co.* 87 Mo. 321.

If the tenant overload the floors of a ruinous building so that they and the merchandise put upon them fall into the cellar to the injury of a lessee of the cellar, the tenant will be liable for the injury. *Edwards v. Halinder*, Popham, 46.

A landlord is not liable for injuries caused by the

that he exercised ordinary care to keep it in a safe condition; but where it appears from such explanatory circumstances that the cause of the fall of the building was a latent defect in its construction, and there is no evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to show that such cause might have been discovered and removed before the accident by the exercise of ordinary care on the part of the owner.

3. Evidence considered, and held that the jury were properly instructed to return a verdict for the defendant.

(July 10, 1895.)

APPPEAL by plaintiff for an order of the District Court for Ramsey County over-

ruling a motion for a new trial after a verdict had been directed in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles N. Akers and D. D. Williams, for appellant:

The law makes it the duty of the owner of a building to keep it in proper order, so that no one may be injured by it.

Ignorance of the condition of the building, or the fact that the defect could not easily be detected, would not relieve the owner from liability.

Barnes v. Beirne, 88 La. Ann. 280; *Tucker v. Illinois C. R. Co.* 42 La. Ann. 114; 2 Shearm. & Redf. Neg. § 702, and cases cited.

fall of a wooden awning attached to the wall of his building in consequence of the tenant's permitting a crowd of people to stand upon it. *Kalis v. Shattuck*, 69 Cal. 503, 68 Am. Rep. 563.

But the owner of a building who aids in the construction of a wooden awning is liable for injuries caused by the fall of it and a portion of the wall to which it is attached by reason of the insufficiency of the wall to support the burden. *Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622.

Under the Louisiana statutes the owner of a building is answerable for the damages occasioned by its ruin when this is caused by neglect to repair it or when it is the result of a vice in its original construction. *Howe v. New Orleans*, 13 La. Ann. 481.

And it is immaterial whether the building becomes unsafe by agencies of time or weather or the acts of trespassers. *Tucker v. Illinois C. R. Co.* 42 La. Ann. 114.

In *Odell v. Solomon*, 13 Jones & S. 119, a tenant in possession of a building is liable to one injured by the fall upon him of a portion of the building by reason of failure to keep it in safe condition, although the landlord has neglected to make repairs.

But in the higher court it was held that a tenant in possession of a building is bound only to reasonable care that it shall not cause injury to others. And in order to hold him liable for injuries caused by the fall of a portion of the building upon a passerby negligence must be established as matter of fact. Constructive negligence is not sufficient. *Odell v. Solomon*, 99 N. Y. 635.

If a wall is a nuisance when a lease of it is given, and it subsequently falls upon and injures a person rightfully upon adjoining property, both landlord and tenant may be held liable for the injury. *Timlin v. Standard Oil Co.* 84 Hun. 44.

The owner of land will be liable for damages done to an adjoining owner by the fall of chimneys which were in a ruinous condition when he leased the property to a tenant. *Todd v. Flight*, 9 C. B. N. S. 377, 30 L. J. C. P. N. S. 21, 3 L. T. N. S. 326, 9 Week. Rep. 145.

If only portions of the building are in possession of tenants, and a third person is injured by the falling of fire walls and a cornice, the owner is liable unless it is shown that such portions of the building were in possession of the tenants. *O'Connor v. Andrews*, 81 Tex. 28; *O'Connor v. Curtis* (Tex.), 13 S. W. 953.

For liability of landlord when a portion of the walls remain in his possession, see *note* to *Jones v. Millsaps* (Miss.) 23 L. R. A. 157.

Upon the question of the liability of the landlord as distinguished from that of the tenant for the fall of walls in possession of the tenant, see *note* to *Lee v. Molaughlin* (Me.) 23 L. R. A. 197.

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Building in possession of contractor.

One who is engaged in excavating a cellar under a building is liable, in case he does the work so negligently as to cause the building to fall, to a clerk in the store who is injured by the fall of the building while in the cellar, where he has gone to recover the hat of a customer, which has been carried there by the wind. *Lamparter v. Wallbaum*, 45 Ill. 444, 92 Am. Dec. 225.

A subcontractor for a portion of a building, who removes braces put up by the subcontractor for the mason work to keep the walls from falling, is liable to the latter in case the wall is blown down because of the absence of braces. *Pasquini v. Lowry*, 44 N. Y. S. R. 339.

The owners of a building which is being erected by independent contractors are liable for injuries caused by its fall if it is erected in such an unskilful and dangerous manner as to constitute a nuisance. But if the wall is erected in an ordinarily substantial and safe manner, and is overthrown by the operation of extraordinary causes against which ordinary skill, care, and foresight would not provide, the owner will not be liable. *Deford v. State, Keyser*, 30 Md. 179.

If the owner contracts with a third person to have his building raised and a story put under it the owner is not liable for injuries caused by the fall of the building during the time of making the repairs, if the contractor was a person of proper skill and the work was not a nuisance. *Connors v. Hennessey*, 112 Mass. 90.

If during the process of constructing a wall it falls because of defective plans the owner is liable, but if because of negligence or want of care and skill of the independent contractor the latter only is liable. *Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460.

If one who has contracted to put up the iron front of a building sublets the contract to one who has the entire charge of the work the contractor will not be liable for injuries caused by the fall of the building in consequence of the negligence of the subcontractor. *Peyton v. Richards*, 11 La. Ann. 62.

If the wall is being constructed by an independent contractor the owner is not liable for injuries caused by its being blown down during the process of construction. *Benedict v. Martin*, 36 Barb. 238.

If the owner of a building which has been burned negligently permits the walls to become dangerous, he will be liable to the owner of adjacent property injured by their fall although the city has volunteered to take care of the ruins and have the walls torn down. *Anderson v. East*, 117 Ind. 123, 3 L. R. A. 712.

The owner of a wall of a burned building which falls on and injures property on adjoining premises is liable for the injury, although his property at the

The falling of the walls and sign without apparent cause was presumptive negligence.

Morris v. Strobel & W. Co. 81 Hun, 1; *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 12 L. R. A. 189; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 580.

The fact that the premises were in the possession of a tenant under a lease is no defense.

Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 780.

Charles Ryder was not a trespasser but was engaged in a duty imposed by law.

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; 2 Thomp. Neg. 1046; *Cleveland v. Spier*, 16 C. B. N. S. 899; *Ryan v. Thomson*, 88 Jones & S. 133.

time was in possession of a skillful contractor for the purpose of rebuilding the house. *Seesengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 93.

The mere fact that the building is in possession of the insurer for repairs will not exonerate the owner from liability for injuries caused by its fall if it was in an obviously dangerous condition. *Knopp v. Alter*, 47 La. Ann. 570.

The fact that the insurer has elected to repair, and that the building has been turned over to him for that purpose, will not absolve the owner from liability in case the walls are thrown down by reason of their dangerous condition and injure a person employed in an adjoining building. *Steppe v. Alter*, 48 La. Ann. 363.

In case the owner has let the work to a competent contractor he will not be liable to the employee of a subcontractor who is injured by the fall of the wall through the negligence of the contractor. *Gallagher v. Southwestern Exposition Asso.* 28 La. Ann. 244.

As to liability of a contractor for defects in work turned over to his employer, see note to *First Presby. Congregation v. Smith* (Pa.) 23 L. R. A. 504.

In case the work has been completed and accepted by the owner the Massachusetts court holds that after the wall has been accepted from the contractor the owner is liable for injuries caused by its fall on account of its defective and unsafe condition. *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224.

Few courts have had that state of facts before them, so that there has been no general expression of opinion upon the question of the owner's liability under such circumstances. The Massachusetts court applied to the solution of the problem the doctrine of *Fletcher v. Rylands*, L. R. 1 Exch. 225, 35 L. J. Exch. N. S. 154, 12 Jur. N. S. 608, 14 L. T. N. S. 523, 14 Week. Rep. 799, 4 Hurlst. & C. 263, that one who for his own purpose brings upon his property anything likely to do mischief if it escapes must keep it in at his peril. *Gorham v. Gross*, *supra*, has been cited with apparent approval in some of the other cases upon the general question of liability for the fall of walls. But there are other cases cited in this note which do not seem to be in entire accord with the principle therein stated.

In a Michigan case where the roof of a building fell on a clear day and injured a person on the street adjoining, the court held that the fact that the work was done by an independent contractor would not relieve the owner from liability if he had accepted the work, since it was his duty to have the buildings so erected as to render it reasonably safe. *Wilkinson v. Detroit Steel & S. Works*, 73 Mich. 406.

But in that case there was some evidence to show 34 L. R. A.

Messrs. Batchelder & Batchelder, for respondent:

The question of negligence was purely one of law for the court. If a verdict had been rendered for the plaintiff the court would have been compelled to set it aside.

Abbott v. Chicago, M. & St. P. R. Co. 30 Minn. 482; *Freeberg v. St. Paul Plow-Works*, 48 Minn. 99; *Thompson v. Pioneer-Press Co.* 37 Minn. 285; *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325.

It is incumbent on the party who seeks damage for personal injuries to show that he was acting in a way that did not tend to produce the injury.

Murphy v. Deane, 101 Mass. 455, 8 Am. Rep. 890; *Chaffee v. Boston & L. R. Co.* 104 Mass. 115; *Gavett v. Manchester & L. R. Co.* 16 Gray,

that the original plan was defective and also that the owner employed a superintendent to oversee the work so that the question of the owner's own negligence was also an element in the case.

Liability for injury to person in street.

A ruined and dilapidated wall is a nuisance if it imperils the safety of persons or travelers on the public highway. *Murray v. McShane*, 53 Md. 217, 38 Am. Rep. 367.

Permitting a building to overhang a highway in such a manner as to be in danger of falling upon it may be an indictable nuisance. *Chute v. State*, 19 Minn. 271.

It is the duty of the owner of a building under his control and in his own occupation to keep it in such a state of repair that travelers on the highway shall not suffer injury. *Franke v. St. Louis*, 110 Mo. 516.

The owner of a building from which a cornice overhanging the highway falls because the nails fastening it to the building have become loosened by reason of ordinary decay is liable for an injury to a passer-by without proof of knowledge on his part of the dangerous condition of the cornice. *Roberts v. Mitchell*, 21 Ont. App. Rep. 433.

Executors in possession of property of the deceased are personally liable for injuries to a passer-by by the fall of a window from the building into the street which is caused by their neglecting to make necessary repairs on the building. *Ferrier v. Trepannier*, 24 Can. S. C. 86.

To exempt the owner and contractor from liability for damages caused by the fall of a house in process of demolition the notice of dangers must be of such a character as to put the person injured in fault. *Jackson v. Schmidt*, 14 La. Ann. 818.

If the walls of a church are negligently permitted to stand after the rest of the building has been destroyed by fire, and subsequently fall upon and injure a person passing along the highway, the church society will be liable for the injury. *Church of Ascension v. Auckbart*, 3 Hill, 193.

Where the owners of three adjoining lots build houses supported by partition walls, and they are destroyed by fire and the walls left standing until they fall into the street and injure a passer-by, the three owners are jointly liable for the injuries thereby caused. *Simmons v. Everson*, 124 N. Y. 319.

A church society will be liable for the fall of a shutter forming part of its spire if it injures a person upon the street below and the circumstances were such that notice on its part of the defective condition of the shutter can be presumed. *Woods v. Trinity Parish*, 21 D. C. 540.

Negligence will be presumed from the fact of the fall of a building so as to injure a person passing on the street adjoining. *Mullen v. St. John*, 57 N. Y. 571, 15 Am. Rep. 530.

501, 77 Am. Dec. 422; *Larson v. St. Paul & D. R. Co.* 43 Minn. 488.

Plaintiff was in law a trespasser and wrongdoer.

Trask v. Shotwell, 41 Minn. 68; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 872, 87 Am. Dec. 644.

Plaintiff's right to recover is not strengthened by the fact that the parties committing the trespass were in the highway.

Harrington v. St. Paul & S. O. R. Co. 17 Minn. 215; *Althen v. Kelly*, 82 Minn. 280; *Bisell v. New York C. R. Co.* 23 N. Y. 61; *White v. Godfrey*, 97 Mass. 472; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Sweeney v. Old Colony R. Co. supra*.

When a stranger does a negligent or unlaw-

ful act on the land or building of another, and in doing that act occasions injury to a third party (or to himself), the owner of the land or building is not liable.

Gray v. Boston Gaslight Co. 114 Mass. 153, 19 Am. Rep. 324.

The defendant owed no duty or obligation to the plaintiff in relation to the building or wall which he has failed to discharge or fulfil. He has neither done nor omitted to do any act by which a legal duty or obligation has been violated.

Rosenfeld v. Newman, 59 Minn. 156; *Sutton v. New York C. & H. R. R. Co.* 66 N. Y. 243; 16 Am. & Eng. Enc. Law, pp. 463, 464; *Larson v. St. Paul & D. R. Co. supra*; *Frederberg v. St. Paul Plow Works*, 48 Minn. 109.

In Louisiana ignorance of the condition of the building or the circumstance that it could not be easily detected, is no defense. *Barnes v. Beirne*, 38 La. Ann. 280.

Liability for injury to person on adjoining property.

If a man hath a house near my house, and he suffereth his house to beso ruinous as it is likely to fall upon my house, I may have a writ de domo reparanda to compel him to repair his house. Co. Litt 562.

But that writ was subsequently abolished, and it is stated in a note that an action for damages will lie for failure to make the repairs.

The owner of a building is liable for the damages which its fall may cause to property on adjoining premises. *Kappes v. Appel*, 14 Ill. App. 170.

The mere fact that the city fire department has pronounced a fire wall safe will not absolve the owner from the duty of using care to determine whether or not it is safe, and prevent its injuring other persons. *Dixon v. Wachenheimer*, 9 Ohio C. C. 401.

If a building falls because of defects in material and workmanship reasonably within the knowledge of the owner, and thereby inflicts injuries upon adjoining owners or their property, or any person employed within the vicinity, such as a fireman trying to extinguish a fire, the owner is liable for the injuries ensuing therefrom. *Kitchen v. Carter*, 47 Neb. 776.

One who builds or maintains a high chimney the fall of which would injure an adjoining building is liable for its fall in a not unusual gale, or from any cause except such as human foresight cannot reasonably be expected to anticipate and prevent. *Cork v. Bissom*, 162 Mass. 330, 26 L. R. A. 256.

A wall which is built under the agreement that when the adjoining owner pays one half the cost he may use it as a party wall is not a party wall until the payment is made, and if it falls before that time injuring the adjoining owner, he may maintain an action for his damages against the one who erected the wall. *Glover v. Mersman*, 4 Mo. App. 90.

If a building in process of erection falls by reason of negligence and want of skill, the owner is liable for injuries thereby caused to the property of an adjoining owner. *Seabrook v. Hecker*, 3 Robt. 291.

A property owner is not absolved from the duty of care for dangerous walls on Sunday. *Dixon v. Wachenheimer*, 9 Ohio C. C. 401.

A person who is building a house under a contract to finish it by a certain time or forfeit a certain amount may maintain an action against the owner of an adjoining wall which falls upon his materials and delays his work so that he is compelled to pay the forfeiture. *Lynds v. Clark*, 14 Mo. App. 74.

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In *Taylor v. Standall*, 7 Q. B. 634, 3 Dowl. & L. 161, 14 L. J. Q. B. N. S. 301, 9 Jur. 1090, where defendant's building fell upon and threw down a wall belonging to plaintiff for which plaintiff brought the action, defendant pleaded that he had repaired plaintiff's wall at his own expense; but the court said there is a vested right of action and the plea states a kind of set-off, but that is no answer.

It is not necessary to serve notice on the owner of the unsafe condition of the property in order to hold him liable for injuries caused by its fall. *Tucker v. Illinois C. R. Co.* 43 La. Ann. 114.

Where two buildings adjoining each other were burned leaving the side and walls standing close to each other, and a person in taking down one of the walls was injured by the fall of the other, the court held that in the absence of anything to show that one of the walls would have fallen while both were standing or that defendant had notice or was bound to know that one was being removed, he was not liable. *Mahoney v. Libbey*, 123 Mass. 30, 25 Am. Rep. 6.

The mere fact that the owner of a building in process of erection has his attention called to the fact that the walls are leaning, is not sufficient to render him liable for injuries caused by their fall on the following day, unless the danger is so obvious that a reasonably prudent man would have acted immediately for his own safety in case he was in danger of injury should the building fall. *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227.

The owners of a wall that fell and injured the occupant of an adjoining building are not liable if they exercised proper care to make the wall safe and after such care believed that it was safe. *Schell v. Second Nat. Bank*, 14 Minn. 43.

In that case the wall which fell was one left standing after a fire, and the immediate cause of the fall appears to have been a hurricane, but that fact is not made an element in the case. The question of proper care was left to the jury, and the issue found in favor of defendant. The principle of the case is not in accord with *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234, which is noticed *supra*. In most cases of the fall of a building negligence has been shown. In fact the cases must be very few in which a building falls under ordinary circumstances without negligence on the part of someone. Therefore the abstract question as to how far the owner is bound to keep his building from falling and is liable for injuries caused by the fall on the principle of caring for a dangerous agency has not been fully considered. The Massachusetts (*Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234) and Minnesota (*Ryder v. Kinsey*, and *Schell v. Second Nat. Bank, supra*) courts seem inclined to take opposite views of the question, although they did not discuss it from the same point of view. In fact, the Massachusetts case seems to be the only one which has considered the question

Plaintiff was not entitled to the same protection as travelers passing along the street in a lawful manner.

Trask v. Shotwell, and *Freeberg v. St. Paul Floor-Works*, *supra*.

At common law the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupant is prima facie liable to third persons for damages arising from any defect.

Bean v. Green, 4 Cush. 278; *Kirby v. Boylston Market Assn.*, 14 Gray, 250, 74 Am. Dec. 682; *Onkham v. Holdbrook*, 11 Cush. 302; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *New York v. Corlies*, 2 Sandf. 301; *Shipley*

v. Fifty Associates, 101 Mass. 254, 3 Am. Rep. 346.

The owner is not an insurer against the negligence of tenants or the officers of the city or any other party.

Rosenfeld v. Newman, *supra*; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623.

Start, Ch. J., delivered the opinion of the court:

Action to recover for personal injuries sustained by the plaintiff's minor son, Charles Ryder, caused by the falling of a brick veneered wall of a building owned by the defendant. On the trial, after the plaintiff had closed his case, the court directed the jury to return a verdict for the defendant, for the reason that

from its point of view. The other cases seem to treat the question as one of negligence purely with a more or less strict duty on the part of the owner of the building.

Liability for injury to person on property.

A city is not liable for injuries caused by the fall of brick and mortar in a room in one of its public buildings if the accident was the result of causes beyond the control of the city and reasonable time had not elapsed between the time they became dangerous and the accident in which to restore them to safety. *Chicago v. O'Brennan*, 65 Ill. 160.

Where plaintiff as a mere intruder entered the uninclosed premises of a railroad company upon which was a building in a visible state of decay, and while there was injured by a portion of the building blown down by the wind, it was held that he could not recover for the injury, the building not being so situated as to be dangerous to the public. *Lary v. Cleveland, C. & I. R. Co.*, 73 Ind. 322, 41 Am. Rep. 572.

Where plaintiff was attending a picnic near a hotel when a storm came up, and he and the other picnickers sought shelter in and about the hotel, and the weight of the crowd carried down a veranda along one side of the building upon the heads of plaintiff and others in a room beneath it, the owner of the building was held not liable, since the plaintiff was at most a mere licensee and defendant was not shown to be guilty of negligence. *Converse v. Walker*, 30 Hun, 595.

The maintenance of a bowling wall along a passageway from a street to a workshop will render the owner liable for its fall in case it injures a person passing along the passageway, although he is going to the shop for his own pleasure, and not for business. *Schilling v. Abernethy*, 112 Pa. 437, 58 Am. Rep. 325.

The owner of a building erected for rent, who builds loosely, carelessly, unskillfully, and negligently, is liable for injuries to a third person who is injured by the fall of the building while he is in it for a proper purpose. *Godley v. Hagerty*, 20 Pa. 387, 50 Am. Dec. 731.

But when the owner has done all in his power to erect a building safe for the purposes for which it is to be used he will not be liable to the owner of property stored on the premises for injuries to it caused by the fall of the building by reason of an occult defect of which he had no notice. *Walden v. Finch*, 70 Pa. 460.

In *Continental S. B. Co. v. Burke*, 37 L. ed. 969, plaintiff was injured by falling 15 feet by reason of the giving way of a platform or piazza attached to a building upon hotel property at which a club to which he belonged was holding a picnic. The plaintiff was going to the building with a number of other persons to procure liquors which had been stored there by the picnic committee, and the plaintiff was

giving way under their weight. Defendant claimed that the building was a private office and that none but the committee had a right therein, and that the building was not intended for any such use as plaintiff was putting it to, and that the liquors were stored in the building under the express understanding that only five or six persons should go there at a time. A verdict for plaintiff was affirmed by a divided court.

Persons who conduct a fair and construct buildings for the use of their patrons are liable for injuries to such patrons by the breaking down or fall of such structures if caused by the negligence or unskillful manner of their construction. *Latham v. Roach*, 72 Ill. 179; *Francis v. Cockrell*, L. R. 5 Q. B. 184.

And the principle of that case was recognized in *Tucker v. Champaign County Agri. Board*, 52 Ill. App. 316, in which plaintiff was injured by stepping through a hole in the flooring of a structure erected for the accommodation of patrons.

So, an agricultural society which erects a building for exhibits is liable for injuries caused by the fall of the building which is the result of its failure to exercise ordinary care to make it safe. *Brown v. South Kennebec Agri. Soc.*, 47 Me. 275, 74 Am. Dec. 484.

Agents of the owner of ground upon which an exhibition is to be given, who are given the supervision of the building of a stand for the accommodation of the public, are not individually liable in case it gives way because not sufficiently strong to sustain the crowd, and injures a person who sues for damages. *VanAntwerp v. Linton*, 39 Hun, 417.

An employer is not liable to his employee for the fall of a floor upon which grain is stored if due care was used in the construction of the building and there was no reason to suppose that it would not sustain the weight which was put upon it. *Dillon v. Sixth Ave. R. Co.*, 16 Jones & S. 283.

Where a platform over which an employee is to draw materials for a mill is permitted to gradually decay until it falls with a load upon it and injures the employee, he may recover from the employer if the defect could have been discovered by reasonable care. *Murray v. Usher*, 46 Hun, 404.

In *Camp v. Church of St. Louis*, 7 La. Ann. 823, where one employed by the contractor to do the brick work on a church building was injured by the fall of a tower, a verdict in his favor against both the contractor and the owner of the building was affirmed by a divided court.

The owner of a building in process of construction is liable to a carpenter working on the roof who is injured by the falling of the building caused by the walls being negligently made of insufficient thickness. *Giles v. Diamond State Iron Co.* (Del.) 6 Cent. Rep. 897.

An employer is liable to his servant for injuries caused by the fall of an outhouse attached to the side of the building during a time that the servant

the plaintiff had failed to establish his cause of action. The plaintiff appeals from an order denying his motion for a new trial.

The plaintiff's evidence tended to establish the following facts: In 1885 the defendant purchased a lot on Fifth street, in the city of St. Paul, upon which stood a one-story brick-veneered building, which he has ever since leased for store and office purposes. The last lease made by him was in the spring of 1894 to the present tenants. On June 27, 1894, about midnight, Charles Ryder, nineteen years of age, in company with McMahon, a boy about his own age, was walking along Fifth street, and saw a policeman in front of the building, who was trying to take down a sign therefrom, which hung over the sidewalk. This sign was about 8½ feet square, made of oil cloth, with a light wooden frame. It had been suspended by two small iron hooks from a piece of timber, 2x4 inches, extending from the front of the building over the sidewalk, and supported by two guy wires attached to its outer end, and fastened to the sides of the building. It does not appear that it was attached in any way to the part of the wall which fell. The outside hook had become detached from the sign (presumably by a severe storm in the early part of

the evening), so that it hung by the one hook. The policeman informed the young men that he feared the sign would fall upon persons passing, and asked them to assist him in taking it down. They assented, and, after striking and pushing the sign with a stick, the policeman and Ryder raised McMahon up, holding him by the legs, and he gave the sign a twist to detach it from the remaining hook, and at that very instant the whole front of the building above the door and windows fell, crushing Ryder to the sidewalk, breaking his pelvic bone and otherwise seriously injuring him. The building was some 18 feet wide and 15 feet high to the peak of the roof. There was a lintel 8x8 inches over the openings in front, and a 4-inch brick wall, the one that fell, extended above the lintel as high as the peak of the roof. In the rear of this brick wall were six pieces of timber 2x4 inches, fastened together so as to make three pieces 4x4 inches, one at each corner and one in the center; and between these there were studding 2x4 inches, about 2 feet apart. There was no sheathing on the outside of the studding next to the brick, but there was on the inside. The brick-veneered wall was not spiked to the studding or sheathing or anchored to the frame in the customary manner.

is in for a proper purpose. *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315.

The owner of a building who has employed competent builders to erect it, and has accepted it from them, is not liable to a painter who is injured by the fall of a cornice and part of the wall under his weight when he went upon it for a purpose connected with the painting of the building, since the cornice was not intended for such use. *Fanjoy v. Seales*, 29 Cal. 243.

The fact that a building is not made so as to withstand an extraordinary storm does not show negligence. *Giles v. Diamond State Iron Co. supra*.

A city is liable for the fall of a wall which is being built for it, which is caused by the negligent manner in which the work is done, to a workman who is injured by the fall. *Mulcairns v. Janesville*, 67 Wis. 24.

If a landlord attempts to shore up a building in possession of his tenant which has settled, he takes the risk of accidents, and if the building falls, injuring the property of the tenant, the landlord will be liable for such injury. *Butler v. Cushing*, 48 Hun, 521; *Judd v. Cushing*, 50 Hun, 181.

The mere fact that the landlord does not disclose that the house is in a ruinous state will not render him liable to the tenant for injuries caused by the fall of the house, unless he knows that the tenant takes the house relying on its being fit for occupation. *Keates v. Cardigan*, 2 Eng. L. & Eq. 320.

The owner and builder of a storehouse does not by leasing it impliedly warrant that it is fit for the use to which it is to be put so that he will be liable for the damage in case it falls under the weight placed therein. *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45.

A landlord is not liable for injuries to his tenant caused by the fall of the building, which is due to excavations made by third persons on adjoining property, although the landlord knows of the excavation and takes no precaution to prevent his own building from falling. *Ward v. Fagin*, 101 Mo. 680, 10 L. R. A. 147; *Sherwood v. Seaman*, 2 Bosw. 127; *Brewster v. De Fremery*, 33 Cal. 341.

But if a landlord undertakes to rebuild a wall which has become unsafe by reason of building operations carried on by an adjoining owner, and the wall is built so negligently that it falls carrying 84 L. R. A.

down the remainder of the building, he may be liable to the tenant for injuries to his business by reason of the destruction of the building. *McHenry v. Marr*, 39 Md. 512.

As to landlord's liability for injury to guest or servant of tenant, see note to *McConnell v. Lemley*, post, 600.

Neglect to comply with covenants in lease.

A covenant by a lessor to repair a carriage house does not render him liable for injuries to carriages in the house caused by its fall under the weight of a heavy body of snow upon the roof. *Leavitt v. Fletcher*, 10 Allen, 119; *Searle v. Laverick*, L. R. 9 Q. B. 43.

In *Anonymous*, 11 Mod. 8, it is held that if a lessee for years build a house on the leased premises and let it fall it is waste, Chief Justice Holt saying: "Every man of common right ought so to support his own house as that it may not be a nuisance to another man's."

A covenant by the tenant of a mill to repair, natural wear and tear and fire excepted, will not cover the case of the fall of the mill in consequence of its own defective construction. *Hess v. Newcomer*, 7 Md. 825.

If a tenant uses a building in what is apparently a reasonable and proper manner having regard to its character and to the purpose for which it was intended to be used, and it falls under the weight of the goods stored therein, he is not liable for waste. *Manchester Bonded Warehouse Co. v. Carr*, L. R. 5 C. P. Div. 507, 49 L. J. C. P. N. 8, 800, 48 L. T. N. 8, 476, 29 Week. Rep. 354, 45 J. P. 7; *Sanger v. Rilton*, L. R. 7 Ch. Div. 815, 47 L. J. Ch. N. 8, 207, 38 L. T. N. S. 281, 26 Week. Rep. 894.

Illegal building.

If a building is erected of a kind forbidden by the ordinances of the city, and a portion of the wall falls, the owner, contractor, and all persons engaged in the work are liable for the injuries thereby caused. *Walker v. McMillan*, 6 Can. S. C. 241.

Liability of firemen.

A stack of chimneys belonging to a house close to a highway, which by reason of a fire were in immediate danger of falling into the highway, were thrown down by some firemen, and it was held that they were not liable for injuries unavoidably

or attached to them in any way, or otherwise supported. There was fastened to the outside of the wall, and fell with it, a large wooden sign 5x18 feet, which was upon the building when defendant purchased it. Practically there was no change in the construction of the building or its condition from the time the defendant bought it until the wall fell. The evidence further tends to show that the customary and proper way to support a veneered brick wall is to sheat or board up the frame on the outside of the studding next to the brick, then lay the brick along and outside of the sheeting, and bind the brick wall, during the progress of its construction, to the frame of the building, by driving 20-penny nails every fifth or sixth course of the bricks into the boards of which the sheeting is composed, so that the nail heads will remain in the mortar at about the center of the bricks. This is what is meant by "anchoring" or "supporting" a brick or veneered wall. These defects in the construction of the wall were discovered after it fell, but there was no evidence in the case as to whether such defects could or could not have been discovered by the exercise of ordinary care on the part of the owner before the wall fell, except as may be inferred from the facts we have stated.

Upon this evidence, was the question of the defendant's negligence in the premises one of law or fact or for the jury? If fair-minded men might reasonably draw different conclusions from the facts which the evidence tends to prove, the question was one for the jury; otherwise it was for the court. If there is a fair doubt as to the inferences to be so drawn, the question is one of fact. *Abbott v. Chicago, M. & St. P. R. Co.* 30 Minn. 482. The law applicable to this branch of the case is well settled. While the owner of a building is not an insurer against accidents from its condition, yet, so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not by any insecurity or insufficiency for the purpose to which it is put injure any person rightfully in, around, or passing the premises. *Nash v. Minneapolis Mill Co.* 24 Minn. 501, 31 Am. Rep. 349; 2 Shearm. & Redf. Neg. § 702; 1 Wood, Nuisances, § 109. Buildings properly constructed do not fall from slight causes, only from some adequate cause. Therefore, where a building falls without apparent cause, in the absence of explanatory circumstances, negligence will be presumed; and the burden is upon the owner of showing that he exercised ordinary care to keep it in a safe condition. *Mullen v. St. John*,

done to an adjoining house of a third person. *Dewey v. White, Moody & M. 56.*

Act of third person.

The owner of a building is not liable for injury to a passer-by by the fall of a portion of his chimney if the fall is caused by the improper and unauthorized act of a third person of which the owner had no knowledge. *Scullin v. Dolan*, 4 Daly, 163.

The fact that the fall of fire walls caused by the pulling of a wire attached to them will not relieve the owner from liability if the walls were dangerous and he might have known that the wire was so attached to them and was liable to cause their fall. *O'Connor v. Andrews*, 31 Tex. 28; *O'Connor v. Curtis* (Tex.) 15 S. W. 363.

The owner of a building to the chimney of which a third person has without his consent attached a wire so as to render the chimney unsafe may be held liable to a passer-by who is injured by the fall of the chimney. *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324.

Where a pile of bricks and rubbish fell upon and injured plaintiff, the court held that the proof showing that there was no fault or negligence imputable to defendant, that there was no original imperfection in the structure, and that the fall was probably caused by the acts of third persons, the defendant could not be held liable. *Burton v. Davis*, 15 La. Ann. 448.

Via major.

The owner of a fire wall cannot defeat liability for injuries caused by its fall in a high wind on the ground of inevitable accident if he permitted it to stand for seven days after the fire knowing of the danger. *Nordheimer v. Alexander*, Mont. L. R. 6 Q. B. 402.

If the owner of a wall adjoining a street in a populous city permits it to become dilapidated and unsafe he will be liable for injuries caused by its fall, although it is blown down by a storm of unusual violence. *Vincett v. Cook*, 4 Hun, 318.

Where fire destroyed defendant's house leaving one of the walls standing in a dangerous condition, and defendant knowing the fact failed to sup-

port it and some days afterwards it was blown down by a wind and damaged plaintiff's house, the court held that defendant could not shield himself under the plea of *vis major*, and was liable for the damages. *Nordheimer v. Alexander*, 19 Can. S. C. 248.

A city is not liable for injuries caused by the fall of a market house which is blown down by an extraordinary wind storm. *Flori v. St. Louis*, 69 Mo. 341, 38 Am. Rep. 504.

A railroad company is not liable for injuries caused by its buildings being blown down by storms where it has used that care and skill in their structure and maintenance which men of ordinary prudence and skill usually employ. *Pittsburgh, Ft. W. & C. R. Co. v. Brigham*, 20 Ohio St. 374.

In *Couts v. Neer*, 70 Tex. 468, a charge to the jury that defendants and their employees were bound to use such care and skill in the construction of the wall and placing the truss as persons of ordinary prudence would exercise under the same circumstances and surroundings, and if they found that defendants had exercised such care and skill and that the wall was thrown down or caused to fall by reason of an extraordinary rainstorm such as could not have been anticipated and by reasonable care guarded against, then you will find for defendant,—was held to be as favorable to defendant as he could demand, and the verdict having been against him it was allowed to stand.

Fire.

If by reason of the fall of a building fire is communicated to an adjoining building the owner of the fallen building may be liable for the injuries thereby caused. *Hine v. Cushing*, 53 Hun, 519.

Contributory negligence.

If the injured person could have avoided the injury by reasonable precautions on his own part he cannot recover. *Factors & T. Ins. Co. v. Werlein*, 42 La. Ann. 1046, 11 L. R. A. 351.

If a tenant is injured by the fall of a balcony along which he is carrying a stove at a time when he knows the balcony to be unsafe he cannot recover for the injury. *Mullen v. Baine*, 45 N. J. L. 520.

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57 N. Y. 567, 15 Am. Rep. 530; 1 Shearm. & Redf. Neg. §§ 59, 60; 2 Thomp. Neg. 1231.

In the case under consideration, the evidence as to what was done by the plaintiff and those with him in taking down the small, light sign from the building in question would certainly justify the jury in finding that such act was not an adequate cause for the falling of the wall. The presumption then would be, in the absence of explanatory circumstances, that the wall fell because it was in an unsafe condition, and that the defendant was negligent in not exercising ordinary care in properly inspecting and keeping it in repair. But it is only in the absence of explanatory circumstances as to the cause of the fall of a building that the presumption of negligence on the part of the owner is presumed *prima facie*. Therefore, where such explanatory circumstances are given in evidence, and the cause of the fall of the building is established, and there is nothing in the evidence tending to connect such cause with the owner's negligence, the burden rests upon the party asserting such negligence to give evidence tending to show that such cause might have been discovered and removed by the exercise of ordinary care on the part of the owner. The cause of the fall of the wall is clearly established in this case. It fell because of a defect in its construction, in that it was not supported in the usual manner. This was readily discovered after the accident, when the bricks were on the sidewalk, and the manner of constructing the wall was exposed. It is easy to be wise after the fact, but the question is, Did the defendant know, or might he have known, by the exercise of ordinary care, before the accident, of the defect in the construction? If so, he would have been clearly negligent in the premises. But he did not build the wall, and there is no evidence in the case that there was anything in the external appearance of the building indicating its defective construction. On the contrary, it affirmatively appears by the uncontradicted evidence that the defect in

the construction was a concealed one. Neither is there any evidence in the case tending to show that the defect could have been discovered by the exercise of ordinary care in inspecting the building. The *prima facie* presumption arising from the undisputed facts is that the defect could not have been discovered by the exercise of such care; for the sheeting on the inside of the studding and the brick wall on the outside of them concealed the defect, and the absence of sheeting next to the brick wall and the anchoring of it to the sheeting by the large nails could not have been discovered by any means disclosed by the evidence, except by the exercise of extraordinary care in inspecting the building, by making openings in the sheeting or wall to discover whether or not the wall was properly supported. Ordinary, not extraordinary, care, was the measure of the defendant's duty in the premises. No importance can be attached to the fact that the large sign was fastened to the brick wall, for, assuming that the wall was properly constructed, it could not be negligence to fasten the sign to it, and there was nothing about the sign or the manner in which it was attached to the wall to indicate the latent defect in the wall. Upon the whole record, we are satisfied that the presumption of negligence arising from the mere fact that the wall fell was rebutted by the explanatory circumstances disclosed by the evidence, showing the cause of its fall, and that the defect was a latent one; and that, in the absence of any evidence disclosing any fact or circumstance from which it might be reasonably inferred that such defect could have been discovered by the exercise of ordinary care on the part of the defendant, the question of his negligence is not one admitting of a fair doubt, and that the jury were correctly instructed to return a verdict for him. Any other rule would practically make owners of buildings insurers of their safety.

Order affirmed.

PENNSYLVANIA SUPREME COURT

City of PHILADELPHIA, to Use of John McCANN,

v.

PHILADELPHIA & READING RAILROAD COMPANY, *Appt.*

(177 Pa. 202.)

1. Power to assess railroad real estate for local improvements is conferred by a statute for the equalization of the public burden, which provides that railroad property, with certain exceptions, shall be subject to "taxation by ordinances for city purposes."

2. A strip of land 1,500 feet wide along a river bank, and used by a railroad company as a coal and ore terminal, is not all exempt from taxation as roadbed although a large part of it is covered with tracks.

3. A yard owned and used by a railroad company as a coal and ore terminal may be sold to satisfy a tax lien, but the purchaser will take subject to the easement of the company to operate its tracks over the property.

(*Mitchell, J., dissents.*)

(October 5, 1896.)

APPPEAL by defendant from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of plaintiff in a proceeding brought to enforce a lien for assessments for the construction of a sewer.

Affirmed.

The facts are stated in the opinion.

Mr. Thomas Hart, Jr., for appellant:

The roadbed of a railroad company is not

NOTE.—For the liability of a railroad right of way to assessments for local improvements, see 24 L. R. A.

note to Chicago, M. & St. P. R. Co. v. Milwaukee (Wis.) 28 L. R. A. 219.

liable to a municipal claim for a local improvement in front of it or alongside of it, whether the same be merely a right of way or owned in fee.

Philadelphia v. Philadelphia, W. & B. R. Co. 33 Pa. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. 424.

There is no distinction now recognized between the parts of a railroad, the title to which has been acquired in fee, and those parts required by condemnation, the title of the railroad company being considered to be practically the same in both cases.

Pennsylvania S. V. R. Co. v. Reading Paper Mills, 149 Pa. 18; *Pittsburgh, Ft. W. & C. R. Co. v. Peet*, 152 Pa. 468, 19 L. R. A. 467.

The word "railroad" includes, *ex vi termini*, sidings, etc.

Philadelphia, W. & B. R. Co. v. Williams, 54 Pa. 103; *Cleveland & P. R. Co. v. Spear*, 56 Pa. 325, 94 Am. Dec. 84; *Black v. Philadelphia & R. R. Co.* 58 Pa. 249; *Getz's Appeal*, 10 W. N. C. 458.

There is absolutely no difference in fact or in law between the railroad west of Richmond street and that east thereof, except that the latter part is longer, different in shape, has more tracks, that they spread out instead of remaining parallel, and that trains come to a stop and unload into vessels instead of merely passing along to destination.

Defendant's property is not liable, because the statutes relating to the imposition of assessments for local improvements never contemplated making such property liable.

It was very early decided that a railroad or a canal and its necessary appurtenant works were not taxable as "land" or "real estate."

Lehigh Coal & N. Co. v. Northampton County, 8 Watts & S. 384; *Railroad Co. v. Berks County*, 6 Pa. 70; *Delaware & H. Canal Co. v. Wayne County Comrs.* 15 Pa. 351; *Northampton County v. Lehigh Coal & N. Co.* 75 Pa. 461; *Pennsylvania & N. Y. Canal & R. Co. v. Vanduyke*, 137 Pa. 249; *East Pennsylvania R. Co.'s Case*, 1 Walk. (Pa.) 428; *Northumberland County v. Philadelphia & E. R. Co.* 20 W. N. C. 381.

Aside from the act of April 21, 1858, new *Purd. Dig.* 1467, pl. 892, it cannot be questioned that the defendant's lots liened in these cases would not be subject to state or municipal taxation.

There is in this act no legislative intention to make such property liable to municipal assessments.

A liability of this kind is not "taxation" as ordinarily understood and in the sense used in this act.

Northern Liberties v. St. John's Church, 18 Pa. 104; *Pray v. Northern Liberties*, 31 Pa. 69; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Oliver Cemetery Co. v. Philadelphia*, 93 Pa. 129, 89 Am. Rep. 732; *Greensburg v. Young*, 53 Pa. 280; *Eris v. First Univ. Church*, 14 W. N. C. 232.

Taxation for municipal purposes and charges by municipal assessment are entirely different things.

Mount Pleasant v. Baltimore & O. R. Co. 188 Pa. 871, 11 L. R. A. 520; *Pettibone v. Smith*, 150 Pa. 126, 17 L. R. A. 423; *Sewickley M. E. Church's Appeal*, 165 Pa. 477; *Illinois* 34 L. R. A.

O. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132; *New Castle v. Stone Church Graveyard*, 172 Pa. 86.

Railroad property is by the act of 1858 made liable to taxation "by ordinances for city purposes," and such kind of taxation only.

"For city purposes," means the various purposes mentioned and included in the annual tax rate.

Pennsylvania R. Co. v. Pittsburgh, 104 Pa. 532; *Lehigh Coal & N. Co. v. Northampton County*, 8 Watts & S. 337.

Inability to enforce the lien is a sufficient reason why it should not be declared.

Philadelphia v. Philadelphia, W. & B. R. Co. 33 Pa. 41; *Re Opening of Berks Street*, 12 W. N. C. 10; *Re Center Street*, 115 Pa. 247; *Re Chestnut Avenue*, 8 Phila. 265; *Philadelphia & R. T. R. Co.'s Appeal*, 1 Super. Ct. (Pa.) 63.

If the lien in the case now before the court can be sustained, of course the property liened ought to be able to be sold and title passed to the purchaser, but that cannot be.

The property and franchises of a corporation cannot be sold piecemeal under executions.

Graham v. Pennsylvania & O. Canal Co. 3 Pittsb. 541; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Bayard's Appeal*, 73 Pa. 453; *Longstreth v. Philadelphia & R. R. Co.* 11 W. N. C. 309; *Com. v. Susquehanna & D. R. R. Co.* 123 Pa. 306, 1 L. R. A. 225.

Lands necessary for the enjoyment and exercise of a corporate franchise are parts of it, and cannot be levied on apart from it.

Plymouth R. Co. v. Colwell, 89 Pa. 337, 80 Am. Dec. 526; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. 465, 86 Am. Dec. 552.

A railroad with its right of way, embankments, excavations, iron rails, switches, depots, engine house, etc., is, in a certain sense an entirety, extending from one terminus to the other.

Dubugue v. Chicago, D. & M. R. Co. 47 Iowa, 202; *Elizabethtown & P. R. Co. v. Elizabethtown*, 12 Bush, 238; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 584.

Mr. John M. Ridings for appellee.

Dean, J., delivered the opinion of the court:

The defendant is the owner of a large lot of ground in the city of Philadelphia, fronting on Richmond street about 1,547 feet, and extending back to the port warden's line on the Delaware river. Against this property the city filed a municipal lien for part of the cost of constructing a sewer on Richmond street, between Cumberland and William streets. Scire facias was issued on the lien, to which defendant made affidavit of defense, of which this is the material averment: "The said large lot of ground is entirely and exclusively used as the tide-water coal and iron ore terminal of the Philadelphia & Reading Railroad Company. As appears by the said plan, which is an accurate representation of the place, it is covered throughout with a great number of diverging railroad tracks, the said main line entering the property near Somerset street, and spreading out and running to the ends of the wharves, some twenty in number, whereby coal is shipped into vessels for export, and iron ore is re-

ceived from vessels bringing the same here, and loaded into the cars for inland transportation. Engines traverse all the tracks as upon other parts of the railroad. The said lot of ground is an absolutely necessary part of the railroad of the said company." There was a rule for judgment for want of a sufficient affidavit of defense, which the court below, in opinion filed (4 Pa. Dist. R. 453), made absolute, and defendant appeals.

It was decided that the roadbed of a railroad is not, as land, subject to general taxation, nor to special assessments for city improvements, in *Philadelphia v. Philadelphia, W. & B. R. Co.*, 38 Pa. 41. This case was decided in 1856, but not reported and published until 1859, so that the act of April 21, 1858 (P. L. 385), could not have been before the court. The facts of the case show that it was a scire facias on a municipal lien for paving along the railroad, which occupied a strip of land 2,046 feet long by 47 feet wide. The court below says: "The single question is whether the remedy by scire facias on the claim filed can be enforced against a corporate body clothed with the usual railway franchise. The process which the plaintiff seeks to use is directed wholly against the soil of the railway, together with the structure of the railway itself; and, upon a judgment upon it for the plaintiff, this *corpus* may be sold under a *levari facias* to the highest bidder at a sheriff's sale. To authorize this would be to inflict a serious public evil: and this, too, without the pretext of a benefit having been received by the company, by reason of the paving of the public highway contiguous to the railroad." The court then cites a number of cases in this state, which hold that certain kinds of real estate cannot be taken away from the company by sale under the ordinary forms of adverse process; that, even conceding the railroad company might be charged in some mode of proceeding with the cost of paving, the proceeding by scire facias and *levari facias* was not the proper one, because directed against the roadbed. The judgment was affirmed in this court for two reasons, in substance the same as those given by the court below: (1) The claim had no foundation in the letter or spirit of the law. (2) The form of the remedy was one which was inapplicable as against a corporation operating a public highway, because it would destroy that in which the public had an interest. The decisions of the court below and this court are based mainly on the absence of statutory authority to seize and sell, for assessments, the roadbed of a railroad company as land; and reasons of more or less force are given why the absence of such authority is wise. While the facts in this case show the decision was eminently just, for the sale sought to be enforced by a *levari facias* was of a strip of land only 47 feet wide, on which was the actual structure of the railroad, yet the cases decided up to that time show the exemption of property from taxation, on the plea that it was an indispensable part of the corporate franchise, had reached a point which, in the legislative mind, was no longer tolerable. Water stations, depots, toll houses, reservoirs, houses and gardens of lock tenders and collectors, engines, and machinery for raising cars up planes, collectors' and engineers' offices, all were exempt on the ground that they were

indispensable to the exercise of the franchise. As noticed, this last decision was in 1856, but then came the act of April 21, 1858, which contains this provision: "The offices, depots, car houses, and other real property of railroad corporations situated in said city (Philadelphia), the superstructure of the road and water stations only excepted, are and hereafter shall be subject to taxation by ordinances for city purposes." From its plain words, this was not an act defining what amount or what character of taxes might be imposed on corporate property, but an act declaring what property thereafter should not be exempt, and what should be, from taxation. It brought again within the taxing power a very large amount of property, which under the former decisions of this court had escaped. And it declared in explicit terms that the superstructure and water stations should be exempt. Although the word "superstructure" might, in present railway engineering phraseology, be limited to sleepers, rails, and fastenings (see *Superstructure*, Century Dictionary), yet we have no doubt that the legislature of that day, adopting the ordinary meaning of the word, intended by it the roadbed, with whatever had been constructed upon it. Except this and water stations, railroad real estate should be subject to taxation.

But it is argued that the words "subject to taxation by ordinances for city purposes" only mean taxation for ordinary revenue, and give no authority to assess for municipal improvements. Under the authorities the word "taxation" does not always indicate a power of assessments for local improvements. The purpose as well as the language of the act may exclude such power. But this act plainly includes the power. The purpose, as declared in the preamble, is the equalization of the public burden. The burden, under the decisions, had not been theretofore shared equally, if the landowner for 1,500 feet of a large lot on one side of Richmond street escaped assessments for municipal improvements, while the lotowners on the opposite side paid the whole. The intention was inequality should be remedied. How? By conferring power to tax it by "ordinances for city purposes." The construction of the sewer is a city purpose. Therefore the power to assess for payment of the cost of it, theretofore limited, is thereafter almost unrestricted. The power conferred is intended to be ample that the evil before existing because of want of it should be remedied. We are of opinion that this act conferred fully on the city the power here claimed, to assess, by ordinance, railroad real estate for local improvements.

The *Junction Railroad Case*, 88 Pa. 428, following *Philadelphia v. Philadelphia, W. & B. R. Co.* *supra*, declares the roadbed exempt, but recognizes the well-marked distinction made by the act of 1858 between the roadbed and other real estate of the company. The claim in the *Junction Railroad Case* was filed against the strip of land constituting the roadbed, and on that ground was not sustained. Nor can the roadbed here be made subject to this lien. Just what portion of this land is subject to lien for this assessment we do not

decide. Clearly a large part of it is not roadbed. The affidavit and map filed show a large part of the land is a coal yard or terminal. Defendant, by its act of incorporation, is authorized to appropriate for roadbed a strip of land 4 rods or 66 feet wide. In addition it can appropriate land for sidings and turnouts for the speedy and safe passage of its cars. Land so taken would properly be termed "roadbed" and be exempt from taxation. But a tract of land 1,500 feet wide, extending from Richmond street to the river, used as a coal and ore terminal, is not a roadbed, any more than the private coal yards in the city, where, by turnouts and sidings the company dumps coal, are parts of the roadbed. All are appurtenant to the business of the road, but are not an integral part of it in conducting its business as a carrier. If it did not provide these terminal facilities, private individuals, with a view to profit, would. The complete control of such a yard by the company, doubtless, adds to the efficiency and economy of shipment and delivery after the coal is carried between point of consignment and destination, and the company may properly own and control the land as a stimulant to its business; but, if it chooses to do so, it must pay municipal assessments, as other real-estate owners.

While we can, from this record, determine that a large part of this 1,500 feet is not roadbed, we cannot say just how much is. But that fact prevents not the entry of judgment. The plaintiff has a lien on the land in excess of that not subject to municipal assessment. A sale of the land passes to the purchaser nothing the lien does not bind. He takes it subject to defendant's easement. In *Re Howard Street*, 142 Pa. 601, our Brother Mitchell, in passing on the constitutionality of this act of 1858, to the apportionment of benefits and damages, suggests that serious difficulties may arise from lack of provision for collection and distribution; but he says none of them arise in that case, and they may never arise. A similar question was raised in *Re Opening of Berks Street*, 12 W. N. C. 10, where the court says it is something with which it has nothing to do. The same argument is presented here; that is, the insufficiency of the process to enforce the judgment. We might pass the question, as was done in the other cases, as one which could only arise when the writ was issued on the judgment. But the difficulties presented in the cases cited, which were to assess and apportion damages and benefits caused by the opening of streets, do not appear here. The city has its judgment *in rem* against land on which defendant had, under the law, before the filing of the municipal lien, a visible notorious easement or right of way to the extent of its roadbed. No adverse process could disturb it in the enjoyment of this easement, for, as is held in *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 43 Am. Dec. 815, and the many cases following it, "the franchises and corporate rights of a company, and the means vested in them which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away and transferred by any act of the company itself or

by any adverse process against it." The roadbed running to the river through this yard, made necessary to the existence of the road as a common carrier, cannot be taken from it by a proceeding *in rem* against the yard. The purchaser takes subject to the easement, just as the purchaser of land at sale under a mortgage takes subject to an open, visible easement antedating the mortgage. The argument of appellant's counsel, although a most able one, does not treat the act of 1858 as the undoubted law on which the case turns. We are clearly of the opinion that the city's claim is sustained by this act; that it, in effect, negatived a large number of the decisions of this court announced before its passage, in view of the statutes on this subject then existing. Since 1858, what land held by railroads in Philadelphia shall be assessed for municipal improvements is no longer a judicial question. The statute has answered it in unmistakable terms.

The judgment is affirmed.

Mitchell, J., dissenting:

It is conceded that the roadbed or other part of the property essential to the franchise is not subject to taxation or municipal charges, while property merely convenient may be. The affidavits in these cases raise questions of fact as to which class the premises liened belong to, and I would send the cases to a jury to settle these questions before judgment, and not leave them to future contest as suggested in the opinion of the court.

J. F. WHITE *et al.*

v.

City of MEADVILLE *et al.*

(177 Pa. 642.)

A municipal corporation which has contracted with a private corporation for a water supply as authorized by the act of May 23, 1874, cannot subsequently proceed to erect a plant of its own, as it is authorized to do by another section of the act, but in case it wishes to own a waterworks plant it must proceed, under § 60 of the act, to acquire the one belonging to the other contracting party.

(October 5, 1894.)

EXCEPTIONS to rulings of a referee in a proceeding to enjoin defendants from carrying out contracts for the erection of waterworks. *Sustained.*

The facts are stated in the opinion.

Messrs. Carl I. Heydrick and C. Heydrick for plaintiffs.

Messrs. Arthur L. Bates, City Solicitor, **Samuel Gustine Thompson**, **George W. Haskins**, **Thomas Roddy**, and **John O. McClintock**, for defendants:

The municipal legislation on the subject of waterworks, as on other subjects, is vested in the municipal authorities and subject to their discretion, under the law, and the action of the

NOTE.—For a somewhat similar case decided differently, see *Re Brooklyn* (N. Y.) 26 L. R. A. 270.

city authorities in this case is not an abuse of power.

Lehigh Water Co.'s Appeal, 103 Pa. 515; *Re Millvale*, 162 Pa. 374; *Luzerne Water Co. v. Toby Creek Water Co.* 148 Pa. 568.

When a statute prescribes for a municipal corporation a specific mode of contracting that mode must be strictly observed, nor can the city officials bind it to any greater extent or in any different manner.

Leavenworth v. Norton, 1 Kan. 482; *Rhineland v. New York*, 24 How. Pr. 304; *Lafayette v. Cox*, 5 Ind. 39; *McCracken v. San Francisco*, 16 Cal. 620; *Farmers' Loan & T. Co. v. Carroll*, 5 Barb. 649; *Head v. Providence Ins. Co.* 6 U. S. 2 Cranch, 127, 2 L. ed. 229; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 64, 6 L. ed. 552; *Zottman v. San Francisco*, 20 Cal. 102, 81 Am. Dec. 96; *Nicolson Pav. Co. v. Painter*, 85 Cal. 705; *Police Jury v. Britton*, 82 U. S. 15 Wall. 566, 21 L. ed. 251, *Shawnee County Comrs. v. Carter*, 2 Kan. 115.

Where, as is sometimes the case, the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive and must be pursued or the contract will not bind the corporation.

Dill. Mun. Corp. § 378; Head v. Providence Ins. Co. 6 U. S. 2 Cranch, 128, 2 L. ed. 230; *Meadville's Appeals* (Pa.) 5 Atl. 780; *Fuller v. Scranton*, 18 W. N. C. 18; *Addis v. Pittsburgh*, 85 Pa. 879.

This case is not one of the water company against the city, but of a taxpayer against the city; on the ground that he is a taxpayer. Such taxpayer has no right to raise the question of the equities, if any, between the Meadville Water Company and the city.

If the corporation act confers exclusive privileges the act of 1889 repeals it to the extent of such privileges.

Luzerne Water Co. v. Toby Creek Water Co. *supra*.

A grant of exclusive privileges is not favored by the law, and must be construed strictly.

Freeport Waterworks Co. v. Prager, 129 Pa. 605.

When the alleged contract was attempted to be made, November, 1874, with the Meadville Water Company, there was no legislative authority empowering the city to furnish water by a "contract with, or authorizing any person, company, or association to erect waterworks," as the act of April 23, 1874, did not apply. The city could make a contract for the supply of water, but the authority to delegate and by delegation exhaust its power did not exist under the act.

This power, being legislative and therefore discretionary, cannot be controlled by the courts or surrendered or bargained away.

25 Am. & Eng. Enc. Law, p. 1043; *State, Durant v. Jersey City*, 25 N. J. L. 309; *State, Townsend v. Jersey City*, 26 N. J. L. 444.

A municipal corporation cannot divest itself of the legislative discretion conferred upon it by law; it cannot surrender it by contract nor bind itself not to exercise it whenever it may become necessary.

Brick Presby. Church v. New York, 5 Cow. 540; 15 Am. & Eng. Enc. Law, p. 1045; *Dill. Mun. Corp.* 4th ed. ¶¶ 94, 97; *Branson v.* 34 L. R. A.

Philadelphia, 47 Pa. 329; *Johnson v. Philadelphia*, 60 Pa. 445.

This power being legislative, the corporate authorities in the exercise of their discretion are not subject to judicial control.

Howard's Appeal, 162 Pa. 374; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

The councils had no power to grant exclusive privileges, and if they had so granted them they had the right to revoke them.

Meadville Fuel Gas Co.'s Appeal (Pa.) 4 Atl. 786.

Dean, J., delivered the opinion of the court:

The city of Meadville was incorporated by act of February 15, 1866, and supplements of March 28 and April 6, 1870. Its municipal powers and privileges are also regulated by the general act of May 23, 1874, for government of cities of the third class. Before the adoption of the present Constitution, its debt exceeded 2 per cent of the assessed value of its taxable property. On 16th of December, 1873, an election was held to determine whether the city should construct municipal waterworks to supply the inhabitants with water. The vote was 177 for, and 519 against, the proposition. Then, August 5, 1874, the mayor was authorized by councils to appoint a committee to confer with citizens on the subject of a supply of water, and the committee was appointed. No written report seems to have been made, but on the 12th of August, following, it was resolved by councils that the proposition of Dick & Gill and others be accepted. Then on October 23, 1874, a committee of councils and the mayor were authorized to contract for the construction of such works with the Meadville Water Company as soon as the company was duly incorporated. Articles of association were then entered into by 100 citizens and taxpayers for the formation of the company, which was duly chartered October 30, 1874; and on November 7 a contract was signed by the mayor, for the city, attested by the clerk and by the proper officers of the company. This contract provided for a supply of water for all city purposes, in pursuance of the authority conferred by their charter to supply the public, and, further, that connections with the water-mains should be made on all the streets, for hydrants, public buildings, markets, fountains, etc.; such connections to be designated by the city. The grades of all streets, lanes, and alleys where water mains should be laid were to be furnished by the city, which should grant the right of way through all such streets, lanes, and alleys. For furnishing water for city purposes, the company was to be paid \$6,000 annually. The contract was to continue ten years, and then for another ten years, with some change of compensation for fire hydrants. The company then proceeded with the construction of its works, and completed the same at a cost of about \$185,000. The city made annual appropriations to pay for the water furnished for city purposes up until 1893, when further payment was refused on the ground that the original contract was invalid for want of proper ordinance authorizing the same.

On September 21, 1894, city councils passed an ordinance that \$75,000 of city bonds should be issued for purpose of constructing new municipal waterworks. Notice was then given of an election for the proposed increase of debt, in which it was stated that the assessed valuation of the city was \$2,030,000, and the existing debt \$61,500; that the proposed increase of debt for the construction of the waterworks was 3.7 per cent. The majority of the voters favored the increase of debt. Councils then, on March 11, 1895, adopted this ordinance: "That a system of waterworks be built and erected for the use of the city of Meadville for the purpose of supplying said city with water, and such persons and corporations as may desire the same; to be made and completed in accordance with the plans to be provided by the civil engineer of the city." The city engineer prepared plans for the new works, embracing about 22 miles of mains to be put down on the streets and alleys of the city, reaching for the most part all the consumers of water supplied by the old company. Further, the city entered into a contract with Chandley Bros. & Co. for the construction of the works in accordance with the plans of the city engineer; the price to be paid being \$104,723, not including cost of land for pumping station, water wells, reservoir, or right of way through private land. These plaintiffs then filed this bill to restrain the city from carrying out the contract, they averring in said bill (1) illegality and irregularity of the election for increase of debt; (2) that the proposed increase of debt exceeded the constitutional limit of municipal indebtedness; (3) that the construction of municipal works, in view of the contract obligations of the city with the Meadville Water Company, was without authority of law, and, even if the power existed, the proposed exercise of it was a gross abuse of the power. The city filed an answer denying all the material averments of plaintiffs' bill, and conclusions of law therefrom, and further affirmatively alleging that the original contract was invalid, not being authorized by proper ordinance, and therefore was not binding upon the city. By agreement of the parties, Theodore Lamb, Esq., was appointed referee, to report facts and conclusions of law. He made a report, and on the facts concludes (1) that, although there was no formal ordinance authorizing the contract, the city, by subsequent distinct, unequivocal acts, running through years, had ratified it, and was legally bound by its terms; (2) the irregularities attending the election on the question of increase of indebtedness were not sufficiently grave to invalidate it; (3) that the proposed increase of indebtedness by the contract with Chandley Bros. & Co. for construction, added to the existing bonded indebtedness of the city, did exceed 7 per cent of the taxable property, and was therefore void, being in violation of the Constitution; (4) that the city has full power to make the contract, if the debt had not exceeded the constitutional limit. It is therefore suggested that an injunction issue to restrain the city from further proceeding with the construction of the municipal works. Both parties have filed exceptions to this decree. We fully concur in the referee's finding of fact, and approve all his conclusions of law, except

34 L. R. A.

the tenth. This disposes of all the exceptions on both sides but the plaintiffs' fifth exception, which is to the referee's conclusion that the city had power to make the new contract, notwithstanding its liability on the old one. It is perhaps needless to say that the question raised is not altogether free from difficulty, and we might avoid passing upon it in this particular case; but the same question is already before us in one other case, and like circumstances existing in perhaps a hundred others, involving millions of property, may raise it in the future. Therefore our plain duty is to pass upon it here. We have had the aid of full and able argument on each side. The full bench has given it prolonged and complete consideration in all its aspects, and as a result this judgment is fully concurred in by every member of the court.

As before noted, the question is raised by the referee's tenth conclusion of law, as follows: "(10) In the opinion of the referee, the right of the city of Meadville to build waterworks is one governed by legal considerations alone. Has the city power to do so? If so, the works may be constructed, and no equitable considerations can stay her hands. When the Meadville Water Company constructed its plant, it did so with knowledge that the city had the right to construct waterworks at any time, and it was bound to know that the city had the right to reconsider its determination not to do so at any time. The building of other works may, and undoubtedly will, seriously affect the present company, but the loss that may occur is one for which the law allows no compensation. It seems to me that the cases of *Lehigh Water Co.'s Appeal*, 102 Pa. 515, and *Re Millvale*, 162 Pa. 874, fully settle this doctrine."

The general borough act of 1851, under which Meadville first became a municipality, gave authority to boroughs to "light the streets, to provide a supply of water for the use of the inhabitants, . . . to make all needful regulations for the protection of pipes, lamps, reservoirs, and other construction or apparatus, and to prevent the waste of water so supplied." This clause was reenacted in the city's special charter of 1866, with the addition of authority to supply itself with water for fire purposes. And so the authority continued, as the referee finds, down to August 13, 1891, when, by proper official action, it accepted the provisions of the act of assembly of May 23, 1874, providing for the organization and government of cities of the third class, in which class it took its appropriate place. That act authorizes cities of this class, in their corporate capacity, to "supply with water the city and such persons, partnerships, and corporations therein as may desire the same, at such prices as may be agreed upon and for that purpose have at all times the unrestricted right to make, erect, and maintain all proper waterworks, machinery, buildings, cisterns, reservoirs, pipes, and conduits for the raising, reception, conveyance, and distribution of water, or to make contracts with, and authorize any person, company, or association to erect all proper waterworks, machinery, buildings, cisterns, reservoirs, pipes, and conduits for the

raising, reception, conveyance, and distribution of water, and give such persons, company, or association the exclusive privilege of furnishing water as aforesaid for any length of time not exceeding ten years." The fiftieth section of the same act, in order to effect the powers thus given more fully, authorizes the purchase by the city, at such price as may be agreed upon, of the rights, privileges, and franchises of any water company then in operation, and thereafter to exercise all the powers of the company so purchased. The 53d section confers on the city the right of eminent domain, and authorizes it to appropriate such land and property as may be required in the construction of waterworks. The corporation act of April 29, 1874, gives to water companies the right to introduce into boroughs and cities, wherever they may be located, a sufficient supply of pure water; and, when completed, its right in the locality covered by its works is exclusive, until, during a period of five years, the company has divided among its stockholders a dividend equal to 8 per cent upon its capital stock. Then it is made lawful, after twenty years from the introduction of the water, for the municipality to become the owner of the waterworks, by paying the net cost of erecting and maintaining the same, with interest thereon at the rate of 10 per cent per annum, deducting from such interest, however, any dividends theretofore declared. Both acts were passed at the same session of the legislature, within four weeks of each other. They are very elaborate, apparently making provision for every contingency that occurred to the legislative mind at the date of their passage; and clearly, from the proximity in dates of their discussion and enactment, no provision in the later act was intended to repeal the first directly or by repugnancy. In *Smith v. People*, 47 N. Y. 390, is this apt language, applicable to such facts: "Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect so as to give validity and effect to every other act passed at the same session."

Here, then, plainly, were two distinct methods by which the municipality could supply its citizens with water. By putting either method in operation the same end was accomplished; that is, the supplying of the citizens with water. There is no repugnancy in the provisions of the two acts, on the assumption that one or the other alone will be adopted to effect the purpose. There will be a decided repugnancy in their operation if both be put at work at the same time to effect that purpose. If anything be manifest, it is that if two water mains be laid side by side on the same street, equally accessible to the householder on each side, conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries, and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory

taxation, support the municipal system, he will not voluntarily support the private corporation system. Such a conflict of interests will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume—every court is bound to hesitate long before assuming—that the legislature intends, by grants to distinct corporations for public purposes, that there shall arise such conflict in the exercise of the franchises as will result in the practical destruction of property of any citizen without compensation. It is a cardinal rule of construction, between older and younger grants of franchises, that the sovereign does not intend that the younger shall infringe on the older; but to assume that these franchises can be in existence and in operation at the same time is to assume that the commonwealth has granted precisely the same thing to the municipality that it had already granted to the water company, for, in a business view, the contemporaneous exercise of the franchises is impossible. Therefore, in approaching the consideration of the words of the acts, the judicial mind, at the start, must incline against the conclusion of the learned referee. Consider, then, the words of clause 9 of the 20th section of the act of May 23, 1874. The city is "to have at all times the exclusive right to supply itself with water, and such persons, partnerships, and corporations at such prices as may be agreed upon." This is the grant by the commonwealth of the power or authority to its creature, the municipality, which without the grant was helpless, in this purely commercial matter. It was not an exercise of governmental power, which would be implied from the mere creation of a municipality. In *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 185, this court, in discussing this question, adopted this language: "As a local sovereign, it [the city] had no authority to enter into the business of manufacturing and selling gas. For its sovereignty did not extend to such subjects, any more than it did to almost any other manufacture. It is true, a municipal corporation is not bound by any engagement which prevents a discharge of the duties imposed upon it by its organic law, for the plain reason that such engagements are contrary to law. But when such a corporation engages in things not public in their nature, it acts as a private individual, no longer legislates, but contracts, and is as much bound by its engagements as is a natural person. The distinction between public duties and private business is wide and obvious." Therefore the grant specifically of the means by which the power may be executed is given. It shall have the unrestricted right to erect and maintain proper waterworks, machinery, buildings, and reservoirs, to convey and distribute the water. First is the exclusive power to supply itself, and then the powers incident to and necessary to make the first power effective. To have granted the right only to supply itself would have left a doubtful implication, as to whether it might erect its own works, or should buy its supply from corporation dealers in water. But after the grant of the right to supply, and the one method of exercising the right, it occurs to the legislative mind, as all such grants are strictly construed, and this prescribes but one method,

that the city may be shut up to that one. The legislature, only twenty-four days before, had enacted that water companies might be authorized to supply water, and should have power to erect and maintain all works and machinery necessary and proper for raising and introducing into the town, borough, city, or district where they may be located a sufficient supply of pure water. Here was another kind of corporation than municipal, empowered to convey and distribute water to cities and towns. The city may not desire to erect and manage its own waterworks; may prefer to purchase water. Then comes the grant of a second method of supplying itself with water: "Or to make contracts with and authorize any persons, company, or association" to convey and distribute the water for any length of time not exceeding ten years. The primary grant was the power to supply; the secondary one, the grant of two distinct methods of exercising the power, either of which might be adopted. There was no grant of power to put both methods in operation at the same time; for once the power has been exercised to supply the city, by contract, through another creature of the same sovereign, then the municipal function has passed from the city, and must be performed by the other contracting party, which last has rights and obligations imposed upon it by law, as clearly defined and as capable of enforcement as those of the city. As long as the city keeps within the scope of its powers to bargain, it must stand by the bargain, the same as an individual. We do not doubt that the legislature could, by the act of May 23, 1874, have granted to the city the right to change back and forth from one method of supply to the other, as whim or interest might dictate. It is sufficient to say that it did not do so. This view of the scope of legislation on this subject accords with the known facts. A municipality, in its beginnings, is perhaps not financially strong, or its debt may approach the constitutional limit so closely that it cannot borrow. Nevertheless the low state of its financial condition does not render less urgent the necessity of a water supply. It can obtain it in but one way,—by contract with those who have the money, and are willing to invest their private capital in the construction of waterworks. The legislature knew that capital would not be invested in such an enterprise if in the future it were liable to confiscation by competition with a public enterprise operated from a municipal treasury capable of replenishment from the pocket of the taxpayer. That fact suggested clause 7 of the corporation act. The municipality will not be forever poor. The time will come when it will be of financial ability to own and operate its own works. The very fact of having a supply of water on an investment of private capital has tended to stimulate its growth, and to largely appreciate the value of taxable property. Therefore, says the legislature: "It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city, or district in which the said company shall be located, to become the owners of said works, and the property of said company, by paying therefor the net cost of

erecting and maintaining the same, with interest thereon, at the rate of 10 per centum per annum, deducting from said interest all dividends theretofore declared: provided, that nothing in this section contained shall authorize a company incorporated under the provisions of this act to construct gas or waterworks within the limits of any municipality, when gas or waterworks shall have been constructed by said municipality, without the lawful consent of the corporate authorities thereof: and provided further, that the court of common pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said companies to hear, inquire, and determine as to the charges thereof for gas or water so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to their decrees by the usual process."

It is correct, as argued by defendants, that this clause is repealed by the act of May 23, 1889; but as between these contracting parties, whose rights vested at the date of the contract, the subsequent act could not divest them. If the act of 1874 had provided that the works should be taken at their actual value, and then had enacted a merely different form of procedure to ascertain the value, the contract right would not, perhaps, have been affected by the act of 1889. But here the value is a fixed one,—the net cost, with interest at 10 per cent per annum, deducting dividends. The result is one of computation. There is no room for discretion or judgment, which may be exercised under one form of proceeding as well as another. Both the contracting parties must be conclusively presumed to have had in view the law which empowered them to contract, and which became part of the contract. At the end of twenty years the defendants have a right to take the works at a price fixed by the law, and that is one of computation. True, as to the city, the taking of the works is only permissive. It is not bound to take them; while, if the city demands, plaintiffs are bound to surrender them. But, if the city does not choose to become the owner of the works in the mode pointed out in the act, it has no power to destroy their value by duplicating them at the expense of the taxpayers.

As to the question raised by clause 3, we decline to discuss it, as it has no bearing on the one before us. It will be time enough for that when two private corporations seek to exercise their franchises in the city at the same time.

The argument that by this construction the citizens are in the power of a private corporation, having the sole authority to determine the price, quantity, and quality of the water supply, is completely answered by the second proviso to clause 7, and subsequent legislation regulating the conduct of water companies. *Brymer v. Butler Water Co.* 172 Pa. 489; *Com. v. McCormick*, *v. Russell*, Id. 506. The two cases cited by the referee as sustaining his decision (*Lahigh Water Co.'s Appeal*, 102 Pa. 515. and *Re Millvale*, 162 Pa. 374), are in apparent conflict with this judgment; and the language of the court, to some extent, in both cases, would lead to a different conclusion from the one to

which we have come. The first case, on its facts, however, is not the same as this. By a supplement to the act incorporating the borough of Easton, March 12, 1867, the town council was authorized to construct and provide waterworks, and elect water commissioners. Then, by another supplement, April 15 of the same year, the borough was authorized to construct or purchase waterworks. In this case the municipality had by these special acts, with the consent of the majority of voters, the authority to erect its own waterworks; and this special legislation constituted part of its corporate power, antedating the present Constitution and the acts of 1874. By the schedule to the Constitution it is declared: "All laws in force in this commonwealth at the time of the adoption of this Constitution, not inconsistent therewith, and all rights, actions, prosecutions and contracts, shall continue as if this Constitution had not been adopted." It was held that the authority conferred by the special acts of 1867 was not taken away by the act of 1874 giving the exclusive right to the water company. When it is noticed that the controversy turned on the repeal or nonrepeal of the special acts, and whether the borough had, by inaction under the special law, lost its right to construct municipal waterworks, the distinction between that case and the one before us is obvious. Without adverting to what was said by Justice Paxson in delivering the opinion, and considering only what was decided, there is no conflict between that case and this. In *Re Millvale*, *supra*, it was assumed by all parties in the court below, and by the learned judge of that court, that the authority of the municipality to violate its contract existed. On the appeal the point pressed in this case was scarcely touched upon in the argument. With the greatest reluctance on the part of every member of this court, the decree of the court below was affirmed. That reluctance is expressed in no doubtful language by our Brother Green, who delivered the opinion. In fact, it was assumed by all counsel and both courts that *Lehigh Water Co.'s Appeal*, *supra*, was decisive of the contention on that point, and the case went against the water company on other grounds. It was a mistake. We now are glad of the opportunity for correction,—especially so because the example of Millvale borough seems to have misled other municipal corporations to adopt the same course of action. *Luzerne Water Co. v. Toby Creek Water Co.* 143 Pa. 568, also cited by defendants, was a controversy between two rival companies, and the power of the municipality did not come in question.

Therefore in this case we are of opinion, for the reasons given, that the fifth exception to the learned referee's tenth conclusion of law should be sustained, and it is decreed accordingly. Further, it is directed that the said defendants and each and every of them, be restrained by a permanent injunction from entering into contract for the construction of waterworks in accordance with the plans prepared by the city civil engineer as aforesaid. It is further ordered that defendants pay the costs of this proceeding.

34 L. R. A.

NORTHERN CENTRAL RAILWAY COMPANY, Appt.,

HARRISBURG & MECHANICSBURG ELECTRIC RAILWAY COMPANY *et al.*

(177 Pa. 142.)

1. **Authority to a street-railway company to cross any railroad operated by steam or otherwise does not give power to cross elsewhere than at points where the railroad is crossed by a street or highway when other sections of the street-railway charter confine the adoption of its route to established streets and public highways.**
2. **A railroad right of way is property which the company may protect from unlawful invasion by a street-railroad company which seeks to establish a crossing over it.**
3. **Constructing a street railway on a viaduct 100 feet long and 23 feet high over a railroad company's right of way, and operating cars thereon, are such an invasion of the rights of the railroad company as will entitle it to maintain a suit to restrain it.**

(October 5, 1890.)

A PPEAL by complainant from a decree of the Court of Common Pleas for Cumberland County dismissing a bill filed to enjoin defendants from crossing plaintiff's right of way. *Reversed.*

The facts are stated in the opinion.

Messrs. Edward B. Watts, W. F. Sadler, and John Hays, for appellants;

There was no right to cross land held in fee. *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 167 Pa. 62, 27 L. R. A. 766; *Lehigh Coal & N. Co. v. Inter-County Street R. Co.* 167 Pa. 75.

The Northern Central Railway Company has not only the same right as a private person to be compensated for injury to the land held by it in fee, which the defendant proposes to cross, but it also has such property or ownership in its right of way as cannot be appropriated to public use without its consent, unless provision be made for compensation for the damages suffered.

Pennsylvania S. V. R. Co. v. Reading Paper Mills, 149 Pa. 18; *Potts v. Quaker City Elec. R. Co.* 161 Pa. 396; *Pittsburgh Ft. W. & C. R. Co. v. Feet*, 152 Pa. 488, 19 L. R. A. 467; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511; *Old Colony & F. R. Co. v. Plymouth County*, 14 Gray, 155.

It was improper to begin the construction of the defendant's railway without the consent of all the owners of land through which it passed or which abutted on the roads over which it is proposed to build the same. The defendant did not have the consent of all such owners.

Lehigh Coal & N. Co. v. Inter-County Street R. Co. *supra*.

NOTE.—For crossing a railroad by a street railway without compensation to the railroad company, see *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (Ill.) 20 L. R. A. 485, and note.

Messrs. A. G. Miller and J. W. Wetsel,
for appellees:

Building on township roads is recognized by the Constitution.

Art. 17, § 9: *Gettysburg Battlefield Assn. v. Gettysburg Electric R. Co.* 2 Pa. Dist. R. 659; *Gillette v. Chester & M. R. Co.* Id. 450; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 3 Pa. Dist. R. 58; *Union Street R. Co. v. Hazleton & N. S. Electric R. Co.* 154 Pa. 422; *Plymouth Twp. v. Chestnut Hill & N. R. Co.* 168 Pa. 181.

A railroad is a highway—a public highway—and is not held for all purposes as private property.

Pittsburgh & C. R. Co. v. Southwest Pennsylvania R. Co. 77 Pa. 173.

The Constitution of the state permits crossings.

Const. 1874, art. 17, § 1: *Junction R. Co. v. Philadelphia*, 88 Pa. 424.

The learned court properly said that it was not within its province to question the franchise granted by the state.

Turnpike Co. v. Jenkintown Electric R. Co. and Plymouth Twp. v. Chestnut Hill & N. R. Co. 4 Pa. Dist. R. 8.

It matters not, so far as the right to cross steam railroads is conferred by act May 14, 1889, § 18, whether the land occupied by the railroad company for railroad and track purposes is held by easement, as it is commonly called, or in fee simple. It is the possession for railroad purposes, which prevails, and not as to how the right of possession was obtained.

Junction R. Co. v. Philadelphia, *supra*.

By virtue of act May 14, 1889, § 18, electric railways may cross steam railroads, and that, too, without compensation, etc., and the said act is constitutional.

Lockhart v. Craig Street R. Co. 8 Pa. Co. Ct. 470, 139 Pa. 419; *Delaware, L. & W. R. Co. v. Wilkesbarre & W. S. R. Co.* 1 Pa. Dist. R. 627.

This right to occupy the turnpikes and cross steam railroads is absolute by virtue of the act of 1889, and if the said railroads feel aggrieved, or that conditions to preserve their rights and safety of the public are necessary, an appeal can be made to the court under the act of June 19, 1871.

Delaware, L. & W. R. Co. v. Wilkesbarre & W. S. R. Co. *supra*; *Pennsylvania R. Co. v. Broaddock Electric R. Co.* 152 Pa. 116.

The right to cross another railway or railroad is expressly given, and prior consent is not needed.

Citizens' Pass. R. Co. v. East Harrisburg Pass. R. Co. 164 Pa. 274.

The court found that appellant would not be injured nor interfered with in the operation of its railroad by an overhead crossing as contemplated, and therefore there was no necessity to make an order defining conditions under the act of 1871.

Delaware, L. & W. R. Co. v. Wilkesbarre & W. S. R. Co. *supra*.

Railways may diverge for a short distance where the conformation of the service or the position of streams makes it necessary in order to avoid discomfort or danger to the traveling public.

Rahn Twp. v. Tamaqua & L. Street R. Co. 167 Pa. 84.

34 L. R. A.

The right of electric passenger railways incorporated under the act of 1889 to occupy county roads with consent of local authorities has been recognized.

Gettysburg Battlefield Assn. v. Gettysburg Electric R. Co. 2 Pa. Dist. R. 659; *Gillette v. Chester & M. R. Co.* Id. 450; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 3 Pa. Dist. R. 58; *Union Street R. Co. v. Hazleton & N. S. Electric R. Co.* 154 Pa. 422; *Plymouth Twp. v. Chestnut Hill & N. R. Co.* 168 Pa. 181.

Sterrett, Ch. J., delivered the opinion of the court:

It is unnecessary to consider all the questions presented by this record. Such of them as are worthy of notice have been referred to, at least briefly, by the learned president of the common pleas in his opinion, findings of fact, and conclusions of law sent up with the record. The general and controlling question, however, is whether a company chartered under the street railway act of May 14, 1889 (Pub. Laws, 211), has the right to construct, maintain, and operate its road across the lines of a steam-railroad company, without the consent and against the protest of the latter, at a point where its roadway is not crossed by a public highway. The answer to this question must, of course, be sought for in the expressly granted or necessarily implied powers and authority with which the street-railway company has been invested by the law under which it was created, and subject to which it continues to exist. If the right referred to cannot be found therein, it necessarily follows that the question must be answered in the negative. Section 1 of the act of 1889 provides "that any number of persons, not less than five, may form a company for the purpose of constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid or to be extended under any existing charter, with the privilege of so much of any street, used or authorized to be used under any existing charter, as is hereinafter provided, for public use in the conveyance of passengers, by any power other than by locomotive; and for that purpose may make and sign articles of association, in which shall be stated . . . the streets and highways upon which the said railway is to be laid and constructed," etc. Section 4, authorizing extensions and branches, declares that "the act of the company authorizing any extension or branch shall distinctly name the streets and highways on which said extension or branch is to be laid or constructed." It also provides that "no extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter except as hereinafter provided." Section 14 authorizes the "use of such portion of the track of any other company, already laid down, as may be necessary to construct a circuit upon its own road at the end thereof." The length of track to be thus used "only with the consent of the local authorities of the city, borough, or township, in no event, shall exceed 500 feet of single track." It also prescribes the mode in which compensation for such use shall be made, etc. The next section declares: "No

street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough, or township without the consent of the local authorities thereof, nor shall any street railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the 500 feet to be used under § 14." Section 17 authorizes the occupation and use of turnpikes, not exceeding sufficient width for two tracks, and requires that compensation for such use shall be first made to the owner or owners of such turnpike or turnpikes, in the mode prescribed in § 14, aforesaid. With the exception of above-mentioned restricted and qualified rights to use a small section of another company's track in forming a circuit, and to occupy and use longitudinal strips of turnpikes, etc., street-railway companies chartered under said act are certainly not in express terms invested with any other power or authority in the nature of eminent domain. Indeed, the specific grant of these qualified rights is strongly indicative of legislative intention to withhold from such companies every other power of eminent domain. This conclusion is further fortified by the provisions intended to restrict them to establish streets and highways as the location of their main lines, extensions, and branches. As we have seen, their right to construct, maintain, and operate street railways is specifically limited to existing streets and highways. The names of the streets and highways selected by them must be stated in each company's articles of association. In the recorded action of the company exercising the branching power, etc., authorized by the act, it must also "distinctly name the streets and highways on which said extension or branch is to be laid or constructed." In brief, in the selection or adoption of the route, either of their main line or of any extension or branch thereof, they are expressly confined to established streets or other avenues in cities and boroughs, and to public highways in townships, subject to such further restrictions, even as to them, as are specified in the act. Outside of and beyond the restricted power and authority as to selection and adoption of a route, etc., thus granted, they are not invested with any other authority in that regard except such as may be necessarily implied. Without ignoring the well-settled rules applicable to the construction of charters, it is impossible to reach any other conclusion than that the legislature, in this carefully drawn and well-guarded act, intended to withhold from companies chartered thereunder everything in the nature of a roving commission under which they might assert the right to locate, construct, and operate street railroads wherever they pleased. It was successfully contended in the court below that the authority given in § 18 of the act "to cross at grade diagonally or transversely, any railroad operated by steam or otherwise," is general in its application, and confers an unqualified right to cross a steam railroad anywhere, without regard to whether there is an established street or highway crossing at the same point or not. This is a grave mistake. As we have seen, location, construction, and operation of street

railways are authorized only on established streets and highways. Section 18 is evidently predicated of that fact, and hence the authority therein granted is necessarily applicable only to crossings at points where the railroad is crossed by a street or highway. In other words, it refers only to crossing at a point where the street or highway on which the street railway is located crosses the steam railroad. To hold otherwise would not only be contrary to the manifest intention of the legislature, but it would involve the constitutionality of the eighteenth section.

As to the property on which the alleged trespass was threatened, the learned trial judge found that "at the place of crossing plaintiff has a right of way 60 feet in width, and an adjoining strip of land 20 feet wide, which was acquired by deed;" and in sustaining plaintiff's eighteenth and nineteenth exceptions to his previous rulings he further found that said 20-foot-wide strip of land owned by it in fee, that prior to filing the bill defendant company attempted to cross plaintiff's land and right of way at the point in question, and that plaintiff had reason to apprehend that such attempt was imminent, etc.; but, in view of the facts, as he found them, he held as matter of law that plaintiff's right of way and ownership in fee of said strip of land were immaterial; that the right to cross plaintiff's railroad, etc., at an elevation of about 23 feet above the surface of its tracks was conferred upon the Harrisburg & Mechanicsburg Electric Railway Company by § 18 of the act, and then said: "The long, narrow piece of land referred to, which is held in fee, is essentially part and parcel of the railroad, just as much so as the easement which it adjoins, and the right to cross it is as clearly given as is the right to cross the easement." For reasons already suggested, we think he was clearly wrong in this. Aside from the ownership in fee of the 20-foot-wide strip, the plaintiff has a substantial property interest in its right of way which the defendant is bound to respect. While that interest cannot be called a fee, it is a species of title that has some of the incidents of an estate in land. As was well said by our Brother Mitchell in *Pennsylvania S. V. R. Co. v. Reading Paper Mills*, 149 Pa. 18: "Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over, the whole surface, to raise and maintain any appropriate superstructure, including necessary foundations, and to deal with it, within the limits of railroad uses, as absolutely and as uncontrolled as an owner in fee. There was no such easement at common law. . . . It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional, fee terminable on the cesser of the use for railroad purposes. But, whatever it may be called, it is, in substance, an interest in the land special and exclusive in its nature, and which may be the subject of special injury. . . . and therefore within the rule which governs the application of equitable relief."

There is also manifest error in the tenth finding of fact, viz.: "So far as the evidence has disclosed, the building of defendant's railway and the running of cars thereon will not

injure or affect the operation of plaintiff's railroad, or inflict upon plaintiff any actual damage. There will be no increase of danger from accident or other cause." Aside from the unauthorized occupation of plaintiff's property by spanning the same with an overhead bridge or viaduct, 100 feet or more in length and about 22 feet above its tracks, at a point where there has never been an overhead or grade crossing of any kind, it is impossible to reach the conclusion that such a superstructure, with electric cars running thereon at frequent intervals, will not result in a greater or less increase of danger to plaintiff company, its patrons, and employees. To what extent the danger from accident or other cause would be increased would, of course, depend very largely on the degree of care and skill exercised in the construction and maintenance of the bridge and in the operation of the street railway thereon; but that, under the most favorable circumstances, there would be an appreciable increase of danger, no one can doubt.

It follows from what has been said that plaintiff had standing to resist the threatened invasion of its rights by the Harrisburg & Mechanicsburg Electric Railway Company, one of the defendants, and, upon the facts shown by the pleadings and proofs, it was entitled to the relief prayed for.

The decree dismissing the bill is accordingly reversed, and the perpetual injunction specially prayed for is now granted against the Harrisburg & Mechanicsburg Electric Railway Company, with costs to be paid by said company; and as to the other defendant the bill is dismissed. It is also ordered that the record be remitted to the court below for further proceedings in accordance with the opinion of this court.

William H. OAKFORD, *Appt.*,

v.

Samuel F. NIXON *et al.*

(177 Pa. 76.)

1. **One having the lease of the roof and outside of a party wall of a building** projecting above the adjoining buildings for the purpose of advertising thereon by means of a stereopticon, is not evicted by the destruction of the value of the wall for advertising purposes, caused by the tenant of the adjoining building, without any denial of the validity of the lease by renting the roof of his building with a screen erected thereon to another advertising company.
2. **A lease of the roof and outside of a party wall of a building** projecting above the adjoining buildings for the purpose of advertising thereon by means of a stereopticon does not become invalid for failure of consideration because the tenant in possession of the adjoining building, without questioning the validity of the lease, leases the roof of his building with a screen erected thereon to another advertising company, by means of which the value of the wall for advertising purposes is destroyed, where the lease contained no provision on that point.

(October 5, 1896.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of defendants in an action brought to recover rent alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinion.

Messrs. Avery D. Harrington and J. Alfred Smith, for appellant:

The contract in suit is a lease, and the amount stipulated to be paid as rent is rent.

2 Bouvier, Law Dict. p. 18; Taylor, Land. & T. 8th ed. ¶ 251; *Branch v. Doane*, 17 Conn. 402; *Davis v. Townsend*, 10 Barb. 333; *Smith v. Simons*, 1 Root, 818, 1 Am. Dec. 48.

There can be no such thing as a party wall where the premises in question and the adjoining premises are owned by the same person, as in this case.

Finley v. Stuebing, 88 Phila. Leg. Int. 386; *Weston v. Arnold*, 22 Week. Rep. 284, 43 L. J. Ch. N. S. 128.

If consent of the tenant of the adjoining property to the use of the wall had been obtained by the lessees, they would presumably have continued to pay the rent. Because they neglected or refused to do so, can the defendants visit the result of such neglect or refusal upon the plaintiff, who was in no default whatever, and refuse to pay the rent due under the contract? When one of two parties to a contract must suffer, shall it not be the one who is in default?

8 Addison, Cont. *1196.

If the thing promised be possible in itself, it is no excuse that the promisor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking, unconditionally, to fulfil a promise when he might have guarded himself by the terms of his contract.

Pennsylvania R. Co. v. Reichert, 58 Md. 261; *Hand v. Baynes*, 4 Whart. 204, 88 Am. Dec. 54; *The B. L. Harriman v. Emerick* ("The Harriman"), 76 U. S. 9 Wall. 161-171, 19 L. ed. 629-632; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Jones v. United States*, 96 U. S. 24-29, 24 L. ed. 644-646; *Bacon v. Cobb*, 45 Ill. 47; *Adams v. Nichols*, 19 Pick. 275, 81 Am. Dec. 187; *Barns v. Wilson*, 116 Pa. 808.

The doctrine of *caveat emptor* applies to the leasing of property, and there is no warranty that the premises shall be fit for the purpose for which they are rented.

Huber v. Baum, 152 Pa. 626.

Mr. James H. Shakespeare, for appellees:

A lease is a demise of lands or tenements, and possession must accompany the lease.

Wood, Land. & T. chap. 42, pp. 793, 796-798; Taylor, Land. & T. 248; *Doran v. Chase*, 2 W. N. C. 609; *Briggs v. Thompson*, 9 Pa. 840.

Appellants were merely tenants by parol from year to year, which year expired August 15, 1892, and at the time of the execution of the instrument sued upon they were liable to a three-months notice from their landlord to vacate the said premises, 29 South Ninth street, on August 15, 1892. Therefore the clause in

NOTE.—As to eviction, see also *Collier v. Cowger* (Ark.) 61 L. R. A. 107, and note; *Edmison v. Lowry* 84 L. R. A.

(S. D.) 17 L. R. A. 275, and note; and *Collins v. Lewis* (Main.) 19 L. R. A. 822.

the instrument sued upon providing that if the bill-posting company held over it should be bound for another year was void because appellants could not make a contract exceeding the duration of their own term.

Taylor, Land, & T. 67, 68.

An eviction by a paramount landlord of any portion of demised premises will suspend the whole rent if the tenant promptly abandons the whole premises.

Seabrook v. Moyer, 88 Pa. 417; *Wolf v. Weiner*, 2 Brewst. (Pa.) 524.

Actual physical expulsion is not necessary to constitute an eviction, but any interference with tenant's beneficial enjoyment will amount to an eviction in law.

Doran v. Chase, and *Briggs v. Thompson*, *supra*.

This suit was not for use or occupation, but was for a future use of something that appellants had no right or authority to promise to give.

Wistar v. American Baptist Pub. Soc. 2 W. N. C. 333.

Appellants being tenants of 29 South Ninth street, rented the inside and not the outside, and had no right to put, or to grant a license to anyone to put, any signs or advertisements on the outside of the south wall thereof (which wall is the subject of the instrument sued upon) unless with the consent of the landlord; and both appellants and their licensee would be liable to the landlord in trespass.

Hels v. Stewart, 19 W. N. C. 129; *Devlin v. Snellenburg*, 132 Pa. 186.

Williams, J., delivered the opinion of the court:

The facts upon which the legal question presented on this record is raised are quite novel. It appears from the evidence that Andrew Moore is the owner of a row of buildings between the hotel known as the "Girard House" and Ninth street, extending from Jayne street to Chestnut. The most northerly of these buildings is No. 29 South Ninth street, and it has been occupied for some time by the plaintiffs as lessees of Moore. The building next to No. 29 is in the occupancy of George M. Moore as a tenant, and is but one story high. The other buildings, down to Chestnut street, are also but one story high, while No. 29 is two stories in height. The south wall of No. 29 is for this reason plainly visible above the buildings south of it to persons going in and out of the postoffice, and to persons passing along Chestnut street, at its intersection with Ninth street, and for some distance westwardly therefrom. The American Bill-Posting Company, Limited, desired to make use of the conspicuous surface so presented for the display of advertisements by means of pictures and words thrown upon the wall by a stereopticon; and it entered into a contract, in the form of a lease, with the plaintiff, for the use of the roof and south wall of No. 29 at an agreed rent. The defendants are the sureties of the company upon this contract. The company took possession of the roof and south wall in pursuance of its contract, and entered upon the display of its advertisements, which were thrown upon the south

wall by means of a stereopticon. Some time afterwards George M. Moore made a lease of the roof of the building occupied by him, for a similar purpose, to the American Exhibition Company. The use of this building was made possible by the erection of a frame upon the roof to support a screen on which views could be displayed. This frame and screen, when in place, nearly covered up the south wall of No. 29, and rendered it practically valueless to the bill-posting company. It thereupon abandoned the effort to use it, and refused to pay accruing rent. The position taken by it was that it had been evicted from the leasehold, and that the rent was, as a matter of law, suspended in consequence.

If the facts amount to an eviction, the defense is well taken. It may be conceded that the plaintiff had no title to the south wall of No. 29. It was a party wall, and the rights of the plaintiff did not extend beyond its center. Its southern face belonged, for all purposes, to the owner of the land on which that half of the wall rested. But the company was put into actual possession of its surface. Neither the plaintiff nor the owner nor the tenant of the adjoining building has objected, or denied the validity of the lease. What has happened is that the tenant of the adjoining property has made a contract with another company for the use, not of the wall of No. 29, but of a frame erected on his own roof, and that the use of this frame has the effect of covering up considerable of the surface of the south wall of No. 29, and greatly reducing its value as a surface for the display of advertisements. Is this an eviction? Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord, or by the failure of his title. *Anderson*, Law Dict. 418. It has come in later years to include any wrongful act of the landlord which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as one of commission. The rent is suspended by an eviction because it is plainly unjust that the landlord should be permitted to collect it while, by his own act, he deprives his tenant of the possession which is the consideration for it. But the landlord is not responsible for the acts of others lawfully done on their own premises. He is liable only for his own acts, and for such acts of others as it was his duty to protect his tenant from. *Tiley v. Moyers*, 43 Pa. 404; *Hoeverer v. Fleming*, 91 Pa. 322.

If Mrs. Oakford or Andrew Moore, her landlord, or any person having an estate in fee simply or by lease in the party wall on the south side of No. 29, had objected to the use of that wall by the bill-posting company, and ousted it from its possession, whether by legal proceedings or by physical interference, an eviction would have taken place. The right to use the wall would in that case have been taken away from the tenant, and the duty to pay rent would have ceased. But neither Mrs. Oakford nor her landlord nor any other person has objected. No ouster by legal proceedings or by physical interference has taken place. The lessee is still in possession so far as the plaintiff or anyone having any right to question its possession is concerned; but

that possession has been lessened, perhaps practically destroyed, by the action of an adjoining tenant. If this action was a lawful one, within the limit of his own premises, the plaintiff cannot be held liable for it. The covenants for quiet possession relate only to acts of the lessor and those acting under him, or of the holder of a better title. They do not extend to the ill-natured conduct of other persons by which the value or the comfort of the leasehold may be diminished. The probability that the view of the south wall of No. 29 would be cut off by some intervening structure between it and Chestnut street, erected by one of the owners or tenants in the row, was one that could be estimated by the company as well as by Mrs. Oakford. If the company desired to guard against this contingency, it could have been done by contract with the intervening tenants, or by a special covenant with Mrs. Oakford. But the company made no inquiry and took no precautions. It assumed the risk of the actions of the owners and tenants of the property between No. 29 and Chestnut street, and the result has been what should have been anticipated. The tenant of an intervening property has undertaken to furnish a wholly different surface for the display of advertisements, which, when in use, conceals the south wall of No. 29 from view, and takes away its value. This does not seem to us to be an eviction. The tenant has been disappointed, but not dispossessed. He is in possession of the space he leased, but he cannot use it in the manner he anticipated because of the action of a third person, done within the limits of his own leasehold. If this was not an eviction, for the same reason it does not amount to a failure of consideration, as the case appears on this record. The consideration of the promise to pay rent was the right to the use of the roof and south wall of No. 29. That right has not been legally denied, but its value has been reduced. Since the action of George W. Moore, it is not worth the rent the bill posting company promised to pay for it. But, if the depreciation is not chargeable to the plaintiff, it is the misfortune of the company to have had its possession made useless by the intervention of parties with whom it had no contract, and against whose conduct it had no covenant.

The judgment is reversed, and a venire facias de novo awarded.

Simon D. VAN STEUBEN, *Appt.*,

CENTRAL RAILROAD COMPANY OF
NEW JERSEY.

(178 Pa. 307.)

1. A lease by a railroad company without clear and specific statutory authority is utterly void.

2. A statute of a state in which a rail-

road company is organized can give it no authority to lease a railroad held by it in another state contrary to the policy of the latter state.

3. Evidence that a certain engine which passed at the time a fire started threw sparks to an unusual distance is sufficient to go to the jury on the question whether or not such engine caused the fire, notwithstanding testimony that such engine was provided with a sufficient spark arrester.

4. The testimony of a witness that she had seen the engine claimed to have set a fire on different occasions throw large coals should not be taken from the jury, notwithstanding she testifies on cross-examination that she was mistaken, where the reason she gives for her mistake is unsatisfactory.

5. Evidence as to sparks thrown and fires set by unidentified engines is admissible in an action against a railroad company for fires charged to have been set by sparks, where there is evidence that the fire started while two trains were passing.

(November 11, 1896.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Northampton County in favor of defendant in an action brought to recover damages for the burning of certain of plaintiff's buildings by fire alleged to have been set out by defendant's locomotives.

Reversed.

The facts are stated in the opinion.

Messrs. O. H. Myers and W. S. Kirkpatrick for appellant.

Messrs. Edward J. Fox and James W. Fox, for appellee:

The engine came from the shops four days before the fire with its spark arrester in good condition, and the day after the fire after careful inspection it was again found to be in good condition. What, then, becomes of the fragile proof offered by the plaintiff?

Henderson v. Philadelphia & R. R. Co. 144 Pa. 487, 16 L. R. A. 299.

Miss Redener goes on the stand and swears that in her former testimony she was mistaken as to the fact which she testified. This leaves her testimony as if she had never said that she saw the engine throw sparks.

Kohler v. Pennsylvania R. Co. 185 Pa. 846; *Ely v. Pittsburgh, C. O. & St. L. R. Co.* 158 Pa. 233; *Ford v. Anderson*, 139 Pa. 261.

It was formerly held that where there was a scintilla of evidence of a material fact the question should be submitted to the jury. This doctrine, however, has been overruled both in England and by this court.

Philadelphia & R. R. Co. v. Yerger, 78 Pa. 121; *Wheelton v. Hardisty*, 8 El. & Bl. 262; *Jennings v. Pennsylvania R. Co.* 93 Pa. 337; *Post v. Buffalo, P. & W. R. Co.* 108 Pa. 585; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. 379, 91 Am. Dec. 166; *Erie R. Co. v. Decker*, 78 Pa. 293; *Pennsylvania R. Co. v. Page*, 21 W. N. C. 52.

As all engines, whether provided with spark arresters or not, emit sparks, the mere

NOTE.—As to the right to lease a railroad, see also *Beveridge v. New York Elev. R. Co.* (N. Y.) 2 L. R. A. 448; *Stockton v. Central R. Co.* (N. J. Ch.) 17 L. R. A.

97; *Ricketts v. Chesapeake & O. R. Co.* (W. Va.) 7 L. R. A. 354; *Fisher v. West Virginia & P. R. Co.* (W. Va.) 23 L. R. A. 758.

existence of a fire along the road, caused by sparks from the company's engines, is not enough to fasten upon the company the charge of either negligence or want of skill.

Philadelphia & R. R. Co. v. Yiser, 8 Pa. 866; *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 478, 16 L. R. A. 299.

The contracts were just what they purported to be, viz., a lease by the Central Company to the Port Reading Company, and a guaranty of the rentals by the Philadelphia & Reading Company to the Central Company.

Where the statute authorizes the lease, the lessee assumes during the existence of the lease all the duties and obligations of the lessor, and, from the time it enters into possession of the road, becomes solely liable for all injuries resulting from its management unless it is operating the road in the name of the lessor.

8 Wood, Railway Law, § 480; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425; *Miller v. New York, L. & W. R. Co.* 125 N. Y. 118; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. Rep. 165.

In 1887 a lease was executed between the Central Company and the Philadelphia & Reading Company directly, and Mr. Dinsmore sought to have a preliminary injunction issued in the United States circuit court upon this ground alone, and the court refused to permit the injunction to go.

Dinsmore v. Central R. Co. 19 Fed. Rep. 153.

If a preliminary injunction could not issue from the New Jersey courts, it cannot be possible that the Pennsylvania courts will determine it in this proceeding.

The question of the validity of the lease is a question of mixed law and fact, but some evidence must surely be adduced to submit to the jury before, under the instructions of the court, they can be permitted to pass upon the question whether the prohibition against consolidation of competing lines was infringed by the agreements in question.

Com. v. South Pennsylvania R. Co. 1 Pa. Co. Ct. 214; *Gummere v. Lehigh Valley R. Co.* 1 Pa. Dist. R. 585.

The Central Company was lawfully in possession of this division of its railroad. It executed a contract with another corporation of New Jersey in New Jersey by which it let its whole system, including this branch to the Port Reading Company. Admittedly that contract in New Jersey is a perfectly valid one. The *lex loci contractus* sustains it. The Lehigh Coal & Navigation Company, its lessor, acquiesces in it so far as we know, and there is no provision in its lease to prevent it. The Lehigh Coal & Navigation Company under the laws of Pennsylvania could have made this lease direct to the Port Reading Company. The implication of all the acts of assembly is that such a contract is valid. No prohibitive statute is shown.

Baltimore & P. & B. Co. v. McCutcheon, 18 Pa. 13.

McCullum, J., delivered the opinion of the court:

Three questions are raised by the specifications of error: (1) Was the action, in view of the leases given in evidence, maintainable against the defendant? (2) Was there suffi-

cient evidence of negligence to submit to the jury? (3) Was the evidence as to the condition of the unidentified engines properly excluded? These questions will be considered in the order in which they are stated.

The action was brought to recover damages for the destruction of plaintiff's buildings by fire caused by the alleged negligence of the defendant, as the lessee of the Lehigh & Susquehanna Railroad. To fix the liability upon the defendant company, the plaintiff gave in evidence the charter of the Lehigh Coal & Navigation Company, under which the Lehigh & Susquehanna Railroad was constructed, and the charter of the defendant company, a corporation of the state of New Jersey, and a lease of the former road by the latter company for a period of 999 years, dated March 31, 1871. The defendant gave in evidence a lease dated February 12, 1892, by the defendant company to the Port Reading Railroad Company, a corporation of the state of New Jersey, of their railroads and leased roads, including the Lehigh & Susquehanna Railroad, with the rolling stock, for the balance of the term of 999 years. The Port Reading Railroad was projected to extend "from a point on the Bound Brook Railroad to a point on the Arthur Kill, on the Staten Island Sound," and was not shown to form a continuous route with the Lehigh & Susquehanna Railroad, and was unfinished at the time of the execution of the lease. The plaintiff, in rebuttal, gave in evidence a lease, dated February 11, 1892, of the Lehigh Valley Railroad Company of their roads in Pennsylvania, with the rolling stock, to the Philadelphia & Reading Railroad Company, for a term of 999 years, together with a tripartite agreement, dated February 12, 1892, between the defendant company, the Philadelphia & Reading Railroad Company, and the Port Reading Railroad Company, and further evidence to show that the Philadelphia & Reading Railroad Company, and not the Port Reading Railroad Company, was the real lessee from the defendant company, in contravention of the laws of Pennsylvania inhibiting the merger of parallel and competing lines, and the laws of New Jersey restricting the execution of leases made by foreign corporations. The court took the case from the jury, one of the grounds specified being that, under the evidence, the action was not brought against the proper party. The plaintiff's evidence given in chief was sufficient to establish a liability on the part of the defendant for negligence, until overcome by countervailing evidence on the part of the defendant. If the defendant's evidence is insufficient for that purpose, it will not be necessary to consider the testimony in rebuttal. The first question which presents itself for consideration, therefore, is whether the lease of the defendant company to the Port Reading Railroad Company was valid.

The general rule of law governing the execution of railroad leases is thus stated by Mr Justice Sharswood in *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.* 81* Pa. 104: "One railroad company cannot lease to another its franchise of operating a road built or authorized to be built, unless it can show a grant of power from the sovereign in express terms or by necessary implication. In England, courts of

equity have frequently enjoined railway companies from carrying leasing contracts into effect which wanted the express authority of Parliament. 1 Redf. Railways, 592. The general canon of construction applicable to legislative grants of this class, derogating, as they do, from common right and public policy, requires that the intention should be very manifest if not to be unequivocally expressed, at all events not to depend upon ambiguous phrases, rendering the implication doubtful." *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. 126, and *Stewart's Appeal*, 56 Pa. 418, are authorities for the same principle.

The defendant points to the statute of New Jersey for its authority for the execution of the lease, by which it seeks to escape liability. But the defendant company and the Port Reading Company are foreign corporations, and this leads us to inquire, What is their standing in our courts? A "corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . The recognition of its existence even by other states, and the enforcement of its contracts made therein depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy." *Paul v. Virginia*, 75 U. S. 8 Wall. 181, 19 L. ed. 860. The public policy of a state is to be deduced from the general course of legislation and the settled adjudications of its highest courts. *American & F. Christian Union v. Yount*, 101 U. S. 856, 25 L. ed. 890. It has been ruled that an act, although held to be unconstitutional, may express legislative policy as to foreign corporations. *Empire Mills v. Alston Grocery Co.* (Tex. App.) 12 L. R. A. 366.

The next question which we are called upon to consider is the public policy of our state as to the leasing of railroads. All of the statutes to which our attention has been directed, conferring leasing powers upon railroads, are limited to railroad companies created by or existing under the laws of this commonwealth giving them leasing rights with foreign or domestic railroads, provided they shall be connected with each other directly, or by intervening railroads. It has been decided that the terms of a statute providing for the leasing of continuous lines must be held to refer to corporations of the state, unless there is an expressed intent that they are to apply to foreign corporations. *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 443. In *Empire Mills v. Alston Grocery Co.*, *supra*, it was held that the repeal of the statute granting the privilege of organizing mercantile corporations was a direct prohibition against the operation of such corporations within the state, and therefore the law of comity did not require that a mercantile corporation organized under the laws of another state should be allowed to do business therein. In *Methodist Church v. Remington*, 1 Watts, 219, 26 Am. Dec. 61, it was held that the equitable powers of the courts will not be exercised to enforce a trust which is against the policy of the state, as expressed by the legislature in parallel cases.

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The warrant for the Port Reading lease must be found, if at all, in the legislation of this state. The defendant company relies upon the lease as a defense to the suit. It ought therefore to show that it is such a lease as is authorized by our laws. The act of April 23, 1861 (Pub. Laws, 410), and the act of February 17, 1870 (Pub. Laws, 81), expressly confer upon railroad companies leasing powers, but in each the grant of these powers is upon a condition named therein. To these acts the defendant must look for its authority to make the lease. It cannot be found in the act of March 24, 1865 (Pub. Laws, 49), or in the act of April 14, 1868 (Pub. Laws, 100). Neither of them expressly or by necessary implication confers leasing rights. The act of 1861 confers the right to lease, "provided that the roads of the companies so contracting or leasing shall be directly or by means of intersecting railroads connected with each other;" and the act of 1870 confers it, "provided, however, that such road or roads so embraced in any lease . . . shall be connected, either directly or by intervening line, with the railroad or railroads of said company or companies of this commonwealth so entering into such lease, . . . and thus forming a continuous route or routes for the transportation of persons and property." There is nothing in the Port Reading lease or in the evidence in the case which shows that the Port Reading Railroad was connected directly or by intervening line with the Lehigh & Susquehanna Railroad, and it is not claimed in the printed argument of the appellee that they were so connected. As the defendant company relied on its lease to the Port Reading Company for exemption from liability for loss or injury caused by the negligent operation of the Lehigh & Susquehanna Railroad, it was bound to show a warrant for the lease in the statutes of this Commonwealth. This, as we have seen, it failed to do. It is well settled that, "where the lease is made without clear and specific authority, it is utterly void, because public policy very strongly opposes any attempt on the part of the company to relieve itself of its high obligations by transferring them to another company; and, where this is the case, the liability of the lessor is entirely unaffected by the void lease. It remains the same, the lessee being regarded merely as the agents." Wood, Railway Law, 1055, 1056, and cases cited.

We have not considered the appellant's contention that the lease to the Port Reading Company was in fact, though not in form, a lease to the Philadelphia & Reading Railroad Company, nor whether the evidence was sufficient to warrant a finding that the Lehigh Valley Railroad and the Lehigh & Susquehanna Railroad are parallel and competing lines. While these are questions of fact, to be determined upon evidence applicable to them in a proceeding to cancel the lease, the question whether they can be raised in an action for loss or injury caused by negligence in the operation of the road does not appear to have been presented to or considered by the court below, nor was it brought to our notice in the argument on appeal. We express no opinion on this question now, but we suggest that it ought

to be raised, argued, and considered in the court below and here before there is a final decision of it.

The next question to be considered relates to the sufficiency of the evidence offered to prove the negligence of the defendant. The buildings destroyed were a barn, wagon shed, grain shed, and pig sty, located in close proximity to the railroad tracks. The distance from the west-bound track to the place where the fire originated, in a pile of straw at the rear of the barn, was about 122 feet. The fire occurred on the 19th of July, 1892, about 6 o'clock in the evening, at the close of the day's work of threshing. It was first seen by the hired girl, Edna Redener. She testified that, immediately before she saw the fire, she had been sent from the house to the wood pile for some wood, and that, while she was standing on the porch of the house, she saw the west-bound coal train, with engine No. 815, pass the premises, going west. On reaching the wood pile, she saw the fire, and she at once notified Eugene Kindt, the tenant of the farm, who was in the barn sweeping the floor. She further testified that she had seen this engine on different occasions throw coals as large as hickory nuts. Eugene Kindt testified that, from the front part of the barn, he saw the tail end of a train going west when he started towards the fire, and, when he first saw the fire, he could have covered it with a big hat. John Ruple testified that he lived about 150 rods west of the plaintiff's buildings, and some 120 yards from the railroad; that he was on his porch, watching for his brother on an east-bound train, at the time the fire started; that the east-bound and west-bound trains passed each other about 75 yards west of the barn; that the west-bound train was moving at the rate of 25 or 30 miles an hour, and threw fire some 40 or 50 feet up in the air; that it set fire to the grass alongside of the track; and that "the tail end of the east-bound train had not passed yet when the fire broke out." John Warg testified that he had seen No. 815 throw coals the size of a hazel nut, from 150 to 200 feet. A number of other witnesses testified that unidentified locomotives on this railroad threw large coals shortly before and after the fire. Witnesses were produced by the defendant who testified that engine No. 815 was furnished with a spark arrester of an improved pattern, and that it had been examined shortly before and after the fire, and found in good condition. Defendant then recalled Edna Redener for further cross-examination. She testified that she was mistaken when she stated in her former examination that she had seen

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engine No. 815 throw sparks as large as hickory nuts, but the reason she gave for her mistake is not satisfactory. The reason she gave was that Mrs. Kindt told her she was mistaken, although she admitted that Mrs. Kindt was not present at the time she before thought she had seen the sparks. Mrs. Kindt was also called by the defendant for further cross-examination, and testified that the fire had started before the east-bound train had passed. The court thereupon struck out all the evidence as to the condition of the unidentified engines, and refused to receive similar offers, and, holding that the plaintiff had failed to make out a case, gave binding instructions for the defendant.

The evidence has been briefly reviewed in order to determine whether it was of such a character as to warrant a submission to the jury. If the action of the court in excluding the evidence in regard to sparks thrown and fire set by unidentified engines was correct, still there was sufficient evidence of negligence to warrant a jury in finding it. Besides the witness Edna Redener, there were two other witnesses who testified, among other things, as to the unusual distance to which the sparks from engine No. 815 were borne. Such evidence required the submission of the case to the jury, notwithstanding the testimony that the engine was provided with a sufficient spark arrester. *Huyett v. Philadelphia & R. R. Co.* 23 Pa. 374; *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97; *Pennsylvania Co. v. Watson*, 81* Pa. 298; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122, 35 Am. Rep. 644; *Philadelphia & R. R. Co. v. Schulte*, 98 Pa. 341; and *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 461, 16 L. R. A. 299.

We also think the court erred in holding that the testimony of Edna Redener should not be submitted to the consideration of the jury. When the unsatisfactory reason for correcting her testimony is considered, we think the jury should have been permitted to pass upon it. The same may be said of the evidence as to the unidentified engines. Mrs. Kindt's testimony that the fire had started before the east-bound train had passed was not undisputed. The positive evidence of John Ruple left the question in doubt, and that doubt should have been solved by the jury, and not by the court. *Kohler v. Pennsylvania R. Co.* 135 Pa. 346; *Kly v. Pittsburgh, C. O. & St. L. R. Co.* 158 Pa. 233; and *Glass v. Philadelphia*, 169 Pa. 492.

Judgment reversed, and venire facias de novo awarded.

WYOMING SUPREME COURT.

Henry G. HAY, Exr., etc., of Charles G. Strom, Deceased, *Ptff. in Err.*,
v.

Severin PETERSON.

(.....Wyo.....)

1. An executor resisting payment of a claim for compensation for services rendered to the testator by a person not related to him, on the ground that they were rendered in consideration of his maintenance, has the burden of showing that fact.
2. Regular payments for a period of time of a part of the monthly wages earned by a servant, who has been working for his employer for several years without a settlement, will make the account mutual for the purpose of determining whether any part is barred by the statute of limitations.
3. Refusal to give an instruction that declarations by a creditor that any debt that had existed was discharged is prima facie evidence of payment is properly refused when the declarations in evidence may be referred as much to the question of the existence of the contract as to that of payment.
4. Destruction by a servant of his employer's books after the latter's death will not raise the presumption that they contained

charges against the servant,—especially where they were not destroyed until after they had been examined, and the servant claimed to have been executing his employer's orders.

5. Memoranda written by a deceased person upon dates on a calendar indicating payment of money to his creditor, but not specifying the amounts, nor shown to have been made in regular course of business or to have been continuous, are not admissible as evidence that such payments were made.
6. Memoranda of accounts not in regular account books are not admissible as secondary evidence in the absence of anything to show that the items had ever been entered in such books, or if so that they could not be produced.
7. An executor may call one who is suing on a claim against the estate as a witness and compel him to testify as to transactions with the testator, although the statute forbids the claimant to support his claim by his own testimony in the first instance.

(August 1, 1896.)

ERROR to the District Court for Laramie County to review a judgment in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Affirmed.*
The facts are stated in the opinion.

NOTE—Presumption against the destroyer (*spoliator*) of evidence.

- I. Where a party fails to produce evidence after demand or notice by the party entitled to the production thereof.
- II. Where a party fails to introduce documentary (the "best") evidence which would properly be a part of the case.
 - a. The rule stated.
 - b. The substituted evidence.
 - c. The rule and evidence in admiralty.
- III. Where a party adversely interested destroys or withholds evidence to which the adversary is entitled.
 - a. The rule.
 - b. The proof.
 - c. The damages.

It is a maxim of the law that "everything will be presumed against the despoiler." (*Omnia presumuntur in odium spoliatoris.*) *Loft's Maxims*, No. 339; *Broom, Legal Maxims*, 938.

This doctrine, though not the first time iterated, is the best exemplified in that most celebrated old case—*Armory v. Delamirie*, quaintly and tersely reported as follows: "The plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretense of weighing it, took out the stones, and, calling to the master to let him know it came to three half pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones." In trover against the master, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels

the measure of their damages, which they accordingly did." 1 *Strange*, 605, 1 *Smith, Lead. Cas.* 7th Am. ed. 636.

In other words the rhymster has said:

"And seeing by this wickedness the stone
Was made away and his worth known to none,
Craftsmen there came to show by weight and tale
What gems of best and uttermost avail
Might in the compass of that ring be laid,
With no less damage it should be paid;
For what man hideth in wrong-doing
Against him the law deemeth everything."
[*Leading Cases Done into English*, London, 1876.]

"The presumption *in odium spoliatoris* is perfectly legitimate. It is so natural and so just that it is a part of every civilized code." *Bryant v. Stilwell*, 24 Pa. 814, 817.

Concerning evidence this presumption is applied in varying degrees of severity in three general classes of cases: (1) Where a party fails to produce evidence after demand or notice by the party entitled to the production thereof; (2) where a party fails to introduce documentary (the "best") evidence which would properly be a part of the case; and (3) where a party adversely interested destroys or withholds evidence to which the adversary is entitled. That a case of the last-named class often is the result of its being one of the other two.

- I. Where a party fails to produce evidence after demand or notice by the party entitled to the production thereof.

When a party who has control of evidence fails to produce it in response to a *subpoena duces tecum*, or notice, from another party to the suit entitled to its possession (or upon demand when the writing or other evidence is present in court), secondary evidence may be offered, and the strongest presumption favoring it will be entertained *in odium spoliatoris*. *Thayer v. Middlesex Mut. F. Ins. Co.* 10 Pick. 328; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 967; *Leeds v. Cook*, 4 Esp. 256; *Atty. Gen. v. Halliday*, 26 U. C. Q. B. 307.

Mr. T. F. Burke for plaintiff in error.
Messrs. R. E. Esteb and J. A. Van Orsdel for defendant in error.

Groesbeck, Ch. J., delivered the opinion of the court:

This is an action against Henry G. Hay, the plaintiff in error, as executor of the last will and testament of Charles G. Strom, deceased, to recover for services rendered by Severin Peterson, the defendant in error, to decedent, during his lifetime, in the sum of \$7,186.67, for fourteen years, ten months, and twenty days, at the rate of \$40 per month, the period of time being from November 1, 1878, to September 21, 1893, at which last-named date the employer died. The claim was presented to the executor, and disallowed. The petition declares upon a *quantum meruit*, and alleges that the reasonable value of the services was \$40 per month, and "that plaintiff has received no compensation for his labor during said period." The amended answer, upon which the trial was had, for a first defense denied each allegation of the petition, except the death of Strom, the employer, the probate of his will, the appointment and qualification of the executor, the presentation of the claim, its disallowance, and the filing of the claim with the clerk of the district court of the proper county, and that the plaintiff worked for said Strom during most of the period alleged in the petition, except when he was sick and unable to work. The second defense, in brief, sets forth that the plaintiff below made his home with Strom, and was a member of his family, and

was during all of the period mentioned in the petition provided with food, clothing, lodging, medical attendance, and care, and that any labor performed by Peterson for Strom was rendered as a member of Strom's family, without any contract between the parties, or any promise on the part of Strom to pay for the same; that Strom took Peterson into his home as a matter of friendship, and by reason of his charitable and friendly feeling towards him cared for and maintained him as one of his family, furnishing all the necessities of life and supplies for his subsistence, as well as various sums of money from time to time for his personal needs and expenses, including, among other sums of money, not less than \$6 per month, monthly, during the years 1886, 1887, and 1888. The third defense alleges that the said sum of \$6 per month during the years aforesaid received by Peterson was all that his services were worth over and above his board, lodging, medical attendance, and care, and that he was paid in full whatever was due him up to December 31, 1893, and that all of the claim of the plaintiff prior to September 20, 1885, accrued more than eight years prior to the commencement of the suit, and was barred by the statute of limitations. The fourth defense sets forth in a different form the bar of the statute of limitations, showing that on the 10th day of January, 1891, all of the claim of the plaintiff for work prior to January 10, 1887, had accrued more than four years, and was then barred by the statute of limitations as it existed on January 10, 1891, the date of the approval of chapter 72, Laws 1890-91,

It does not, however, dispense with the necessity of making proof. The burden is upon the party making the demand or giving the notice, not only to prove that such notice was given but also to make out a case by substitution of other evidence for that which the adversary does not produce. *Moulton v. Mason*, 21 Mich. 364; *Hunt v. Collins*, 4 Iowa, 56; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 68 Am. Dec. 30; *Lawson v. Sherwood*, 1 Stark. 314.

The presumption aids the evidence offered in lieu of that which is withheld, but it does not pre-suppose the existence of a fact not shown. There is, however, on Lord Abinger's assertion, one circumstance under which such secondary evidence of the contents of the document cannot be given. It is where the document is in existence in the control of a third person. *Doe, Bowdler, v. Owen*, 8 Car. & P. 110.

This division of the subject has been hereinbefore considered,—*Cartier v. Troy Lumber Co.* (Ill.) 14 L. R. A. 470,—and needs no other mention here than that when there is in fact a destruction of the evidence withheld, the case comes within the third class as shown below.

II. Where a party fails to introduce documentary (the "best") evidence which would properly be a part of the case.

a. The rule stated.

Complete suppression for the purposes of the suit is equal to spoliation, and it has been said to be ground for presuming that which was claimed by the adversary. *Bowles v. Stewart*, 1 Sch. & Lef. 200, 222.

"To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents the jury from
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learning a material fact, must take the consequences of an honest indignation which his conduct may excite." *Bryant v. Stilwell*, 24 Pa. 314, 317.

It is at least true that "when a person is proved to have suppressed any species of evidence or to have defaced or destroyed any written instrument, a presumption will arise that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of the circumstances." The general rule is, *Omnis presumitur in odium spoliatoris*. *Winchell v. Edwards*, 57 Ill. 41; *Riggs v. Pennsylvania & N. E. R. Co.* 16 Fed. Rep. 804.

Where evidence which would properly be a part of the case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, the jury "may" draw an inference that would be unfavorable to him. *Hall v. Vanderpool*, 156 Pa. 152; *Thompson v. Shannon*, 9 Tex. 536; *Black v. Wright*, 9 Fred. L. 447; *Bindley v. Martin Bros.* 23 W. Va. 773; *McDonough v. O'Neil*, 113 Mass. 82.

They may presume that had it been produced it would have been against him. *Miller v. Jones*, 32 Ark. 337.

Therefore the neglect to make proof raises the presumption that he could not have done so. *Parks v. Richardson*, 4 B. Mon. 276.

The withholding of books of account may raise "every presumption against them." *Page v. Stephens*, 23 Mich. 337.

The neglect of an executor to keep strict accounts, when it was his duty to collect the rents and he had collected part of them, raised the presumption that he had collected all of them. *Landis v. Scott*, 32 Pa. 465.

And the failure to produce a note in evidence raised every fair presumption against it. *Symington v. M'Lin*, 1 Dev. & B. L. 261.

which extended the time for bringing actions upon contracts not in writing, either express or implied, from four years, the limitation theretofore fixed by § 2870 of the Revised Statutes of Wyoming, to eight years. The sixth defense alleged payment in full, and the seventh defense was a counterclaim for board, lodging, medical attendance, subsistence, and care furnished to Peterson by Strom, alleged to be reasonably worth the sum sued for. It is conceded that a reply was filed to the affirmative defenses of the answer. The trial resulted in a verdict for the plaintiff below in the sum of \$3,297.83, and, upon a motion for a new trial, the court found the verdict excessive, and directed that the motion should be granted, unless the plaintiff, Peterson, filed a remittitur in the sum of \$878.83, reducing the verdict to the sum of \$2,419. This remittitur was filed, the motion for a new trial was overruled, and judgment was entered for the amount of the verdict as reduced. The deductions made from the verdict were for three months' services while plaintiff below was sick and in the hospital, and by a payment of \$6 per month for the years 1886 to 1888, inclusive, amounting in the aggregate to \$261, the further reduction allowed by the court being the difference between the rate of wages per month allowed by the jury and the rate of \$15 per month allowed by the court, exclusive of board, lodging, and clothing.

There are twenty-two assignments of error in the action of the trial court in rejecting certain evidence offered by the plaintiff in error, the refusal of certain instructions requested by

him, and the giving of certain instructions requested by the adverse party. The verdict is also assailed as not based upon sufficient evidence, and as contrary to law. Peterson, the plaintiff below, did not testify as to the contract or term of service, probably because his adversary was the executor of the will of decedent, and no objection is made on that score under the rule laid down by our statute excluding a party from testifying in such matters where his adversary is an executor. The testimony to support the claim of the plaintiff below was that of admissions made by the decedent during his lifetime that he had promised to pay Peterson when he was "through with him," one of the witnesses stating that the amount was \$40, and another \$30, per month. There was other testimony to the effect that the decedent had said that he had not paid Peterson anything, as the latter was unable to take care of his money; and that decedent had shown a package, which he had put in his safe, to a witness, and stated that it was Peterson's wages. The services of Peterson were of long daily duration, and consisted of his attendance at the liquor saloon of his employer, where he had waited upon customers, and performed menial labors in cleaning out the saloon. Besides these services, he had performed personal services in waiting upon his employer. The evidence very clearly establishes that Peterson did not render his services as a member of Strom's family, nor in return for board, lodging, and medical care when sick. A portion of the time—about three months—he was sick at the hospital, and was

Likewise a party's refusal to explain what he can explain justifies the presumption that his explanation would be to his prejudice. *Heath v. Waters*, 40 Mich. 457; *Union Parish School Board v. Trimble*, 88 La. Ann. 1073; *Mitchell v. Napier*, 22 Tex. 120.

The presumption arises most strongly against one who keeps back documents. *Atty. Gen. v. Dean and Canons of Windsor*, 24 Beav. 679.

The refusal to offer a deed in evidence which is present in court warrants the strongest presumption that the deed would show that the possessor claiming title under it had none. *Roe, Haldane, v. Harvey*, 4 Burr. 2484.

Where a deed stands in the way of a party's inheritance under a will, and such party does not produce it or account for its loss, the court will give the most favorable intendment as to its contents, for the benefit of the heir. *Livingston v. Newkirk*, 3 Johns. Ch. 815.

"This is the settled doctrine in the books; and it is founded on the maxim of law, that *omnia presumuntur in odium spoliatoris*." *Ibid.*; *Rex v. Countess Arundel*, Hob. 109; *Dalton v. Coatsworth*, 1 P. Wms. 731; *Cowper v. Earl Cowper*, 2 P. Wms. 720, 748; *Cookes v. Heller*, 1 Ves. Sr. 234.

The nonproduction of a lease raises a presumption that the production of it would do the plaintiff no good. *Tryman v. Knowles*, 13 C. B. 222, 22 L. J. C. P. N. S. 143, 17 Jur. 238; *Hardon v. Hesketh*, 4 Hurlst. & N. 175, 28 L. J. Exch. N. S. 187.

And the suppression of receipts is evidence that such receipts afford inferences unfavorable to the title of the plaintiff. *James v. Blow, and Owen v. Flack*, 2 Sim. & Stu. 600, 608, 4 L. J. Ch. N. S. 202.

b. The substituted evidence.

The best evidence is required and a party is not permitted to have recourse to secondary evidence except in cases of accident, honest mistake, or in-
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voluntary necessity. The party who, having it in his power to produce the best evidence, voluntarily suppresses or destroys it, creates every presumption against himself as a depollor. Before he will be permitted to enjoy the benefit of the rule admitting secondary evidence, he must first rebut the inference that the original document or other evidence was kept back or destroyed by design. He cannot give parol or secondary evidence of its contents without first introducing evidence sufficient to rebut the suspicion of fraud which arises from his act. The motive of the destruction is the controlling fact which determines the admissibility of the secondary evidence. When the loss or destruction is shown to be without *mala fides* the rule laid down in the celebrated case of *Armory v. Delamirie*, 1 Strange, 605, 1 Smith, Lead. Cas. 7th Am. ed. 636, does not apply, and the party will be allowed the same benefit from the proof of contents as he would if the document itself had been produced. *Riggs v. Taylor*, 22 U. S. 9 Wheat. 408, 6 L. ed. 140; *Renner v. Bank of Columbia*, 22 U. S. 9 Wheat. 581, 6 L. ed. 166; *Broadwell v. Stiles*, 8 N. J. L. 71; *Price v. Tailman*, 1 N. J. L. 447; *Livingston v. Rogers*, 2 Johns. Cas. 483, 1 Cal. Cas. 27; *Blade v. Nolan*, 12 Wend. 173, 27 Am. Dec. 126; "The Count Joannes" v. Bennett, 5 Allen, 169, 81 Am. Dec. 738; *Rudolph v. Lane*, 67 Ind. 115; *Blake v. Fash*, 44 Ill. 304; *Palmer v. Goldsmith*, 15 Ill. App. 544; *Bagley v. McMickle*, 9 Cal. 490; *Bagley v. Eaton*, 10 Cal. 126, 148; *Clunnes v. Pezzy*, 1 Campb. 8; *Saltern v. Melhuish*, AmbL 247.

What shall constitute satisfactory proof that evidence was withheld or destroyed for an improper purpose cannot easily be reduced to a fixed rule. The presumption is not universal and inelastic, but special, varying with the concrete case. It must be applied with judgment and sound discretion. It is a presumption of fact and

a county charge. The instructions for the defense that the services were rendered as a member of the family of Strom seem to fairly present the law, and the burden of proving that there was an understanding that Peterson was to receive nothing for his services except his maintenance was very properly put upon the defendant below. An agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family, or near relatives. Lawson, Presumptive Ev. 74. The parties were not relatives, and the evidence establishes the fact that Peterson was not considered a member of Strom's family, but that he was to be paid for his services, the amount of which was not clearly fixed. It is unnecessary to review the instructions complained of on this point, as they fairly present the law governing this branch of the case.

Other assignments of error attack the verdict as excessive. As modified and reduced by the court, the allowance of \$15 per month is not excessive, if plaintiff should have recovered, and the verdict should not be disturbed on that ground.

The statute of limitations is pleaded in bar, and is presented by the following instruction requested by the plaintiff in error and refused by the court: "The jury are instructed as a matter of law that the plaintiff cannot recover for any services or work performed by him for the deceased in his lifetime prior to eight years preceding his death." The other defense of the old statute of limitations in force during a period covered by the employment is not urged

upon our attention, and we shall not consider it. The action could only be brought within eight years after the cause of action accrued. It is asserted that the right of action accrues and the statute begins to run on each item of the account from the day of its proper date,—that is, from the day of the delivery of the article or work done,—as was held in *Courson v. Courson*, 19 Ohio St. 454; but in that case there was an interrupted term of service, and the breaks in such term served to make such continuous period of service separate and distinct items of account. In this case the service was continuous, except for a brief period of three months, while defendant in error was sick, and in the county hospital, and the service was resumed after his recovery. But it is insisted that where there is an express employment, but no time or measure of compensation or term of employment agreed upon, the law will regard the hiring as from year to year, and the wages payable at the same time, and will not imply an agreement that the payment of compensation shall be postponed until the termination of the employment. To this effect are the cases of *Davis v. Gorton*, 16 N. Y. 255, 69 Am. Dec. 694; *Re Gardner*, 103 N. Y. 533, 57 Am. Rep. 788; *Gilbert v. Comstock*, 93 N. Y. 484; *Miller v. Lash*, 85 N. C. 51; *Grady v. Wilson*, 115 N. C. 844; 1 Wood, Limitation of Actions, 330. There are other cases to the contrary, notably *Littler v. Smiley*, 9 Ind. 116; and we are not prepared to adopt the rule of the New York cases, as we think that the contrary rule is upheld by this court in *Jackson v. Mutt* (Wyo.) 42 Pac. 603, where the circumstances—

not of law and may be overcome by other evidence.

Proof that a deed for a chattel (a slave) once existed and was in the possession of a person who intermarried with the grantee of the deed; that the deed had been demanded of him and not produced; that he resided "now" in another state; that further search and inquiry had been made of the persons who might possibly be in possession of the deed and without effect,—was deemed sufficient to rebut the presumption of fraud and admit secondary evidence. *Mordecai v. Beal*, 8 Port. (Ala.) 539.

That a weak-minded woman, at the request of her brother, had destroyed a deed of conveyance executed by herself, was deemed by the court to be the result of "unfortunate advice," and not of an intent on her part to commit a fraud upon anyone. *Drosten v. Mueller*, 103 Mo. 624.

The testimony of a party that she destroyed certain letters because she "had no further use for them and believed them to be of no consequence" was deemed sufficient to repel the inference of a fraudulent intent in their destruction. *Smith v. Holyoke*, 112 Mass. 517; *Lucas v. Brooks*, 23 La. Ann. 117.

Lord Ellenborough permitted a party, by his own testimony, to prove loss and diligence, and then permitted him to testify from memory as to the contents of a deed. *Kensington v. English*, 8 East, 288.

On this principle secondary evidence of a lost United States patent to land was admitted to prove title. *Bell v. Hearne*, 10 La. Ann. 515.

And secondary evidence of the loss or destruction of naturalization papers may be given when the case is freed from the inference of fraud. *Kreitz v. Behrensmeier*, 125 Ill. 141.

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Likewise false invoices come within the spirit of the rule. *Bush v. Guion*, 6 La. Ann. 797.

Although the destruction of the written evidence prior to the commencement of the suit raises a presumption unfavorable to the party who destroyed it, yet the presumption may be rebutted by proof adduced on the part of such party. *St. Louis v. Queen*, 25 Can. S. C. 649.

But the voluntary destruction of evidence (letters) after the commencement of the suit raises the inference of a fraudulent design to do away with evidence, and it is within the discretion of the court to refuse to admit proof of the contents by the destroyer. *Baldwin v. Threlkeld*, 8 Ind. App. 812, Following *Blade v. Noland*, 12 Wend. 173, 27 Am. Dec. 126.

Failure to call witnesses who are known to be conversant with the facts. (The *Fred. M. Lawrence*, 15 Fed. Rep. 635; The *Ville du Havre*, 7 Ben. 328; *Grubbs v. North Carolina Home Ins. Co.* 108 N. C. 473), or bribing witnesses to be absent (*Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Houser v. Austin*, 2 Idaho. 188), gives rise to a like presumption; but a collation of cases does not properly belong in this connection. It will be the subject of a subsequent note.

The full rigor of the rule is that where papers are concealed or falsified the party will not be entitled to further proof "for that is an indulgence granted only to honest mistake and unintentional error." *The Liverpool*, 1 Gall. 518.

This principle was strictly adhered to in many English cases. *Wardour v. Berisford*, 1 Vern. 452; *Dorington v. Jackson*, Id. 449; *Plampin v. Betta*, Id. 272; *East India Co. v. Evans*, Id. 308; *Dyer v. Tymewell*, 2 Vern. 122, *Freem. Ch.* 112; *East India Co. v. Sandys*, 1 Vern. 127; *Childs v. Saxby*, Id. 207; *Hunt v. Matthews*, Id. 408.

of the case were somewhat similar to the case at bar. However, the payments made in the years 1886 to 1888 took the case out of the statute, and made the account between the parties a mutual one. It is urged that the regularity of payments of \$6 monthly during these years leads to the inference that these payments were in full for those years, and had no reference to past transactions; but there is testimony that during these periods and afterwards the decedent had stated that he had not paid Peterson anything, and that his wages were \$30 per month. There certainly was evidence to the effect that these payments were part, and not complete, payments, and it can reasonably be inferred from the evidence that they were on account. In New York, such payments have been held sufficient to take the case out of the statute, and such holding is not contrary to the views announced in the cases from that state already cited. *Smith v. Velie*, 60 N. Y. 106; *Re Gardner*, 108 N. Y. 533, 57 Am. Rep. 768. The ruling of the court refusing to give the instruction, and to apply the statute of limitations to that portion of the claim prior to September 23, 1885, was warranted under the evidence.

The court was asked to instruct the jury that the declarations of a creditor, as in the case of plaintiff below, that any debt of the deceased to him is discharged, or that there is nothing due him, is *prima facie* evidence of payment. Peterson admitted to witnesses that Strom owed him nothing, directly after the latter, in his last sickness, asked him, if there was anything due, to make out his bill, to

which interrogation of Strom, Peterson did not respond. This evidence did not particularly relate to an admission of payment, but might tend to show that there was no original contract to pay for services rendered by Peterson. It was strong evidence against Peterson, but the court and jury seem to have treated it of small moment, taken in connection with the other evidence in the cause; and we think that their action in this respect, although the admission was not denied by Peterson, is not error, because the weight to be given to testimony of mere admissions is to be determined by the jury, and it may be proper for the court to instruct them that such testimony is usually unsatisfactory, and should be received with great caution. *Saveland v. Green*, 40 Wis. 431, 444. The instruction was too sweeping in its terms, and the ground was fully covered by another instruction which was given at the request of the defendant below, in substance, that if the plaintiff knew before the death of Strom that the latter desired and requested all his creditors, including Peterson, to present their claims before his death, and if plaintiff refused to do so, and said that nothing was due him, that fact raised a strong presumption against him.

Some of the books of account of the decedent were destroyed by the plaintiff, Peterson, and the only books found were those discovered concealed under a barrel, and a calendar found hanging on the wall. Upon the latter entries were made showing that at the close of January of that year Peterson was paid for one month, and at the close of the year was paid

But in the American courts it is held that the presumption arises against nothing but the evidence destroyed. *Thompson v. Thompson*, 9 Ind. 223, 68 Am. Dec. 638; *Life & F. Ins. Co. v. Merchant*, 1 F. Ins. Co. 7 Wend. 31; *Wilson v. Cassidy*, 2 Ind. 562.

An affidavit which is of itself sufficient to open the door for secondary evidence of the contents of a promissory note is not itself evidence of the contents of the note. *Almy v. Reed*, 10 Cush. 421.

The affidavit of the contents of a letter not produced was admitted because, as the court said, "if untrue it was at the imminent peril of exposure by the production of the letter, and that under such circumstances the representation in the affidavit must be taken to be true." *Lumley v. Wagner*, 1 De G. M. & G. 804, 634, 21 L. J. Ch. N. S. 898, 16 Jur. 871.

c. The rule and evidence in admiralty.

In admiralty prize courts it is a recognized law of nations that neutral property is free from confiscation. But where such neutrality cannot be shown satisfactorily because the ship's papers have been destroyed, and such destruction or spoliation has not been frankly and satisfactorily explained, a presumption of *mala fides* is raised, and the property will be condemned as that of the enemy, unless such presumption is removed by other evidence admitted within the discretion of the prize court as in other cases. This is the American rule. *The Pizarro*, 15 U. S. 21 Wheat. 227, 4 L. ed. 226; *The Peterhoff*, Blatchf. Pr. Cas. 463.

The maritime courts on the continent of Europe excluded further proof after spoliation was established, holding that alone sufficient to raise the presumption against neutrality and to justify confiscation, but the English Admiralty Code, modified 34 L. R. A.

that rule to the extent of not holding spoliation alone to be defamatory when other circumstances were clear. *The Hunter*, 1 Dods. Adm. 480, 486, 487; *The Two Brothers*, 1 Rob. Adm. 131; *The Rising Sun*, 2 Rob. Adm. 104; *The Polly*, Id. 361; *The Johanna Emilie*, 13 Jur. 708.

III. Where a party adversely interested destroys or withholds evidence to which the adversary is entitled.

a. The rule.

Courts will go far in presuming against those who destroy documents and instruments necessary to the security or elucidation of the rights of others, but there is a limit to the application of the term "everything" as it is used in the rule "Everything will be presumed against the despoiler." *Diehl v. Emig*, 65 Pa. 328; *Halyburton v. Kershaw*, 8 Desaus. Eq. 105; *Preston v. Leighton*, 6 Md. 33; *Carnel v. Day*, Litt. Sel. Cas. 492, 493.

The principle of the maxim *Omnia presumuntur in odium spoliatoris*, as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises a presumption that the document would, if produced, mitigate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance. There is great danger that the maxim may be carried too far. It cannot properly be pushed to the extent of dispensing with the necessity of other evidence, and should be regarded "as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." Where there is express and positive evidence, there is no place for presumption or inference. It is only in reference to the contents of the paper destroyed or withheld that

in full, and these entries were in the handwriting of decedent. Judge Potter, who drew up the will, after the death of the testator left Peterson in charge of the place of business of the decedent, where there were a number of account books. He afterwards examined them carefully, but was not allowed to state whether there were any charges therein against any employee of the decedent, Strom. At the time he was questioned upon this matter it had not been shown that the books, or any of them, had been destroyed, and it seems that the question was properly objected to. No exception was taken to the ruling of the court sustaining this objection, and the question, although a vital one in the case, was not renewed. Judge Potter examined three or four of the books, he says, very carefully, so that he had a general idea of them, without examining any particular account. The books might have been intact when the inventory and appraisement were taken, which took a day or two; and the witness stated that he was under the impression that he examined the books at that time, but may have examined them before the inventory was taken. He had charged Peterson to leave everything as it was, and, when he discovered that the books were burned, spoke sharply to Peterson, reminding him of the direction, and asked him why the books had been destroyed. Peterson replied that Strom, the deceased, had told him to burn them up. This answer was made promptly, and Judge Potter says there was nothing extraordinary in Peterson's conduct when he made this explanation. The instruction asked for on this point was as fol-

lows: "If the jury believe from all the evidence in this case that the books of account of the deceased, or any of them, were destroyed by plaintiff, a presumption arises that, had the truth appeared by said books, it would have been against his interest." This instruction was refused, and the court gave no other bearing upon the question. The defendant was entitled to an instruction covering the point, for it is a universal rule that the suppression or destruction of evidence raises the presumption against the spoliator, where the evidence is relevant to the case, or where it was his duty to preserve it. *Omnia presumuntur contra spoliatorem*. Lawson, Presumptive Ev. 140 et seq. Where the spoliator is the claimant, the fact of spoliation alone raises a presumption against his claim. Where a deed, a will, or other paper is proved to be destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption, *in odium spoliatoris*, applies in favor of the party who claims under such paper, though the contents are not proved. *Id.* 152, and cases cited. But there is great danger that the maxim may be carried too far, and it should be cautiously applied. In this case the mere destruction of the books is not sufficient to warrant the presumption that their contents were against the interest of Peterson, for they were burned after they had been examined, and some time after the funeral of Strom. There was no attempt made to conceal the books by Peterson, or to prevent their examination, and it nowhere appears that there were charges against Peterson on the books destroyed, although it does appear

the maxim can have application; and where the contents are proved there is no occasion for resort to the maxim. *Bott v. Wood*, 56 Miss. 136; *Jones v. Knausa*, 31 N. J. Eq. 609.

Where, then, a deed or will is shown to have been in existence but to have been destroyed by the adversary, it will be presumed that such deed or will contained the conditions favoring the party who asserts them, when it was possible for it to have contained them. *Dalston v. Coatsworth*, 1 P. Wms. 731.

This rule is built upon the cases of *Rex v. Countess Arundel*, Hob. 109; *Sanson v. Rumsey*, 2 Vern. 561; *Hampden v. Hampden*, 1 Bro. P. C. 550; and *Woodroff and Burton*, Reg. Lib. A. 1722, fol. 222, decided in the order named, and was followed in *Lord Melville's Trial*, 29 How. St. Tr. 1194.

No presumption arises except upon proof. Inference may aid proof but cannot create it. There must be proof offered to sustain the allegations of the pleadings, which proof, if insufficient, may be aided by every presumption against the destroyer, but the mere proof of the destruction will not warrant the rendition of a judgment which could otherwise only be supported by the facts evidenced by the writing destroyed. *Gage v. Parmelee*, 87 Ill. 329.

The case of *Cowper v. Earl Cowper*, 2 P. Wms. 749 (A. D. 1784), was the first to emphatically iterate the rule that no presumption could arise except upon evidence, and it was based on the holdings in *Rex v. Countess Arundel*, Hob. 109; *Gartside v. Ratcliff*, 1 Ch. Cas. 292; *Hunt v. Matthews*, 1 Vern. 408; *Wardour v. Bertsford* (said to be not rightly reported), 1 Vern. 452; and *Countess Plymouth v. Bladon*, 2 Vern. 32, which need no further consideration here. See also *Moffat v. Moffat*, 10 Bosw. 468, 501.

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The rule may be applied in like cases to the following:

Where the defendant has placed it beyond the power of the plaintiff to prove the execution of a bill of sale, proof of that fact will raise a presumption of its execution. *Cheatham v. Riddle*, 8 Tex. 162.

The destruction of a receipt will raise the presumption of the payment of money. *Downing v. Plate*, 90 Ill. 238.

The failure of a party to perform his duty in keeping strict account of the workings in a coal mine extending under adjoining land raises the presumption that all the coal taken out came therefrom. *Dean v. Thwaite*, 21 Beav. 621.

The failure of a confidential agent to keep vouchers against himself while keeping those against his principal raised the presumption that he had received his full compensation. *White v. Lady Lincoln*, and *Duke Newcastle v. Kinderley*, 8 Ves. Jr. 383.

The destruction of a contract by the vendor for the purchase of land about the time a demand was made by the vendee for the delivery of a deed was held sufficient to raise the presumption that it did not state the agreement in the manner alleged by the vendor. *Warren v. Crew*, 22 Iowa, 315.

Upon proof that a member of the firm whose duty it was to keep the books, expended more money for personal or family expenses than he has charged himself with, the maxim *in odium spoliatoris* applies. *Dimond v. Henderson*, 47 Wis. 172.

Where the controversy was as to the number of acres conveyed by a certain deed which the defendant might have produced, the court said: "Perhaps the presumption *in odium spoliatoris* might arise from the fact of the nonproduction of the deed and failure to account for its absence;" but the case

that the books discovered did contain charges against him. Whether Judge Potter's examination was sufficient or not to show that there were such charges does not appear; neither does it appear that he did not know, or could not remember, whether there were any charges in the books against the plaintiff. However, the instruction asked was too broad, and should have been modified by counsel, for the mere fact of the destruction of the books alone does not show that they were evidence against the interest of the spoliator. His conduct might not have been that of a spoliator, but rather that of a stupid or ignorant man, who thought that he had a duty to perform, enjoined upon him by his deceased employer; and there are some indications in the evidence that support this view. Some four months prior to his death, Strom published in a local daily paper a notice which the publisher states he believes was brought to him by Peterson, entitled "Extends Thanks," which states that on the 7th of the month (May, 1893) Strom closed his liquor house, and that he would store his goods, and, if business would justify, would probably open the next summer, and, if not, he would ship his goods away. He then presents his highest compliments to his "proper" customers, and states: "Remember, if I am guilty to creditors for payment, come and collect. If any persons are guilty to me for liquors, please keep this [the notice] as a present." This notice was introduced for the purpose of showing that Strom was settling up his accounts, and that, in addition to his general custom of meeting his obligations promptly, he had given

notice to his creditors that he desired to pay his bills. Other testimony was introduced, showing that he had directed the payment of his local bills, and had requested that money be taken from his safe for that purpose. But the publication referred to also indicates that he had no desire to press his claims against his creditors, and is in harmony with Peterson's statement that Strom had directed him to burn his books. No instruction was asked upon the question of this explanation of Peterson, nor were the jury asked to be instructed to disregard it as evidence. It went to them as his explanation of his conduct in destroying the books. It will be noticed that it appears that an inventory was taken of the property of the estate, but whether before or after the destruction of the books does not appear. It should have been shown that the accounts against the creditors of the estate were not in this inventory, or were not preserved. If they were, and had Peterson's account, if there was any against him, appeared in such inventory, it could have been introduced as secondary evidence.

The instruction asked for presents the British law governing the spoliation of documents. Broom, *Legal Maxims*, 940; 1 Phillips, Ev. (Cowen & H. notes) 639; *Houser v. Austin*, 2 Idaho, 188, 198. The rule is strong in admiralty cases, but upon this point Mr. Justice Story says in the case of *The Pizarro*, 15 U. S. 2 Wheat. 241, 4 L. ed. 229. "The objection which is urged against the admission of the further proof would, under other circumstances, deserve great consideration. Conceal-

was decided on other grounds. *Barney v. Seeley*, 38 Wis. 381.

Likewise, the court announced its willingness that the presumption should be the basis for the decision of the case, but decided the case on other grounds in *Wilson v. Cassidy*, 2 Ind. 682.

The destruction of forged notes after being arrested for their utterance raised a presumption of forgery. *State v. Chamberlain*, 80 Mo. 129, following *Pomeroy v. Benton*, 77 Mo. 64.

Upon the destruction of a second will by a person interested in opposition thereto so that the exact contents of the will cannot be ascertained, the jury were held bound to infer that the second will contained inconsistent dispositions with the first, and further, that the second will contained a clause expressly revoking all former wills, the court saying: "It is far better that there should be an intestacy than that a spoliator should be rewarded for his dishonesty." *Jones v. Murphy*, 8 Watts & S. 275, 301.

If a second will be destroyed or withheld by fraud the jury are bound to infer that the second will contained dispositions of property inconsistent with the first, and more, in *odium spoliatoris*, and that the second will contained a clause expressly revoking all former wills. *Ibid*.

Where, however, the testator is shown to have destroyed the latter will the rule does not apply. Such destruction likewise revives the former, but because it is a direct revocation of the latter. *Harwood v. Goodright*, 1 Cowp. 87, 91.

And where the destruction alone is shown, the testator is presumed to have destroyed it. *Betts v. Jackson*, Brown, 6 Wend. 178.

There is no basis upon which the presumption can arise, where, although the form of the property in question has been changed, neither the value nor

the means of establishing the value has been lessened or destroyed. In case of a change of form—as by the milling of ores—it is only where corroborating circumstances or secondary evidence have been destroyed that the strongest presumption will arise from the direct testimony. *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 389.

And such adverse presumption will not arise in the absence of a purpose to suppress evidence, as by the mere sending away of hides taken from butchered animals alleged to have been wrongfully taken. *People v. Hurley*, 57 Cal. 146.

The destruction of books relating to matters long since settled and never since disputed, will be treated lightly, and will not be allowed to prejudice the case; but it is entirely different where they relate to recent transactions of which the accounts therefrom arising have not been adjusted. And still more where that destruction was by the party who has filed the bill to have accounts taken of those transactions. In such a case the court must be satisfied that the destruction was proper and justifiable or the principle laid down in *Armory v. Delamirie*, 1 Strange, 505, 1 Smith, Lead. Cas. 7th Am. ed. 636, will be applied, and everything will be presumed against the destroyer which is most unfavorable to him if it is consistent with the rest of the facts which have been either admitted or proved. *Gray v. Haig*, 20 Beav. 219.

As to the substitution of secondary evidence in such cases, see *supra*, II. a.

And where a brother for the deliberate and sole purpose of cutting off investigation destroyed book accounts of the firm after suit brought, thereby making it impossible to ascertain the amount out of which he had defrauded his partner, to whom as he said he was "bound by the ties of gratitude for giving him his start in life," the court said: "No

ment, or even spoliation, of papers is not of itself a sufficient ground for condemnation in a prize court. It is undoubtedly a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith or gross prevarication,—it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence, which the party is not permitted to supply." In the case of *Baldwin v. Threlkeld*, 8 Ind. App. 312, the court says: "The court sustained an objection of the appellee to proving the contents of certain letters testified to by the appellant after he had practically admitted that he voluntarily destroyed the letters after he had commenced the suit on a note against the Bryants. The court had a right to deduce from the act of destruction after the commencement of such suit the inference of a fraudulent design to do away with the letters themselves, and upon this theory the exclusion of the evidence was proper." This is the rule laid down in *Blade v. Noland*, 12 Wend. 173, 27 Am. Dec. 126, where a party deliberately destroyed a note before it fell due, and there was nothing in the

case accounting for or explaining the act, consistent with an honest or justifiable purpose; and it was held that the plaintiff was bound to give affirmatively, evidence to show that the act took place under circumstances that repelled the inference of fraudulent design. These cases apply to a case where a party destroys or suppresses his own evidence, and seeks to introduce secondary evidence of the contents of the same, if in its nature documentary, or does not produce the witnesses to testify, or causes them to leave the jurisdiction. But the presumption is not a conclusive or absolute one, although it is a strong presumption; and this is the rule where a party suppresses or withholds evidence. The following instruction was given in the case of *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 688: "If the jury believe from the evidence that William Thompson, the plaintiff, burned, or in any way destroyed, any of the papers of the deceased, James A. Thompson, without the knowledge and consent of those who were interested in the estate of said deceased, it devolves on him to show by proof other than his own statements what those papers contained; and on his failure to do so the law raises the presumption against him that they were of the highest value to the defendant in this suit, and entitles her to a verdict." The court said, in substance, while holding the instruction erroneous, that it is undoubtedly true that a party who destroys the evidence by which his claim or title may be impeached raises a strong presumption against the validity of his claim; and if the

latter case could ever present itself for the rigid rule recognized alike in equity and at law, embodied in the maxim, *Omnia præsumentur in odium spoliatoris*." *Pomeroy v. Benton*, 77 Mo. 64.

b. The proof.

Before one party can charge another as a spoliator he must show that he was himself interested in the document destroyed; and before the destruction will be deemed to be a spoliation he must show that it was done *malo animo* to injure him. *Delany v. Tenison*, 3 Bro. P. C. 650.

Furthermore before the character of a spoliator can be fixed on one who destroys a deed, the purpose of the instrument must be proved to have been what it is surmised to have been. When that is done then the act of the spoliator is deemed to be equivalent to a confession. *M'Reynolds v. M'Cord*, 6 Watts, 288.

As above stated, there must be some evidence "on which the presumption can be reposed," but "if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." *Anonymous*, 1 Ld. Raym. 731, quoting from *Lord Holt* in *B. R. Mich.* 10 Wm. III.

Slight evidence of the contents of a written instrument wilfully destroyed is usually sufficient, for from the fact of the wilful destruction arises the presumption that if the truth had appeared, it would have been against the interest of the destroyer, and that his conduct is attributable to his knowledge of this circumstance. *Jones v. Knauss*, 31 N. J. Eq. 609.

The mere destruction or withholding of an instrument will not always supply the absence of proof of its contents, or corroborate the evidence of an interested witness in regard to them. The presumption arising therefrom may, in some cases, 34 L. R. A.

determine the general character of a paper destroyed or withheld, or reduce to certainty what is equivocal, vague, or uncertain, or complete what is imperfect, but it does not corroborate whatever the party prejudiced by the destruction may testify to be the contents. *Moffatt v. Moffatt*, 10 Bosw. 501.

Courts of equity will go beyond and even contrary to the rules of law and presume most liberally in *odium spoliatoris*.

The fact of the spoliation may be proved by the answer or oath of the opposite party, so may the contents of a paper; but when it is sought to raise a debt against the spoliator there must be some evidence beyond the fact of the spoliation. The term "some evidence" need not be understood to mean a *prima facie* case, but slight evidence which conduces to prove the charge is sufficient; its weight or credibility is a matter of discretion and circumstance. *Askew v. Odenheimer*, *Baldw.* 380; *Saneon v. Rumsey*, 2 Vern. 561; *Cookes v. Hellier*, 1 Ves. Sr. 235; *Gartside v. Ratcliff*, 1 Ch. Cas. 233.

Lord Eldon thought the courts might have gone a little too far in presuming, after proof of spoliation, that the contents of the thing spoiled are what they have been alleged to be; but he refuses to change the rule. *Barker v. Ray*, 2 Russ. Ch. 63, 73.

A will, being in court and not produced by the plaintiff, the jury may infer that the statements of the defendant concerning its contents are true. *Sutton v. Devonport*, 27 L. J. C. P. N. S. 54.

This is upon the theory that if the facts are not as alleged the adversary has it in his power to make it so to appear. *Hampden v. Hampden*, 3 Bro. P. C. 550.

And where the young Earl of Anglesea was transported, sold as a slave, and thereby kept from his inheritance for thirty years, the court said: "These facts speak more strongly in proof of the plaintiffs'

plaintiff destroyed papers or the estate, and especially receipts for taxes, which are important documents, he committed a great wrong, but yet the presumption against him would not be of that conclusive character indicated by the instruction. The jury were told in the instruction in the case cited that, if the plaintiff destroyed any papers of the deceased, the defendant was entitled to their verdict. The court then proceeds to say: "The law of nations, as recognized in continental Europe, under certain circumstances raises a conclusive presumption against the spoliator of papers indicating the national character of a vessel. 1 Kent, Com. 157, 158. But even that rule does not ordinarily prevail in England and the United States. 1 Greenl. Ev. § 31; *The Pizarro*, 15 U. S. 2 Wheat. 242, 4 L. ed. 230, note. This rule has no place in the courts of common law. On proof of the existence of a paper, the testimony of a party who ought to have the custody of it, touching its loss, with evidence of diligent search for it, is addressed to the court. If its loss is established, he is allowed to go to the jury with evidence of its contents. But his adversary may prove that he has withheld or destroyed it, and if he satisfactorily establish that point, every presumption will be indulged against him in reference to its character. 2 Phillips, Ev. (Cowen & H. notes) 293; 3 Phillips, Ev. 1193; *Life & F. Ins. Co. v. Mechanic F. Ins. Co.* 7 Wend. 31. The rule is well stated by Sutherland, J., in the case last referred to." This rule is that the refusal to produce books and papers upon notice given does not warrant the presumption

that they would show the facts alleged by the party giving notice; the only effect of such refusal being that parol evidence of their contents may be given, and, if such secondary evidence be imperfect, vague, and uncertain as to dates, sums, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. But some general evidence of such parts of their contents as are applicable to the case must first be given, before any foundation is laid for any inference or intendment on account of their nonproduction. This doctrine will be applied to another feature of the case at bar. The following instruction was given in the case of *Bott v. Wood*, 56 Miss. 186, 189: "If the jury are satisfied from the evidence that Thomas H. Wood fraudulently destroyed the will now in controversy, testified to by Blanton as duly executed by his father, everything may be presumed against the destroyer of the will in *odium spoliatoris* [meaning 'in hatred of the spoliator'] and against those claiming under him." This instruction was held erroneous, the court remarking that the maxim, *Omnia presumuntur in odium spoliatoris*, might be carried too far, and citing *Best, Ev. §§ 412 et seq.*, as stating that it should be regarded as merely matter of inference in weighing the evidence in its own nature applicable to the subject in dispute. The party destroying a written instrument must not gain by his own wrong, but it is only in reference to the contents of the paper destroyed or withheld that the maxim can have application. As the contents of the will were proved, the maxim

case than a thousand witnesses." *Craig v. Earl Anglesea*, 17 How. St. Tr. 1430.

In the cases of *Sanson v. Rumsey*, 2 Vern. 561, and *Eyton v. Myton*, Id. 380, deeds of marriage settlement were burned, and in *Dalston v. Coatsworth*, 1 P. Wms. 731, a deed of inheritance was destroyed. The rule in each case decreed that the injured party should hold and enjoy, and that the adversary should convey. In one case the court imprisoned the spoliator until he should make a conveyance; the court admitting that it could not imprison him forever, but saying that he could obtain his release by executing the conveyance.

The evidence that is deductible where there has been a spoliation of the "best" evidence (the original document) is of course secondary evidence. The rule is that, if by fraud a party is deprived of the possession of a written instrument which belongs to him, secondary evidence of the contents may be given in the same manner as in the case of lost documents. *Grimes v. Kimball*, 3 Allen, 518.

Where a party refused to produce a lease which was proved to be in her custody, an attorney who had read it was allowed to give evidence of its contents. The court presuming it to be against her interest, inasmuch as she had the power to show it to be otherwise if such were the fact. *Young v. Holmes*, 1 Strange, 70.

Exception. There is one exception to the rule that upon proof of the fact that the party adversely interested destroys or withholds evidence to which the other party is entitled, a presumption arises in *odium spoliatoris* enabling the aggressor to make secondary proof by the words of his own mouth. It is in the case of letters received by the one party from the other.

In such a case the letters are not presumed to contain whatever the adversary avers they do contain, nor is the receiver compelled to account for

their nonproduction in evidence. *Lumley v. Wagner*, 1 DeG. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 371.

If the law created an adverse presumption against one who fails or refuses to produce in evidence letters received by him, it would place almost any single man at the mercy of an artful and designing woman who would choose to recognize in her letters sent to him the existence of a marriage contract. However, this would violate the other rule that parties cannot introduce their own declarations in evidence. *Law v. Woodruff*, 48 Ill. 300.

Where letters which are supposed to have been received are not produced there is at most no more than a suspicion raised. It does not constitute proof. *Carpenter's Estate*, 94 Cal. 406.

"This doctrine is especially applicable to actions for libel, in which the language used, and the sense and meaning which properly attach to it, constitute the gist of the action." *The Count Joannes v. Bennett*, 5 Allen, 160, 51 Am. Dec. 733.

If, however, there has been a destruction of letters, and an action for breach of promise of marriage is brought against the receiver, and he satisfactorily shows that the act of destruction was not the result of fraudulent intent, the case comes within the exception to the rule of law, and secondary evidence of the contents is at his instance admissible. *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

c. The damages.

After a spoliation has been established and "some evidence" is introduced, sufficient on which to base a presumption of damages, it then becomes a question what shall be taken as the measure of damages. On the mere establishing of the fact that the rights of a party are either withheld or violated the law will presume that damage has been done, making it necessary for the adversary

had no application, and it was not a proper guide for the jury. It was held that the instruction was too broad and indefinite in saying that "everything may be presumed against the destroyer of the will," as it should have been limited to intent and presumption as to the terms of the will, if given at all. The instruction given in the case at bar was to the effect that if the plaintiff destroyed the books of account of the deceased, or any of them, a presumption arose that, had the truth appeared by said books, it would have been against his interest. This excludes wholly the circumstances surrounding the destruction of the books, and the explanation of the plaintiff. It also assumes that the books of account contained charges against the plaintiff. It is to the destruction of "evidence" relevant to the case, or where it was the duty of the plaintiff to preserve the evidence, that the rule applies. *Lawson*, Presumptive Ev. p. 140, rule 24. It does not appear that the books destroyed were relevant or material to the case, or that their contents would have disclosed charges against or settlements with the plaintiff, Peterson. Another book found disclosed payments made to the plaintiff, but this does not warrant an absolute or controlling inference that the burned books contained like charges, or any charges against Peterson. *Drosten v. Mueller*, 103 Mo. 624, 633. But the destruction of the books must be a wilful act, as the presumption is that evidence "wilfully" suppressed would be adverse if produced. 1 *Rice*, Ev. § 87, subd. c. While the word "wilful" might, in common parlance, be held to be synonymous

with "intentional," yet there can be no doubt that the destruction must be designedly done with the purpose of suppressing evidence. Taking into consideration all the facts and circumstances relative to the burning of the books by Peterson, including the opportunity afforded for the examination of them for days after the decease of his employer, and that there was not, probably, a very diligent search by him of all the books of account, as one was found with but little effort, and a calendar was left hanging on the wall containing some statements against his interest, his apparent candor and promptness in acknowledging the burning of the books, and the explanation that he gave that it was done at the direction of his employer, and his evidently regarding his unusual act as nothing extraordinary, do not fully convey the belief that the destruction of the books by him was designedly done for the purpose of suppressing evidence against him. Certainly, the presumption resulting from the destruction of the books was not an absolute or conclusive one, and the instruction was too sweeping in its terms, as it neither by qualifying words limited the presumption to intention or design, nor to the fact that the jury should first find that the books contained evidence against him. Although entitled to an instruction upon this point, it was not the duty of the court to give a proper instruction, unless requested in positive terms. If an instruction is requested, and cannot properly be given without modification, the judge may, for that reason, refuse to give it, because to entitle it to be given it must be wholly correct in point of

who would not be mulct to make proof to the contrary. *Tedder v. Stiles*, 16 Ga. 2.

The important question then is the amount. In *Lord Melville's Trial*, 29 How. St. Tr. 1194, 1195, Sir Samuel Romilly said in his argument: "My lords, in civil cases a party who destroys evidence of a transaction is always charged to the full extent that it was possible that that transaction could have gone." (He based his remarks upon the preceding great cases of *White v. Lady Lincoln*, and *Duke Newcastle v. Kinderley*, 8 Ves. Jr. 363.)

A still stronger case than the celebrated *Armory v. Delamirie* is *Mortimer v. Cradock*, 7 Jur. 45, 12 L. J. C. P. N. S. 166, in which a necklace containing fifty-six diamonds was lost and soon thereafter found in the possession of the defendant, a jeweler, but only thirty-one of the diamonds were seen. Upon defendant's failure to establish satisfactorily how he came in possession of those he had, and failure to deny that he ever had the whole number (the whole having been dishonestly taken by some person), the jury were instructed to presume that the defendant had the whole number and to find the damages accordingly, which they did—£500.

The maxim that everything will be presumed against the destroyer "has often been a most effective instrument in the hands of justice to punish wrongdoers."

Where, however, goods are taken from a store the presumption does not arise that goods have been taken of the highest value of the best grade and largest quantity within the store; but only of the precise thing shown to have been taken. *Harris v. Rosenberg*, 48 Conn. 227.

If one in the possession of property prevents the owner from showing its quality he may be charged for the best quality of such article. *Bailey v. Shaw*, 24 N. H. 207, 55 Am. Dec. 241; *Clark v. Miller*, 4 Wend. 623.
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The principle was applied in a case where it had been the duty of a person to keep strict account of the workings of a mine extending under another's land; failing to do so he was deemed to be chargeable with the full amount taken out unless he could prove it was not taken out during the time which the account was directed to embrace. *Dean v. Thwaite*, 21 Beav. 621.

The rule then may be stated to be that if you establish the fact of spoliation against the defendant, and he will not show the sum spoliated, the court will presume it to be the sum alleged by the plaintiff, the same being in harmony with the other facts in the case. *Lancaster v. Atkinson*, 2 Russ. Ch. 60.

When the destruction is freed from the inference of a fraudulent design, then the presumption is not of maximum damages but of a minimum amount.

It being proved by servants that a certain number of full bottles of liquor were delivered to the defendant, the jury were directed to presume that they were filled with the cheapest liquor in which the plaintiff dealt, viz., porter, and they awarded damages upon that scale accordingly. *Clunnes v. Pezzy*, 1 Campb. 8.

Following this case, where a bank note (a loan of currency) was asked and given, and no proof made of the denomination of the note, the jury were instructed to presume it to be one pound sterling—the lowest in circulation. *Lawton v. Sweeney*, 8 Jur. 964.

The fabrication of evidence, as well by interlineations as by intermingling, gives rise to a presumption *in odium spoliatoris*, and will be the subject of a subsequent note. R. 8.

law. Mere nondirection, partial or total, is not ground for a new trial, unless specific instructions, good in point of law, and appropriate to the evidence, are requested and refused. 2 Thomp. Trials, §§ 2341, 2349.

The trial court refused to admit in evidence a certain calendar found in the place of business of Strom, upon which was written in Strom's handwriting certain statements. It was marked for identification, and upon the refusal of the court to receive it as evidence the counsel for defendant below offered to prove by it that in the handwriting of Strom, the deceased, across the date of January 30, 1892, appeared the words, "Severin paid for a month," and across the 31st day of December, 1892, also in the handwriting of the decedent, appeared the words, "Severin Peterson paid to this day in full." This calendar was found hanging on the wall, and one account book was found under a barrel by a son of decedent, in a room where the safe was kept. The witness was not produced, nor his deposition taken, as he was in Sweden; but the fact of the discovery of these papers and books was shown by the affidavit of the executor, which was admitted in evidence in order to prevent a continuance. This affidavit states that other memoranda in Strom's handwriting appeared upon the calendar, but no reference is made to such matters other than the two entries mentioned in the offer of counsel when the calendar was sought to be introduced. Nowhere in the record is it disclosed what these other entries were, and the contents of the calendar are not before us in any form, except as to them. It is asserted that it was shown that it was the custom of the decedent to make memoranda upon the calendars, but this is not borne out by the testimony. The calendar was not a book of original entry, neither does it appear to have been kept in the usual course of business of the decedent. It cannot be said that it was one of the books of account of the deceased. The statute applicable to such evidence, among other things, provides that a party shall not testify where the adverse party is an executor or administrator, with certain exceptions, one of which is as follows: "Sixth. If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries were made by himself, a person since deceased; or a disinterested person nonresident of the county; whereupon the book shall be competent evidence; and such book may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness." Rev. Stat. § 2590. Unfettered by statutory provisions, the American cases, taken together, are to the effect that entries made in the regular and usual course of business are admissible in evidence after the death of the person who made them, on proof of his handwriting; and during his life, if authenticated by himself. Other private entries may be used to refresh the memory, but are not admissible in evidence. Notes to *Price v. Earl Torrington*, 1 Salk. 285; *Doe. Patteshall v. Turford*, 3 Barn. & Ad. 890; 1 Smith, Lead. Cas. 581. The statute does not seem to change this rule, and it is necessary to show that the book offered is an account book, or what may

reasonably be considered to be such. The most liberal rule was adopted by the supreme court of Vermont in *Gleason v. Kinney*, 63 Vt. 560, where the diary of a decedent for a certain year was held rightly admissible in evidence against an administrator. But the entry was in the form of an original entry of a charge in a book account, rather than a memorandum from which such charge could be formulated. There were regular books of account kept in that case, but the entry was found under the proper dates in a diary. The court said: "When the transaction requires and furnishes only a memorandum, its entry on a daybook, journal, or ledger, intermingled with proper accounts, does not render it any more admissible in evidence. But when it is of such a nature that it is the proper subject of a charge upon book, and the party enters it as such a charge, although on a book other than his regular books of account, such entry is an original entry in book account. Nor is its character changed by his failure to transfer it upon his regular books of account." It was also remarked that the nature of the transaction and entry marks the determinative characteristic between a charge in book account and memorandum, and that this is the doctrine in all the cases in Vermont. There is a marked difference between the charges made in that case on the diary of the decedent and upon the calendar in the case at bar. There the entry was in each instance, "Liberty T. Kinney, Dr. To paid . . . for you," while on the calendar offered in this case the entry was, "Severin paid for a month," and, "Severin Peterson paid to this day in full." These entries do not disclose the amount paid in either case, and the memorandum on the calendar, although a proper subject for book charge, was not entered "as such charge"—an omission that appears to be studied. But this Vermont case does not appear to be in harmony with other cases in that state, or with cases elsewhere. Said the court in *Barber v. Bennett*, 58 Vt. 476, 483, 56 Am. Rep. 565. "But it has generally been held that to lay the foundation for the admission of that kind of evidence, it must be shown that the entries [of a deceased person] were made in the usual course of business of the party making them, and at or about the time of the transaction to which they refer. This qualified right to use such evidence in favor of the party making the entries is in contravention of one of the primary rules of evidence, which forbids the manufacture of evidence by a party in his own favor." The rule announced in *Welsh v. Barrett*, 15 Mass. 380, is commended, and that is that, "what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury." The Vermont court would not apply the rule in the case last cited from that state, as the memoranda were made by the decedent, in his lifetime, upon loose pieces of paper; and said further: "A memorandum is defined to be a note to help the memory; and this paper, considered in connection with the circumstances under which it was found, partakes of that character. It certainly was not an account so kept and proved

as to be admissible as evidence. It has been uniformly held in this state that memoranda are not independent evidence in chief, even during the lifetime of the party making them." In the case of *Callanay v. McMillan*, 11 Heisk. 557, the evidence consisted of entries in a memorandum book carried by decedent in his lifetime, which was found by his executors after his death, and the entries therein were proved to be in the testator's handwriting, and it was also proved by the executors that they had no other means of proving these items. They were clearly stated in amounts and dates, but were rejected by the court, which held that the entries were not admissible either under the statute or the general common-law principle, as the book was not a book of account, nor were the entries made in the usual course of business or professional employment, but the book was but a mere private memorandum, and upon no principle admissible. So it was held in the case of *Robinson v. Hoyt*, 39 Mich. 405, that where payments alleged to have been made by a deceased mortgage debtor were denied by the creditor, they were not sufficiently proved by entries in the handwriting of the debtor in an unusual place in his day-book, from which the immediately preceding leaves had been torn, while the regular entries were followed by a number of blank pages. The following cases tend to support these views: *Vina v. Gilman*, 21 W. Va. 309, 45 Am. Rep. 562; *Peck v. Valentine*, 94 N. Y. 569; *New York v. Second Ave. R. Co.* 102 N. Y. 581; *Bates v. Preble*, 151 U. S. 149, 157, 38 L. ed. 106, 110; *Anchor Mill. Co. v. Walsh*, 108 Mo. 277; *Robinson v. Smith*, 111 Mo. 205; *Buckley v. Buckley*, 12 Nev. 423, 442; *Libby v. Brown*, 78 Me. 492; *McDonald v. Carnes*, 90 Ala. 147; *Doolittle v. Stone*, 136 N. Y. 818; *Abel v. Fitch*, 20 Conn. 96; *Bridgewater v. Roxbury*, 54 Conn. 217; *Beak v. House*, 141 Ill. 290. In one state, at least, such memoranda of a decedent as disclosed by these calendars offered in evidence at the trial below are by statute made competent evidence. *Craft's Appeal*, 42 Conn. 158. But we have no such statute, and the rule ought not to be relaxed without it, even under the circumstances disclosed in this case.

Another objection to the entries on this calendar is that they were not shown to be continuous, as the entries must be in a book used continuously for the purpose (1 Whart. Ev. § 688, citing *Kibbe v. Bancroft*, 77 Ill. 18); for, although the affidavit admitted as evidence states that there were other entries besides the two relevant to the case, the offer does not show this fact, and we have no means of determining what those entries were, as there is no proof of the nature and character of the other entries on the calendar, whether of daily entry or of less frequent periods. While our statute ought to be liberally construed, and the liberal rule followed under the common law, to admit a memorial of business transactions which cannot ordinarily be carried in the mind, yet, recognizing the wide application given to books of account under statutes akin to ours, it will not do to admit matters that have not been the subject of book accounts, nor registered in the usual, regular, and ordinary course of business. The account books of the illiterate ought to be as admissible as

the books of a tradesman and a banker, if within the statutory conditions, as the purpose of the law is to secure authenticity and credibility in respect to the evidence, rather than to prescribe forms. *Woolsey v. Bohn*, 41 Minn. 228. There are respectable courts that hold that a debtor's books of account are not evidence to prove payments by him to his creditors (*Hess's Appeal*, 112 Pa. 163), yet the liberal tendency of modern decisions is in the other direction. These payments, however, ought to be charged on something that might be considered a book of account kept in the usual course of business. The proof lacks this crucial test in regard to the calendars, and the calendars were not admissible as primary evidence. They are under the ban as secondary evidence, as there is nothing to show that the entries were ever made in the books of account, or that it is impossible for the executor to show that fact. Even if the destruction of the books by Peterson prevented the executor from giving secondary evidence of their contents, and although slight evidence, under such circumstances, may be admitted, and will be deemed satisfactory, there is nothing to show that any entry on the calendar was ever the subject at any time of book account. Because the entries were not in definite form to constitute a charge as to the amounts paid, and were not shown to have been kept in the usual course of business or to have been transferred to books of account, the calendar was properly rejected by the trial court.

This cause was twice tried, the second trial resulting in a much larger verdict for the plaintiff than was first awarded to him. While there is undoubtedly a sufficient reason for instituting the proceedings in error, and our impressions are that, were we to decide the cause in the first instance, we might have reached a different result than that arrived at by the jury and the trial court, yet, upon the whole, we cannot say that there was not sufficient evidence to sustain the judgment. The claim was a stale one, and the plaintiff below stated that the deceased owed him nothing. He did not deny this, although he was a competent witness to make the denial or explain his admission; yet there is sufficient evidence to sustain the judgment. The law was fairly presented to the jury with one exception,—the matter of the destruction of the books,—and a proper instruction was not requested upon this point. The services rendered were of the most menial character, and were performed at unusual hours, and the circumstances of the case lead us to believe that Peterson was relying largely upon the bounty of his employer, and expected provision to be made for him in the will. It seems as if much difficulty could have been avoided in the case, and the truth clearly ascertained, either by probing the conscience of the plaintiff below by interrogatories as to the original contract and as to payments, by permitting him to testify to the facts in court, or by calling him as a witness. The executor cannot be deprived of his right to compel the adverse party to testify as he might any other witness under our Code provisions. What is intended for the protection of the estate in guarding it

against fraudulent claims or unfounded causes of action should not be permitted to operate as a source of injury, and many times the interests of an estate may urgently require that an executor or an administrator should waive what belongs to him as a privilege, and call the opposite party as a witness. "The facts upon which he founds his defense, or upon which he bases his claim, may be locked in the breast of the adverse party, and without his testimony a failure of justice may ensue. The legislature could not have designed to place the estates of deceased persons at such disadvantage by depriving them of evidence within reach necessary to their protection against imposition and fraud. The adverse and surviving party, when compelled to testify by the executor or administrator, cannot reasonably complain; for, though a party, he can then be examined fully in his own behalf on the subject of his examination in chief. *Nicolls v. Esterly*, 16 Kan. 82; Whart. Ev. § 475a." *Roberts v. Briscoe*, 44 Ohio St. 596, 602. These extracts are from the opinion of the supreme court of Ohio under

statutory provisions identical with ours, including the provision that an adverse party may be compelled to testify the same as any other witness. Wyo. Rev. Stat. § 259.. While counsel are not compelled to resort to such means in a case like the one under consideration, such a course would be highly commendable, and would tend to dissipate the doubts and difficulties that render the case obscure. We do not intend these remarks as a censure or rebuke to the eminent counsel who participated in the trial of this cause, but they may serve to hereafter secure the elicitation of truth in a parallel case,—the great object in view in the administration of justice.

The judgment of the District Court for Laraine County is affirmed.

Mr. Justice **Potter** having been of counsel in the trial court, Hon. J. H. **Hayford**, judge of the district court of the second judicial district, sat in his stead. **Conaway, J.**, and **Hayford**, Special Judge, concur.

PENNSYLVANIA SUPREME COURT.

Annie C. PETERSON, by Next Friend,
v.

ATLANTIC CITY RAILROAD COMPANY, *Appt.*

(177 Pa. 385.)

A judgment in a trial court against a party whose counsel is, to the knowledge of the court, at the time present in the supreme court in obedience to its rule will not be permitted by the latter court to stand.

(October 5, 1896.)

APP^{EAL} by defendant from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Gavin W. Hart for appellant.

Mr. D. B. Meany for appellee.

Dean, J., delivered the opinion of the court:

This action was for damages for personal injuries from negligence of defendant. It was tried in the court below on January 25, 1895, in the absence of defendant's counsel, and a verdict for \$6,000 given for plaintiff. The absence of counsel, Gavin W. Hart, Esq., was owing to his presence in this court at the argument of a cause in which he was of counsel for appellee (*Sheehan v. Railroad*, on supreme court calendar for same week, and for argument same day). The court below was moved for a new trial on this ground, which

was refused, and judgment entered on the verdict. We now have this appeal by defendant, assigning for error the action of the court below in proceeding with the trial in absence of its counsel. Rule 41 of the supreme court is as follows: "That the hour list be suspended in the eastern district during the period assigned to the argument of cases from the county of Philadelphia. The argument of each cause shall be limited to one hour, unless the chief justice, upon an examination of the paper books, shall consider more time to be necessary. Sixty causes shall be assigned to each week, and a list thereof shall be made up and published by the prothonotary on the Saturday preceding. Said causes shall be set down in the order of their term and number, and shall be numbered on said list consecutively. The first twelve cases on said weekly list shall be assigned for argument on Monday, and for each succeeding day of the week, except Saturday, the first twelve cases theretofore undisposed of on said list shall be assigned for argument. No cause on said list shall be continued when reached, except for a sufficient cause. Engagements of counsel in the lower courts will not be recognized as a reason for the continuance or postponement of a cause, except when they are actually engaged in a trial which has been commenced in a previous week and is unfinished."

As by the Constitution the jurisdiction of the supreme court extends over the state, it must, as an inherent judicial power, necessary to the exercise of its jurisdiction, have authority to make rules which, in its opinion, will enable it to dispose of the business which comes before it from every court in the state. Whether

NOTE.—As to the absence of counsel, caused by sickness or death, to constitute ground for an in-
34 L. R. A.

junction for a default judgment, see note to *Merriman v. Walton* (Cal.) 80 L. R. A. 795, 796.

its rules, intended to speed hearings, are the very best to accomplish the purpose, or whether they in any particular instance operate hardly, are proper subjects of discussion in determining whether they shall be abrogated or amended; but when adopted such discussion is out of place in determining whether they should be recognized by the lower courts. If the supreme court have authority to adopt rules which, in its judgment, are necessary for the prompt transaction of the public business we think no lawyer will doubt its power to enforce them; and this without regard to a difference of opinion as to their equitable operation. Clearly, then, it is the duty of the lower courts to have regard to them, not because they, in all cases, are the best, but because, being in the judgment of the supreme court the best, it has adopted them. They then, necessarily, become a rule of action for the lower courts, in so far as their business is affected by them, because they are the law. The common pleas courts have power to adopt rules which shall facilitate the transaction of their business. We have always rigorously sustained this power, unless in rare cases, where the rules were in violation of law. We cannot, however, sustain a rule or an order, even though made with a view to compel prompt trial of an issue in the common pleas, if the effect of such rule is to deny other litigants their right to a hearing in an appellate court. In that case it is a manifest violation of law, and our judgment is final on that question. Besides, not only should we have the aid of the court below in the enforcement of rule 41, because it is a lawful exercise of the power of this court, but also because it is a reasonable exercise of that power. There are in the commonwealth fifty-four judicial districts, with ninety-nine judges. From the final judgments and decrees of these courts there come before us annually, approximately 1,000 appeals, which ought to be heard while this court is in session. After argument, many of these cases demand prolonged investigation and careful consideration. If we are to dispose of this litigation promptly, that disposition of it can only be accomplished by strict order of hearing and rigorous enforcement of the order by such rules as 41. The court sits in Philadelphia five months. Seven weeks of that time are set aside for hearing appeals from the courts of that county; and this, in view of the whole calendar, is all we can afford to give, and, in our judgment, all it is entitled to, exclusively, in an equitable distribution of our time among all the litigants of the state. All the appeals assigned to the two Philadelphia periods are seldom got through with in that time. Those not reached are heard as we can find time on weeks assigned to other counties, and, if not heard then, they go over for a year. To keep down the number of those that go over, many of them involving large sums of money, it is imperative upon us to insist on the presence of counsel when their cases are called. The rule is not for our convenience, but to promote the interests of suitors. In some cases, such as illness or recent death of counsel, and like causes, the rule is relaxed, but not to suit the convenience of counsel who have causes for trial on the common pleas calendar. That, if permitted, would practically break up our calendar,

and continue about one half of the cases for a year; and, if such a course were allowed, it would not be three years until the Philadelphia list would be encumbered with cases which would not be reached for several years. This would be a denial of justice. In adopting and enforcing this rule, we appreciate the difficulties of the common pleas in disposing promptly of all the cases on their calendars in the order in which they are called, while this court is engaged on the list of appeals for Philadelphia. But their cases are more completely in their control than ours. The counsel and parties concerned, in most instances, all reside in the city. During our session they have twenty weeks for Philadelphia, while we have but seven. Under such circumstances, not without inconvenience, we admit, but without seriously delaying suitors, such order could be made by the lower courts as would guard against an adverse judgment to a client while his counsel was attending to his professional duty in this court. But, however this may be, the inconvenience to suitors in a few cases ought not to be permitted to work the eventual vexatious delay and gross injustice which otherwise would be suffered by all the parties to all the appeals from final judgments in all the courts of the city. In view, then, of these facts, and the further fact that neither the learned judge of the court below nor we can add anything to the fifty-two weeks of the year, what is his plain duty? As we see it, it is, not only in letter, but in spirit, to recognize this rule, and to so arrange the trial list of causes before him that counsel, by obeying it, shall not put in peril the interests of their clients. We think it not improbable, when the learned judge remarked, "I doubt the right of the supreme court to make any such rule, and I would like to test it," he for the moment misapprehended our relations to each other and to the public. Neither he nor we, as against each other, have any rights to assert. Both of us have only very plain judicial duties to perform. The public alone have rights to be insisted on, and rights which both of us are bound to keep in mind. These are to have justice administered without "denial or delay." If, in working together for this object, our rules or orders should, in rare cases, come into conflict, then the only question is, not which shall assert a right, but which has the authority to finally determine what shall best promote the public interests. We feel sure a glance at the Constitution, from which both of us derive whatever judicial authority we have, furnishes a complete answer. If the authority to finally decide is reposed in us, then we are bound to exercise it, not as asserting a right, but as performing a public duty.

It would serve no good purpose to take up and discuss at length the conflicting statements of facts by the learned judge of the court below and the able counsel for defendant. The contradictions are more apparent than real, and such as usually arise where each of the parties, under a sense of injury, strenuously insists on what he conceives to be his personal rights, not regarding the situation from the standpoint of official duty; and, although we have carefully considered the testimony, it would only, perhaps, aggravate the irritation were we to attempt to reconcile these conflict

ing statements. We believe each attempted to perform his duty as he saw it, though they do not seem to believe that of each other. Nevertheless, the main fact stands out prominently and unquestionably that the court below disregarded, in spirit at least, a rule of this court, and thereby this defendant, in the absence of its counsel, who was in attendance upon his duties in this court, was cast in a verdict for \$6,000. Lawfully defendant had a right to counsel. Through no fault of its own or of its counsel, but because of the erroneous ruling of the court below, it had none.

The trial was not, therefore, lawful, and *the judgment must be reversed*. It is reversed accordingly, and a v. f. d. n. awarded.

Joseph C. BENNETT, *Appt.*,

v.

EASTERN BUILDING & LOAN ASSOCIATION of Syracuse, New York.

(177 Pa. 232.)

A contract to pay money to a loan association situated in another state at its place of business, made by a resident of one state, who applied to become a member of the association as resident in the foreign state, is to be governed by the laws of its residence, although it had an agency at the place where the borrower resided through which the contract was made.

(October 5, 1892.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Lycoming County in favor of defendant in an action brought to recover back money paid by plaintiff to defendant which was alleged to have been usurious interest upon a loan. *Affirmed*.

The facts are stated in the opinion.

Messrs. T. M. B. Hicks and W. H. Spencer, for appellant:

The place of contract is where it is delivered and first takes effect as a binding obligation.

3 Am. & Eng. Enc. Law. p. 547.

The obligations were delivered at Williamsport, and the money was paid at Williamsport, thus fixing Williamsport as the place where the contract was consummated and the obligations delivered and first became binding as such.

Hitchcock v. United States Bank, 7 Ala. 886; *Rowland v. Old Dominion Bldg. & L. Asso.* 115 N. C. 825, 116 N. C. 877; *Meroney v. Atlanta Nat. Bldg. & L. Asso.* 116 N. C. 883.

Although the appellee has complied with the act of April 22, 1874 (Pub. Laws, 108), by filing the required certificate in the office of the secretary of the commonwealth, this does not confer upon it authority to exercise within this state the powers conferred upon it by its charter.

It is only by virtue of the provisions contained in the 87th section of the act of April 29, 1874 (cl. 1, Pub. Laws, 96, and cl. 6, Pub. Laws, 98), that building associations in-

corporated in Pennsylvania under said act can collect more than the amount actually loaned, with 6 per cent interest.

Jarrett v. Cope, 68 Pa. 67; *Philanthropic Bldg. Asso. v. McKnight*, 85 Pa. 470; *Kupfert v. Guttenberg Bldg. Asso.* 80 Pa. 465.

The comity between the states, in force in Pennsylvania, does not hold that because the statute law of New York provides that the exercise of certain powers conferred upon the corporation in question shall not be deemed a violation of the New York statutes against usury, that therefore this corporation shall be permitted to exercise all these powers, or any of them, in the state of Pennsylvania, without regard to the usury laws of this state.

1 Spelling, Priv. Corp. § 80, p. 99; *Runyan v. Coster*, 89 U. S. 14 Pet. 123, 10 L. ed. 382; *Thompson v. Waters*, 25 Mich. 221, 18 Am. Rep. 243; *Falls v. United States Sav. Loan & Bkg. Co.* 97 Ala. 422, 24 L. R. A. 174; *Hitchcock v. United States Bank*, 7 Ala. 886; 8 Am. & Eng. Enc. Law. p. 834, note 1, tit. Usury; *Bard v. Poole*, 12 N. Y. 504; *New York Mut. Soc. & L. Asso. v. Slaughter*, 4 Pa. Dist. R. 660; *Southern Bldg. & L. Asso. v. Riggle*, Id. 617; *National Bldg. & L. Asso. v. Riley*, Id. 663; *Farrior v. New England Mortg. Secur. Co.* 88 Ala. 275; *American Freehold Land Mortg. Co. v. Sevell*, 92 Ala. 163, 13 L. R. A. 299; *Evans v. Kittrell*, 88 Ala. 449; *Rowland v. Old Dominion Bldg. & L. Asso.* 115 N. C. 825; *Meroney v. Atlanta Nat. Bldg. & L. Asso. supra*.

A contract made at one place, to be performed at another, is governed by the law of the place of performance, provided that the place of performance was not fixed different from that of the contract for the purpose of evading the usury laws of the place where the contract was made.

Fitzsimons v. Baum, 44 Pa. 82; *Earnest v. Hoskins*, 100 Pa. 551; *Depau v. Humphreys*, 8 Mart. N. S. 1; *Hartranft v. Uhlinger*, 115 Pa. 270; *Chapman v. Robertson*, 6 Paige, 627, 81 Am. Dec. 264; *Pratt v. Adams*, 7 Paige, 632; 7 Wait, Act. & Def. 623, pl. 15; *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 658; *Story*, Conf. L. p. 422, § 304a; *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170; *Kilcrease v. Johnson*, 85 Ga. 600.

It is a question to be left to the jury, under all of the circumstances of the case, whether or not these obligations were not made payable at Syracuse, New York, for the purpose of evading the usury laws of Pennsylvania.

Kilcrease v. Johnson, supra; *Vail v. Heustis*, 14 Ind. 607; *Andrews v. Hoxie*, 5 Tex. 171; *Fitzsimons v. Baum*, 44 Pa. 41; *Masterman v. Courie*, 3 Campb. 488; *Hammet v. Yea*, 1 Bos. & P. 151; *Lee v. Cass*, 1 Taunt. 511; *Ketchum v. Barber*, 4 Hill, 228; *Andrews v. Pond*, 88 U. S. 18 Pet. 65, 10 L. ed. 61.

Mr. W. C. Gilmore, for appellee:

The contract in question was clearly a New York contract and is to be determined by the laws of New York.

Hyde v. Goodnow, 3 N. Y. 266; *Western v. Genesee Mut. Ins. Co.* 12 N. Y. 258; *Watson v. Brewster*, 1 Pa. 881; *Benners v. Clemens*, 58 Pa. 24; *Bell v. Packard*, 69 Me. 105, 81 Am. Rep. 251; *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; *Mills v. Wilson*, 88 Pa. 118.

The contract in question was payable by its

NOTE.—For usury upon loans by building associations, see note to *Keeve v. Ladies' Bldg. Asso.* (Ark.) 18 L. R. A. 129.
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express terms in the state of New York and should therefore be construed according to the laws of New York.

3 Am. & Eng. Enc. Law, p. 546, and cases there cited; Addison, Cont. § 239; *Brown v. Camden & A. R. Co.* 83 Pa. 816; *Mills v. Wilson*, *supra*; *Irvine v. Barrett*, 2 Grant, Cas. 78; *Archer v. Dunn*, 2 Watts & S. 327; *Waverly Nat. Bank v. Hall*, 150 Pa. 466; *Building & Loan Asso. v. Logan*, 66 Fed. Rep. 827; *National Mut. Bldg. & L. Asso. v. Ashworth*, 91 Va. 706; *United States Bldg. & L. Asso. v. Farrell* (Tenn.) (See National Bldg. & Loan Herald, Feb. 15, 1896).

In the absence of positive enactments to the contrary, or unless against public policy, corporations of one state may exercise within another state the general powers conferred by its charter.

Grant v. Henry Clay Coal Co. 80 Pa. 208; *Merrimac Min. Co. v. Levy*, 54 Pa. 227, 93 Am. Dec. 697; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Eq. Cas. 180; *Bank of Augusta v. Earle*, 88 U. S. 13 Pet. 519, 10 L. ed. 274; *Life Asso. of America v. Rundie* ("Relte v. Rundie"), 103 U. S. 225, 226, 26 L. ed. 839; *Lancaster v. Amsterdam Improv. Co.* 140 N. Y. 578, 24 L. R. A. 822; *People v. Fire Asso. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 390; *Holtz v. Drew Theological Seminary*, 95 N. Y. 166; *People v. Blake*, 54 Mich. 239; *United States Mortg. Co. v. Gross*, 93 Ill. 483; *American & P. Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 888; *Tombigbee R. Co. v. Kneeland*, 45 U. S. 4 How. 16, 11 L. ed. 855; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Williams v. Orswell*, 51 Miss. 817; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Bard v. Poole*, 12 N. Y. 495; *Merrick v. Van Santvoord*, 84 N. Y. 268; *British American Land Co. v. Ames*, 6 Met. 391; *Martin v. Mobile & O. R. Co.* 7 Bush, 116; *Guaga Iron Co. v. Dawson*, 4 Blackf. 202; *Leasure v. Union Mut. L. Ins. Co.* 91 Pa. 491; *Dodge v. Council Bluffs*, 57 Iowa, 580; *Frazier v. Willcox*, 4 Rob. (La.) 517; *Life Asso. of America v. Levy*, 83 La. Ann. 1203; *Kennebec Co. v. Augusta Ins. & B. Co.* 6 Gray, 204; *Flash v. Conn.*, 16 Fla. 423, 26 Am. Dec. 721; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Bank of Washtenaw v. Montgomery*, 8 Ill. 422; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 875, 56 Am. Rep. 776; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 93 Am. Dec. 688; *Wood Hydraulic Hose Co. v. King*, 45 Ga. 84; *Home Ins. Co. v. Davis*, 29 Mich. 288; *Kerchner v. Gettys*, 18 S. C. 525; *People, Peabody, v. Chicago Gas Trust Co.* 180 Ill. 208, 8 L. R. A. 497; *Ellerman v. Chicago Junction R. & U. S. Y. Co.* 49 N. J. Eq. 217.

Green, J., delivered the opinion of the court:

The defendant is an incorporated building and loan association, duly incorporated by the laws of New York, and located and transacting its business at Syracuse, in that state. The plaintiff, in October, 1891, made application to become a member of the association, by purchasing two shares of its stock, and, in November following, received a certificate for the shares. In May, 1892, he made application

for a loan of \$200, which was granted in December of the same year. As security for the loan he gave a bond and mortgage on some land in Lycoming county, Pennsylvania, for the sum of \$207.89, which included the premium paid for the loan. The actual money paid to the plaintiff was \$180. At the same time he gave to the defendant sixty-seven promissory notes, for \$3.17 each, except three for \$1.67 each, the aggregate amount of which was secured by the mortgage, and represented the monthly payments to be made by the plaintiff as a member of the association. On August 31, 1893, the plaintiff paid the mortgage debt in full, the amount being \$181.07, after deducting the withdrawal value of his stock and a rebate premium. He now claims that the premium retained by the defendant and the fines charged against him in the settlement were usury, and seeks to recover in this action \$50.95, alleging that this amount was the excess over legal interest on the amount of money actually loaned to him by the defendant. He contends that his contract with the defendant was a Pennsylvania contract, and to be governed by the law of that state. The defendant had an agency at Williamsport, in Pennsylvania, and the transaction was conducted between the plaintiff and the defendant's agent at that place. That circumstance, however, is of no account if the contract was to be performed in the state of New York. The appellant does not at all dispute the proposition that contracts are to be governed by the law of the place where they are to be performed, nor does he contend that he would have any right of recovery under the law of New York, which permits building and loan associations to charge usurious rates of interest on loans. The learned court below decided that the place of performance was the state of New York, and the contract was therefore to be governed by the law of that state. In this opinion we concur.

A point was also made that, if the contract was made for the purpose and with the intent of evading the usury laws of Pennsylvania, it must be governed by the law of Pennsylvania, and not of New York. As to this the court below held that there was not a scintilla of evidence of any such intent, and therefore the doctrine could not apply to this case; and in that ruling also we fully concur.

It is only necessary to examine briefly the contract of the parties in order to determine at what place it was to be performed. The defendant's place of business was at Syracuse, in the state of New York. The plaintiff's application for membership was in the following words: "I, Joseph Bennett, of Williamsport, county of Lycoming, state of Pennsylvania, hereby apply for membership in the Eastern Building & Loan Association of Syracuse, Onondaga county, New York, and subscribe for two shares of instalment stock. I hereby agree to abide by all the terms, conditions, and by-laws contained or referred to in the certificate of shares and will also comply with all the rules and regulations of said association." The plaintiff's application was accepted, and he thereupon became a member, consciously and intentionally, of an association of the state of New York, and contracted that he would abide by their by-laws, and comply with all their

rules and regulations. His subsequent application for a loan was entitled "Application for Loan from the Eastern Building & Loan Association of Syracuse, N. Y." He afterwards signed an application for an advance, addressed as follows: "To the Board of Directors of the Eastern Building & Loan Association of Syracuse, N. Y.," requesting the advance to be made, and again agreeing to comply with the charter and by-laws of the association, and all requirements defined by the committee of the board of directors. Thereupon sixty seven notes were prepared, sent to him for signature, and signed by him, in the following words:

On or before the last Saturday of March, 1893, I promise to pay three and $\frac{1}{10}$ dollars to the order of the Eastern Building & Loan Association of Syracuse, N. Y., at its office in Syracuse, N. Y. Value received.

Williamsport, Jan. 2, 1893.

Joseph C. Bennett.

When he gave his bond for the money loaned he obligated himself as follows "I, Joseph C. Bennett, am held and firmly bound unto the Eastern Building & Loan Association of Syracuse, N. Y., in the sum of \$400, lawful money of the United States of America, to be paid to said Eastern Building & Loan Association of Syracuse, N. Y., etc. In the condition of the bond it is provided that if he pays to the association, repeating its name and place, \$207.89 in sixty-seven equal payments, of \$3.17 each, except three of \$1.67 each, "payable monthly to said association, at its office in Syracuse, N. Y., on or before the last Saturday of this and each and every month," etc. The mortgage also executed by the plaintiff repeats the name and designation of the defendant, and its place; recites the bond, with its condition for making all the payments at the office of the company, at Syracuse, New York; and then grants to the defendant, repeating its name and place, certain described land of the plaintiff, situate in Lycoming county, Pennsylvania, with the usual proviso that, if the payments are all made to the defendant, the bond and mortgage should become void.

Thus, it will be seen that in every possible way in which the English language could express it the plaintiff entered into a written contract with the defendant to pay it, in sixty-seven different payments, every one of which was to be made at the office of the defendant in Syracuse, New York, a designated aggregate sum of money. What is the use of discussing the question whether this was a contract to pay money in the state of New York? What is there to discuss? Nothing. No other place of payment is mentioned or can possibly be implied. This one place is positively expressed over and over again, and many times over, in solemn instruments, signed and sealed by the plaintiff himself, and in sixty-seven different notes, also signed by the plaintiff. It is a waste of time to discuss so plain a matter. The fact that the plaintiff lived in Pennsylvania, and negotiated there with an agent of the defendant either for the membership or for the loan, is not of the slightest significance. The contract must be adjudged by its express terms, no matter where the parties were when it was

made. And, when those terms are clear, explicit, involved in no doubt whatever, they must prevail; and it is the duty of the courts to enforce them according to their literal meaning. Nor is there the slightest ground for an allegation that the contract was made for the purpose of evading the usury laws of Pennsylvania. Who had such a purpose, and what is the evidence of it? Did the plaintiff have it, and, if so, did he communicate it to the defendant? If so, where is the evidence of it? There is none whatever. The defendant's business was transacted at its proper place of business in the state of New York. This business was a part of its regular business, done in its usual way; and, as a matter of course, the mere fact that this loan was made to a citizen of Pennsylvania cannot justify an inference that it was done with an intent to evade the laws of Pennsylvania. This business was done just as all its other business was done. The defendant had a lawful right to loan money wherever it pleased, and it would be most absurd to say that, because it lent money to a Pennsylvanian, it therefore intended to evade the laws of Pennsylvania. The Pennsylvanian had a right to borrow money in the state of New York if he chose to do so, and, if he contracted to pay it in the state of New York, he must be conclusively presumed to know that his contract would be governed by the law of that state. In all this there is not a shadow of an unlawful intent to evade the law of Pennsylvania. There was therefore nothing to submit to the jury on that question.

Judgment affirmed.

HARRISBURG NATIONAL BANK, *Appt.*,
v.

Elizabeth Reily BRADSHAW.

(178 Pa. 180.)

1. **A statute excepting accommodation indorsement** from the contracts which may be made by a married woman does not render invalid a renewal after marriage of such an indorsement made before marriage.
2. **A married woman may confirm the act of her attorney** in renewing, in excess of his authority, her indorsement on a note given before marriage, if she could have conferred the power on him in the first instance.
3. **The facts that renewal notes are not made until after the old ones are overdue**, and that the old ones are not protested for nonpayment, will not make the renewals new contracts beyond the power of a married woman to make if the original note was indorsed before

NOTE.—The power of a married woman to execute a renewal of an obligation created before her marriage is a matter on which there are few precedents.

As to the wife's capacity to contract generally, see *Prentiss v. Paisley* (Fla.) 7 L. R. A. 640, and *note*.

For the somewhat kindred matter of the validity of a renewal by an incompetent person of an obligation created while competent, see *Memphis Nat. Bank v. Sneed* (Tenn.) *ante*, 274, and *note*.

her marriage and the renewals are in pursuance of a general understanding that they shall be made, and there was no intention that they should be new contracts.

(October 5, 1890.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Dauphin County in favor of defendant in an action brought to enforce defendant's alleged liability as indorser on a promissory note. *Reversed.*

The facts found by the trial court were as follows:

"(1) In July, 1889, Miss Elizabeth Reilly indorsed a note for \$10,000 for the accommodation of her brother, John W. Reilly, which was discounted for him by the Harrisburg National Bank, with knowledge that she was an accommodation indorser, and when this note matured on November 4, 1889, she in like manner indorsed a like note in renewal of the first. Before the second note matured, she became the wife of Walter J. Bradshaw, and executed, jointly with him, a power of attorney to G. M. McCauley. . . . (2) After her marriage and the execution and delivery of this power of attorney, she removed to Helena, Montana, where she resided when the second note matured on March 7, 1890. On that day the attention of her attorney was called to this note by the president of the bank, who asked him to indorse a note in renewal. Mr. McCauley expressed doubt whether he had authority so to do, and the president said, if he would indorse it, it would be satisfactory, which he then did. He had no knowledge of the execution of the note until this time, and Mrs. Bradshaw had not mentioned it to him, nor given him any authority to act for her, except the power of attorney above referred to. No protest or notice of nonpayment was made or given as to the note which then matured. At this time the balance to the credit of John W. Reilly on the books of the bank was \$2,558.06. (3) Thereafter, at intervals of four months, until August 17, 1894, notes, each in renewal of the preceding one, were given to the bank with the accommodation indorsement of Elizabeth R. Bradshaw, the defendant. None of these renewal notes were protested, and there were intervals of, in some cases, two or three days, and in others as many weeks, between the maturity of a given note and the indorsement and delivery of the renewal. Most of the notes, when matured and renewed, were delivered to the attorney of John W. Reilly and Mrs. Bradshaw, and the renewal interest was paid by him on account of John W. Reilly. (4) When the last note matured, on December 20, 1894, it amounted, with interest, to \$10,817, and it was duly protested, and notice of nonpayment was sent to the defendant."

Messrs. Robert Snodgrass and Wolfe & Bailey, for appellant:

All of the notes, subsequent to the original, were renewals and were so marked. They were not payments in any sense, nor were they shown to have been tendered or accepted as such. They could not have been considered as payments unless it was clearly shown that they were so intended.

Randolph, Com. Paper, § 1511; Dan. Neg. 34 L. R. A.

Inst. § 1266; *Ritter v. Singmaster*, 73 Pa. 400; *Brown v. Scott*, 51 Pa. 357.

If, then, the renewals in question were not payments; but operated simply as a suspension of the right of action, the obligation evidenced by the contract remained, and necessarily related back to the origin of the debt.

Oerholt v. First Nat. Bank, 83 Pa. 490; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 83 Am. Rep. 438.

The true test of liability in the present case must depend upon the question whether or not an antenuptial contract of indorsement falls within the prohibition of the acts of 1887 and 1893. Their plain import is to enlarge the powers of married women, and to confer upon them all the powers of a *feme sole* except in certain specified particulars.

Real Estate Invest. Co. v. Roop, 132 Pa. 496, 7 L. R. A. 211; *Koechling v. Henkel*, 144 Pa. 215.

Antenuptial contracts are substantially in the same position as before, except that they may recognize such contracts, and bind themselves in relation thereto, more effectually than they could under previous laws.

Glyde v. Keister, 82 Pa. 87; *Finley's Appeal*, 87 Pa. 453.

Since the acts of 1887 and 1893 she can confess a judgment, or do any other act in recognition of her liability in such cases, to the same extent as if she were a *feme sole*.

Adams v. Grey, 154 Pa. 258; *McCormick v. Bottorff*, 155 Pa. 381; *Mitchell v. Richmond*, 164 Pa. 566.

The notes given before marriage are not separable from the renewals made after marriage, but the liability of the defendant is to be drawn from the transaction as a whole, and not from any single part of it.

Mahon v. Gormley, 24 Pa. 80.

Demand and notice are not parts of the contract, but merely steps in the remedy, which may be waived by the indorser.

Barclay v. Weaver, 19 Pa. 396, 57 Am. Dec. 661.

A subsequent promise to pay the note by an indorser who has full knowledge of all the facts, amounts to a complete waiver of the want of due notice.

Sherer v. Easton Bank, 83 Pa. 134.

Mr. S. J. M. McCarrell for appellee.

Fell, J., delivered the opinion of the court:

The question presented by this case relates to the power of a married woman to bind herself by the renewal of an accommodation indorsement made before her marriage. The defendant, when single, indorsed a promissory note at four months for \$10,000 for the accommodation of the maker, her brother. Once before marriage she renewed her indorsement, and after her marriage she renewed it as the notes became due, at intervals of four months, for the period of nearly five years. The last of the series of notes was protested, and this suit brought upon it. The statement was drawn and the case presented by the plaintiff upon the theory that the notes given before marriage and the renewals after marriage were parts of a continuing transaction, and that the defendant's liability was to be drawn from the whole of it. The marriage of the defendant

did not affect her relation to obligations into which she had previously entered so as to release her from an antenuptial contract, and it is conceded that the protest of the first note which became due after her marriage would have fixed her liability as to it; but it is claimed that she was without power, after marriage, to renew her indorsement, as she is not permitted by the act of June 8, 1893, to become an accommodation indorser. The learned judge, before whom the case was tried without a jury, held as conclusions of law that the defendant was discharged from liability upon the note indorsed by her before marriage and which matured thereafter by the failure of the bank to protest it for nonpayment; that the failure to protest was not waived by the indorsement of new notes from time to time; and that she was not bound by the indorsements made after marriage, for the reason that she was incompetent to incur liability as an accommodation indorser. The primary question is whether a married woman is bound by the renewal of an existing valid contract, entered into before marriage, when the contract is one which the law does not authorize her to make after marriage. The act of 1893 gives a married woman the same right to acquire, control, and dispose of property and to make contracts in relation thereto that she possessed before marriage. The limitation placed upon the power conferred is that she "may not become accommodation indorser, maker, guarantor, or surety for another." The purpose of the limitation is to protect her from contracts not connected with the management of her estate, and from which she could derive no advantage. As to contracts relating to her own estate or affairs, the existing restraint was removed. It remains as to a class of contracts into which she might be induced or constrained to enter for the benefit of others. The defendant was liable on the indorsement of the note which became due two months after her marriage. True, her liability was conditional only, but it would have been fixed and made absolute by protest and notice. By the renewal of her indorsement she did not enter into a new obligation for the benefit of another, but she continued and extended for her own benefit an existing obligation by which she was bound. By so doing she did not "become an accommodation indorser," and enter into a new forbidden contract. The contract already existed and its continuance was for the relief and benefit of her estate. A construction of the act which denies a woman, after marriage, the power to continue an antecedent obligation, would in many cases impose a hardship upon her. If she cannot continue, the alternative is to pay, however great may be the loss to her estate. Such a construction is not required by the letter of the act, and would not be in harmony with its spirit. The proviso of the act of 1887, which is incorporated into the act of 1893, is for the protection of women after marriage from a class of contracts in which they have no direct interest, and from which their estates can derive no advantage. The renewal of an obligation contracted before marriage, we think, does not come within the meaning

of the act, although the obligation may belong to the prohibited class. The bank could have bound the defendant to the payment of the note absolutely by protest. She could have bound herself by a waiver of protest. The renewal of her indorsement at the maturity of the note was but the recognition and continuance of an obligation which she had before assumed, and which was binding upon her. Whether the power of attorney given by the defendant to G. M. McCauley authorized the indorsement made by him of the note of March 7, 1890, is not material. If she had power to renew the indorsement after marriage, she could do it by her attorney, and if the power under which he acted was not broad enough, it was competent for her to ratify and confirm his act. This she did. The indorsement of notes in renewal by the defendant after she had been released from liability on preceding notes because of the failure of the bank to protest them for nonpayment was not, under the circumstances, the assumption of a new liability as accommodation indorser. After her marriage she resided in Montana. The notes were sent to her by her attorney for indorsement. Most of them were returned to the bank before the maturity of the notes which they were intended to renew. The bank relied upon her carrying out in good faith the understanding which existed between them as to renewals. She did carry it out. It was not at any time the intention of either party that she was assuming a new obligation for her brother, but it was the intention of both that the renewals should be as of the dates of the notes renewed; that there should be no gap; and that she was continuing her own obligation, entered into before marriage, by which she was bound. While the defendant was not authorized, after marriage, to enter into a new contract as accommodation indorser, it was competent for her to continue her valid antenuptial contract. In dealing with this the act of 1893 imposed no limitation upon her power. She could have taken advantage, as could any indorser, of the failure of demand and notice by the holder of the note, or she could overlook the omission and recognize and reassert her liability by a new indorsement. By so doing she was not entering into a new contract not authorized by the act. Substantially the same principle was asserted in *Brunner's Appeal*, 47 Pa. 67. Under the act of 1848 a married woman was liable on her antenuptial contract, but was without power to confess judgment for a debt due by her. It was held in the case cited that she could agree to the revival of a judgment entered after marriage by virtue of a power of attorney signed by her before marriage, for the reason that it was not the creation of a new liability by the renewal of one already existing. We are of opinion that under the findings of fact judgment should have been entered for the plaintiff.

The judgment is reversed, and set aside, and now, October 5, 1896, judgment is entered for the plaintiff for the amount of the note of August 17, 1894, with interest and costs of protest, \$12,202.06.

Marietta HELLER

v.

ROYAL INSURANCE COMPANY OF
LIVERPOOL, *App't.*

(177 Pa. 262.)

1. Insurance against loss by reason of having to pay rent for a building under a lease while it is untenable by reason of fire will cover the time during which the landlord is in possession for the purpose of rebuilding the burned building, under an agreement with the tenant that such possession shall not affect the tenant's liability for rent under the lease until the completion of the new building.
2. An insurer against loss by reason of liability for rent under a lease while the building is untenable because of fire is not relieved from any part of his liability by the fact that the tenant receives from his landlord a sum derived from a policy insuring the landlord against loss of rent because of fire, at least if the combined amounts will not wholly reimburse to the tenant the rent he is compelled to pay under his contract while the building is untenable.

(*Mitchell, J., dissents.*)

(October 5, 1894.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion. See also *Royal Ins. Co. v. Heller* (Pa.) 7 L. R. A. 411.

Messrs. Francis H. Bohlen and M. P. Henry, for appellant:

The entry of the landlord to rebuild, even with the consent of the tenant, suspends the rent.

Magaw v. Lambert, 8 Pa. 444; *Briggs v. Thompson*, 9 Pa. 840; *Hoeverler v. Fleming*, 91 Pa. 824; *Auer v. Penn.*, 92 Pa. 446; Taylor, Land. & T. § 880; Gilbert, Rents, 145.

If the tenant loses the benefit of the enjoyment of any portion of the demised premises, the rent is thereby suspended.

Upton v. Townsend, 17 C. B. 30.

Fire insurance is purely a contract of indemnity which does not differ essentially from a bond of indemnity or the guaranty of a debt.

1 Phillips, Ins. § 4; Wood, Fire Ins. note 2, p. 14; Porter, Ins. p. 2.

If the insured parts with any right of reclamation for the loss to which he is entitled, from another party, the insurer is *pro tanto* discharged.

Niagara F. Ins. Co. v. Fidelity Title & T. Co. 123 Pa. 516; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285.

The right to be relieved of the payment of the rent by the landlord's entry to rebuild is one of the advantages of the tenant's position, by which his liability may be relieved or reduced, under the rule of tenancy in Pennsylvania, which treats the lease as giving an estate in the land, and not as a contract for the use of a building, the destruction of which

puts an end to the contract according to the rules of the civil law.

Viterbo v. Friedlander, 120 U. S. 707, 80 L. ed. 776.

An agreement not to avail himself of the right which the law gives the tenant to be relieved of rent while the landlord is in possession for the purpose of rebuilding is a voluntary concession, and not a liability within the meaning of the policy of insurance, for which indemnity can be claimed from one who stands in the secondary position of an insurer. Such a concession cannot increase the loss to the tenant's insurers.

Atlantic Ins. Co. v. Storrow, *supra*.

Liability for rent, continued by voluntary agreement of the tenant beyond the time when it otherwise would have ceased is not a liability in the meaning of the contract of insurance.

It required an additional agreement by the tenant to continue this liability, which under the lease would have ceased. The rent became collectible by virtue of the new agreement, and not of the original lease. The old lease became a part of the new agreement as if incorporated in it.

Ex parte Vitale, 47 L. T. N. S. 480; *Re Application of Washington Park Comrs.* 52 N. Y. 181; *Bradstreet v. Rich*, 74 Me. 303; *Sewall v. Henry*, 9 Ala. 24; *Pilow v. Brown*, 28 Ark. 240; *Bradley v. Marshall*, 54 Ill. 173; *Smith v. Turpin*, 20 Ohio St. 478.

It is no answer to say that the landlord was not bound to rebuild and could have continued to exact rent after the building was destroyed.

Heller v. Royal Ins. Co. 183 Pa. 152, 7 L. R. A. 411; Porter, Ins. p. 10.

Double indemnity cannot be recovered.

Darrell v. Tibbitts, L. R. 5 Q. B. Div. 560; *Castellain v. Preston*, L. R. 11 Q. B. Div. 380; *Smith v. Columbia Ins. Co.* 17 Pa. 253, 55 Am. Dec. 546; *Thornton v. Enterprise Ins. Co.* 71 Pa. 284; *Hall v. Nashville & C. R. Co.* 80 U. S. 18 Wall. 367, 20 L. ed. 594.

Mr. M. Hampton Todd, for appellee:

Not only had the plaintiff a right to agree with her landlord that he should enter and rebuild, but it was her duty to permit him to do so, and in so doing she did not discharge the defendant for rent accruing after the date of entry from liability to her on its covenant to indemnify her for loss arising from having to pay rent for the destroyed premises.

2 Wood, Fire Ins. p. 1056, § 492.

Mrs. Heller was bound to pay her rent whether the premises were rebuilt or not.

Bussman v. Ganster, 72 Pa. 285.

Dean, J., delivered the opinion of the court:

Five adjoining buildings forming a single store, at corner of Arch and Eighth streets, Philadelphia, were destroyed by fire, January 23, 1888. They were owned by Thomas K. Peterson, trustee, etc., who, by lease dated June 15, 1887, rented them to Marietta Heller, this plaintiff, for the term of three years from the 1st of January, 1888, at an annual rental of \$8,500, payable monthly, and she was in possession at the date of the fire. The Royal Insurance Company,

NOTE—On the question, What constitutes double insurance for the purpose of apportionment of

loss?—see *Clarke v. Western Assur. Co. (Pa.)* 15 L. R. A. 127, and *note*.

84 L. R. A.

this defendant, on the 26th of January, 1887, issued to plaintiff a policy of indemnity against damage to her interest as lessee of the buildings, by fire, in the sum of \$6,000. In the policy is this stipulation: "It being understood that this policy is to indemnify the assured for any loss accruing to her by reason of having to pay rent for the within described building [during] such time or times as the building may be untenable by reason of fire or fires occurring during the continuance of this policy; loss not to be limited by date of expiration of the policy; it being understood that the sum insured is the annual rental of the property, and the amount of loss is to be computed on that basis." Peterson, the landlord, also took out in the Pennsylvania Fire Insurance Company a policy covering the term of the lease, indemnifying him against loss of rents by fire in the sum of \$8,500, in which was this clause:

It is understood and agreed that in case the above-named building, or any part thereof, shall be rendered untenable by fire, this company shall be liable to the assured for the actual loss of rent ensuing therefrom, not exceeding the sum insured, which shall be taken as the yearly rent of the premises, and this company shall be liable only for such proportion of any loss as the sum hereby insured bears to the annual rent of the building; the assured agreeing to rebuild or repair said premises in as short a time as the nature of the case will permit. Loss to be computed from the date of the occurrence of said fire, and cease on said building being rendered tenable.

Note. In case the assured shall elect not to rebuild or repair said premises in as short a time as the nature of the case will admit, then the loss of rent shall be determined by the time which would have been required for such purpose.

Pennsylvania Fire Insurance Company.

After the fire the property was unoccupied for any purpose until the 24th of July following, a period of six months, when plaintiff entered into an agreement with her landlord that he would within seven months erect a new and better building on the lots covered by the old buildings, and make it larger, by extending it over three adjoining lots. Further, plaintiff agreed that she would accept a lease of the new building for a term of five years at an annual rental of \$17,000, payable monthly. There were further stipulations that nothing in the agreement was to affect plaintiff's liability for rent under the old lease until the completion of the new building, and that the entry of the landlord for the purpose of rebuilding was not to be deemed an eviction by him or a surrender by her. It was further stipulated that nothing in the agreement was to affect the right of either on policies of insurance which each held for rent. After the fire this defendant denied any liability, except a proportionate one on loss of rent under both policies, which was, with interest, \$3,096.50, and which it paid to plaintiff without prejudice to her alleged right to claim her entire loss. The Pennsylvania Company, although disclaiming all liability, paid the landlord \$2,000 for the benefit of Mrs. Heller. The plaintiff paid the landlord the rent for one

year, the time the premises were untenable, and claimed that defendant was liable on its policy to her for a balance of \$3,000, with interest, payment of which being refused, she brought suit. The defendant filed an affidavit of defense averring that the agreement to rebuild was a collusive arrangement between the parties at the suggestion of the landlord's insurance company, by which that company was to escape any payment on account of the loss. The court below entered judgment for want of a sufficient affidavit of defense. On appeal this judgment was reversed, this court holding that the facts tending to show collusion would, if proved, not relieve the landlord's insurance company from payment of its proportion of the loss, and the evidence tending to show fraud was for the jury. This case is reported in 183 Pa. 152, 7 L. R. A. 411. When the record was remitted the defendant, instead of pleading and going to trial, filed a demurrer to plaintiff's statement of facts, as not being sufficient in law to warrant judgment. The court below sustained the demurrer, and plaintiff appealed. This court, in an opinion by the chief justice (see 151 Pa. 101), held that under the circumstances as averred by plaintiff, the averment of fraud in the affidavit having dropped out of the case, she was entitled to recover on her claim set out of record; that the facts neither constituted an eviction by the landlord, nor a rescission of the contract under which the plaintiff was answerable for rent, and for aught that appeared the transaction was a perfectly honest one. So the judgment was reversed and a *procedendo* awarded. On the trial of the case in the court below, considerable evidence was given tending to show correspondence and negotiations between the parties and the insurance companies, principally with a view to adjustment without suit of their respective rights; but the court being of opinion that no available defense had been proved, at the close of the evidence directed a verdict for the plaintiff for \$3,000 and interest. We now have this appeal, assigning six errors. It is unnecessary to discuss them in detail. When the case was last here Chief Justice Sterrett says, with this agreement before him: "It neither constituted an eviction by the landlord nor a rescission of the lease under which plaintiff was liable for the rent as to which she was insured by defendant company." There is nothing new in the case now to affect the correctness of this conclusion. The parties in open court abandoned any averment of fraud in the making of this agreement. That being the case, defendant's liability remains according to its contract. That stipulates that it was to "indemnify the assured for any loss accruing to her by reason of having to pay rent for the within-described building [during] such time or times as the building may be untenable by reason of fire." It was untenable during the entire period covered by her claim, by reason of the fire. The occupation of the lot by the landlord for seven months, in rebuilding, in no reasonable construction of this clause rendered the premises tenable, while the agreement with the landlord expressly stipulated her liability for rent was to continue during this period. Therefore what rent she paid was her loss, and this the defendant con-

tracted should be made good. Nor does the fact that the landlord paid over to her \$2,000 received by him from the Pennsylvania Company affect her contract right against this defendant. She received that from a source outside of, and independent of, her contract for indemnity, just as she might have received a gift of that amount from any friend who desired to aid her. Defendant lost nothing, and the \$2,000 did not even reimburse her in full for her loss. She paid rent for unoccupied premises, \$8,500. She claims from this defendant \$6,000, less the \$3,000 already paid her. She has received from her landlord

\$2,000, leaving her still a loser for the year the building was not tenantable, \$500. As is well said by the learned judge of the court below: "Its [defendant's] burden has not been increased, nor has it been deprived of any right it possessed. . . . The landlord and tenant had a lawful right to make the agreement they did make, and, the risk and loss of the defendant company not having been increased thereby, it is liable for the amount due on its policy."

The judgment is affirmed.

Mitchell, J., dissents.

NEVADA SUPREME COURT.

R. SCHWEISS, Petitioner,

v.

DISTRICT COURT OF FIRST JUDICIAL DISTRICT.

(.....Nev.....)

***1. A county is not a municipal corporation,** in the full sense of the term. It is only a quasi corporation, and possesses such powers and is subjected to such liabilities only as are specially provided for by law.

2. Section 25, art. 4, Nev. Const., which requires the legislature to establish a system of county governments which shall be uniform throughout the state, means that all county governments must, in all essential particulars, be alike.

3. The act of the legislature of March 15, 1895 (Stat. 1895, p. 73), entitled "An Act to Incorporate Storey County and Provide for the Government Thereof," is void because in conflict with that section of the Constitution, in many particulars.

4. It is also a local and special act regulating county business, and consequently is in conflict with § 20 of art. 4, which forbids such legislation.

(June 21, 1896.)

PETITION for a writ of prohibition to prevent respondent from taking jurisdiction of a prosecution against petitioner for the alleged illegal keeping of a saloon where intoxicating liquors were sold. *Refused.*

Statement by Bigelow, J.:

Original application for a writ of prohibition. The petitioner was convicted in a justice's court of the offense of keeping a saloon in the city of Virginia, wherein liquors were sold by the glass, without having obtained the license therefor required by an ordinance of said city. From this conviction he appealed to the district court of the first judicial district, Storey County, where his demurrer to the

complaint upon the grounds that it did not state facts sufficient to constitute a cause of action against him, and that the court had no jurisdiction of the offense charged, was overruled, and the case set for trial. Thereupon he filed his petition herein, setting out the above facts, and asking that the court be prohibited from proceeding further in the trial thereof. The defendant demurs upon the ground, among others, that the petition does not state facts sufficient to constitute a proper ground for the issuance of the writ.

Mr. F. M. Huffaker, for petitioner:

The legislature has complete control of the entire subject of counties, etc., except where limited by the Constitution.

Hess v. Pegg, 7 Nev. 23.

The legislature alone is to say what territory a municipal corporation shall occupy.

Re Madera Irrig. Dist. Bonds, 93 Cal. 296, 14 L. R. A. 755; *Winbigler v. Los Angeles*, 45 Cal. 86; 2 Kent, Com. 275; 1 Dill. Mun. Corp. §§ 10, 87, 96.

A county is a geographical subdivision of the state.

State, Beach, v. Finn, 4 Mo. App. 350; *Washer v. Bullitt County*, 110 U. S. 564, 28 L. ed. 251; *Vincent v. Lincoln*, 30 Fed. Rep. 749; *Faulkner v. Hyman*, 142 Mass. 54.

When the act of 1895 leaves the business of Storey county to be as heretofore in all respects and the system of county government untouched, how can it be claimed that an act creating a municipal corporation of Storey county is either a regulation of county business, or an establishment of a system of county government?

The legislature, by the act of 1895, simply merged said city and town business into the county business, which the legislature had a perfect right to do.

State, Rosenstock, v. Swift, 11 Nev. 128.

By the act of 1881 there were created and placed under the control of the Storey county board of commissioners a Virginia city fund, derived from taxation of property within the

NOTE.—For the incorporation of a county as a municipality, see also *State, Walker, v. Bus* (Mo.) 33 L. R. A. 616; and *Kahn v. Sutro* (Cal.) 38 L. R. A. 620.

former corporate limits of said city, and similarly a Gold Hill fund, and because the act of 1895 turns these funds over to Storey county, it has been claimed the act is invalid. The legislature is sole judge in such matters.

1 Dill. Mun. Corp. §§ 84, 85; *State v. Savannah*, R. M. Charl. (Ga.) 250; *Police Comrs. v. Louisville*, 8 Bush, 597; *Diamond v. Cain*, 21 La. Ann. 809; *State, Belden, v. Leovy*, 21 La. Ann. 538.

If the legislature could by general law incorporate all the counties of the state, then it would follow, by special act, any county can be made a municipality.

State, Clarke, v. Irwin, 5 Nev. 123.

Meers, Langan & Knight, for respondent:

The act of March 15, 1895 (Nev. Stat. 1895, p. 73, chap. 80), is unconstitutional and void, in so far as it in any way affects the action sought to be restrained.

Instead of having a county government similar to other county governments of the state we have a "municipal corporation" known as "Storey county."

Counties are "quasi corporations" in contradistinction to "municipal corporations."

Dill. Mun. Corp. § 23; *People, Graves, v. Orange County*, 81 Cal. 489; 15 Am. & Eng. Enc. Law, pp. 952, 953, and notes; *Hamilton County Comrs. v. Mighels*, (1857) 7 Ohio St. 109; *Stermer v. La Plata County Comrs.* 5 Colo. App. 379.

The legislature has the right to say all counties shall be municipal corporations, but it cannot say one particular county shall be a municipal corporation.

State, Perry, v. Arrington, 18 Nev. 412.

No law specifying a different governmental authority for one county from that of the other counties of the state, and no local or special law regulating county or township business, can be passed.

State, Atty. Gen, v. Boyd, 19 Nev. 43; *Williams v. Biddleman*, 7 Nev. 68.

The subject of the incorporation of a county and provision for its government has not, in the nature of the thing, any proper or necessary connection with the matter of the creation, dissolution, government, or existence of the cities or towns within that county.

State, Norcross, v. Washoe County Comrs. (Nev.) 41 Pac. 145; *State v. Humboldt County Comrs.* 21 Nev. 235.

The lower courts may pass upon the constitutionality of the statute of 1895.

Meagher v. Storey County, 5 Nev. 244; *State v. Trolson*, 21 Nev. 419.

Bigelow, Ch. J., delivered the opinion of the court:

The question involved in this case is the validity of the act of the legislature entitled "An Act to Incorporate Storey County and Provide for the Government Thereof," approved March 15, 1895 (Stat. 1895, p. 78). Its constitutionality is attacked upon several different grounds, of which it will be necessary to notice but one or two. Section 1 of the act describes Storey county, not by name, but by metes and bounds, and then creates the territory so described into a municipal corporation by the name of "Storey County," with large

and varied powers,—among them, that of having a common seal; of holding and enjoying both real and personal property, either within or without the municipality, and the same to buy, sell, and mortgage; to receive bequests, gifts, and donations of property, either in fee simple, or in trust for charitable or other purposes, with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the trust. Section 2 provides that all buildings, lands, and property, all rights of property and rights of action, all moneys, revenues, and incomes, belonging or appertaining to Storey county (evidently referring to the county as it now exists), to the city of Virginia, or the town of Gold Hill, shall be vested in Storey county; meaning, by the name as now used, the new municipality. Section 3, that the new municipality shall succeed to all property rights, all books, records, etc., of Storey county, Virginia City, or Gold Hill, and shall become subject to all liabilities of those organizations. Section 4, that Storey county (evidently the municipality) may sue for and recover all property, etc., belonging to either said county, city, or town, and that all existing suits, actions, and proceedings to which "said county," or the city, or town, is a party, are to be continued by or against "said county." Section 7, that all county moneys are to be kept in one fund, to be known as the "County General Fund." Section 10, that the board of commissioners may levy a tax for county purposes, not exceeding the sum of \$3.50 on each \$100 valuation of the property therein.

A comparison of this act with the existing laws governing all the other counties in the state seems to demonstrate that it is in conflict with § 20 of art. 4 of the Constitution, which forbids local and special laws regulating county business; with § 25 of the same article, which requires the legislature to establish a system of county governments which shall be uniform throughout the state. Clearly, a county is not a municipal corporation. If it were, there would have been no occasion for this act changing Storey county into a municipality. It is, at the most, only a quasi corporation, and possesses only such powers, and is subjected to only such liabilities, as are specially provided for by law. Mr. Beach, in his work on Public Corporations, states the distinction between them as follows: "Municipal corporations embrace incorporated cities, villages, and towns, which are full-fledged corporations, with all the powers, duties, and liabilities incident to such a status, while public quasi corporations possess only a portion of the powers, duties, and liabilities of corporations. As instances of the latter class may be mentioned counties, hundreds, townships, overseers of the poor, town supervisors, school districts, and road districts." Beach, Pub. Corp. § 3. And again, in § 6, the same author says: "The preceding sections indicate the essential differences between the municipal and the public quasi corporation. The latter may be defined to be an involuntary political or civil division of the state, created by general laws to aid in the administration of government.

Counties, townships, school districts, road districts, and like public quasi corpora-

tions do not usually possess corporate powers under special charters; but they exist under general laws of the state, which apportion the territory of the state into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the state, and, in order that they may be able to perform these duties, vest them with certain corporate powers." A county is certainly very far from being the complete corporation that is created by the act in question, with all, and probably more than all, the powers that can be vested in a municipal corporation. This, of itself, is sufficient to destroy the uniformity that the Constitution requires to exist in the several county governments. In *Singleton v. Eureka County*, 22 Nev. —, we had occasion to consider this clause of the Constitution at some length, and there concluded that it meant that such government must, in all essential particulars, be alike. *State, Atty. Gen., v. Boyd*, 19 Nev. 43, is to the same effect. But Storey county, as created into a municipal corporation by this act, is not like the other counties, either in form or substance, and therefore the act is in conflict with the Constitution. With the law in question in force, it would be an interesting study to determine just what position Storey county that used to be, the city of Virginia, and the town of Gold Hill would be in. While there is no provision for their disestablishment, there can be little doubt that the framers of the law intended that they should practically cease to exist. If not totally destroyed, it was certainly intended that the breath of life should be taken from them. All property, all rights of action, all revenues and incomes, all books, records, claims, demands, etc., theretofore belonging to Storey county, are transferred to the new municipality.

Without property, without records, without rights in anything, either in possession or in action, its bones are marrowless, and it has nothing in common with the living organizations in the other counties. It is no answer to say that the new municipal corporation has taken its place, and has all the powers, duties, and liabilities that the county formerly had; for it is an entirely different system of government, whereas the Constitution requires them to be the same. Nor is this true merely in matters of form. The municipality has different and additional powers from those possessed by the counties. No county has a common seal; nor can it hold property outside its boundaries, or even inside, except for a few purposes, nor purchase, sell, or mortgage property generally, nor hold and manage it in trust for any purpose, while the municipality of Storey county is authorized to so hold it for all purposes. Other counties must have at least three funds for county purposes,—a general fund, an indigent fund, and a contingent fund (Gen. Stat. § 2008), but this municipality is to have but one. Other counties can under no circumstances levy a tax for county purposes of more than \$2 upon each \$100 of property valuation (Stat. 1891, p. 22), while the new Storey county can levy \$3.50. In fact, were it not that the municipality has the same name and the same boundaries as Storey county, it would be fully as difficult to point out wherein the two governments are uniform as that wherein they differ. In addition, as the act is confined to Storey county, it is both local and special; and, as it unquestionably regulates the business of that county, it is also invalid for that reason.

Writ refused.

Bonifield and Belknap, JJ., concur.

NEW MEXICO SUPREME COURT.

Re SPITZ BROTHERS' ASSIGNMENT.

(.....N. M.....)

Individual partners cannot claim their statutory exemption out of the partnership property in case of insolvency, in the absence of a statute expressly authorizing them to do so.

(September 1, 1896.)

APPEAL by petitioners from a judgment of the District Court for Bernalillo County refusing to recognize their right to exemptions in certain partnership property which they had assigned for the benefit of creditors. *Affirmed.*

Statement by Laughlin, J.:

On the 8th day of December, 1894, the firm

of Spitz Bros., a copartnership composed of Edward Spitz and Berthold Spitz, made an assignment for the benefit of their creditors to M. W. Flourney, as assignee. The firm of Spitz Bros. were, and had been for some time previous to the date of the assignment, doing a general mercantile business at Albuquerque, in Bernalillo county, and at Cerrillos, in Santa Fé county, New Mexico. The deed of assignment is in the usual and proper form, and conveyed to said Flourney, as assignee, in trust, certain tracts and parcels of real estate (describing the same), "and also all the goods, chattels, and effects and property of every kind—real, personal, and mixed—of said firm of Spitz Brothers, and the said Edward Spitz, and the said Berthold Spitz, together with all claims and demands whatsoever and where-soever, including choses in action, suits now pending, and judgments, except, however, so

NOTE.—As to the assumption by a partnership of the individual debts of the partners, see note to 34 L. R. A.

Re Edwards & Wigginton's Estate (Mo.) 29 L. R. A. 681.

much as may, under the laws of the territory of New Mexico, be exempt to each of the above grantors." Thereafter, on the 23d day of January, 1895, the said Edward Spitz and Berthold Spitz filed their separate petitions in the district court for Bernalillo county in which petitions they each stated under oath that each was a resident of the territory, the head of a family, and was not the owner of a homestead, and that there was a clause in the said deed of assignment expressly reserving from the said conveyances so much property conveyed as was, under the laws of this territory, exempted to each of said petitioners; and prayed for an order on the said assignee requiring him to set apart from the proceeds of said estate, and to pay over to each of said petitioners, the sum of \$500, as the equivalent of the amount of exemptions allowed in such cases to residents and heads of families who do not own a homestead. The district court granted the prayer, and issued a rule on the assignee to pay over the amounts claimed in the petitions, or show cause at a fixed date, if any reason he had, why not. The assignee answered the rule, and showed that neither said Edward nor Berthold Spitz, nor their agent nor attorney, ever selected any property, real or personal, from assets of said estate in his hands as assignee, nor claimed any of said property as an exemption, and that the appraised value of the assets of said estate of said Spitz Bros. amounted to \$4,366.96, and that the partnership debts of said firm of Spitz Bros. amounted to the sum of \$10,000 or more. After hearing on the answer to the rule, the court found that neither the said Edward nor the said Berthold Spitz was entitled to any exemptions out of the partnership assets, except out of any residue which might remain after all the partnership debts were paid out of the partnership assets of said firm, from which ruling petitioners appealed to this court.

Messrs. Neill B. Field and Felix H. Lester, for appellants:

Exemption laws should be construed liberally in favor of the debtor.

Montague v. Richardson, 24 Conn. 338, 63 Am. Dec. 173; *Carpenter v. Harrington*, 25 Wend. 870, 37 Am. Dec. 230; *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272; *Rockwell v. Hubbard*, 2 Dougl. (Mich.) 197, 45 Am. Dec. 252; *Thompson, Homesteads & Exemptions*, § 5, and cases cited.

Property owned by a debtor as a member of a partnership is alike within the letter and spirit of the exemption laws. The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less. Whatever it be, within the limitation of the statute the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which his loss might reduce the family depending on him for support.

Stewart v. Brown, 87 N. Y. 350, 93 Am. Dec. 578, and note; *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232; *McCoy v. Brennan*, 41 Mich. 362; *Waite v. Mathews*, 50 Mich. 392; *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 34 L. R. A.

219 and note; *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474; *Spade v. Bruner*, 72 Pa. 57; *Servanti v. Lusk*, 43 Cal. 235; *O'Gorham v. Fink*, 57 Wis. 649, 46 Am. Rep. 58; *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60.

The members of a partnership are the owners of its assets, and may, with the consent of each other, apply the partnership assets to the payment of individual debts as against partnership creditors.

Huiskamp v. Moline Wagon Co. 121 U. S. 310, 30 L. ed. 971.

It was not incumbent upon the assignors to make any selection of exempt property, or to claim the exemption at any particular time.

Chipman v. Kellogg, 60 Mich. 438; *Brooks v. Nichols*, 17 Mich. 83.

Messrs. R. W. D. Bryan and A. B. Mo-Millen, for appellees:

The exemption is of property to be selected. Until selected it was subject to levy and sale.

Carpenter v. Warner, 38 Ohio St. 416.

The joint property is deemed a trust fund primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity.

Story, Eq. Jur. § 1253; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 385, 37 L. ed. 1117; *Fourth Nat. Bank v. New Orleans & O. R. Co.* 78 U. S. 11 Wall. 624, 20 L. ed. 82; *United States v. Hack*, 38 U. S. 8 Pet. 271, 8 L. ed. 941; *Murrill v. Neill*, 49 U. S. 8 How. 414, 12 L. ed. 1185.

If taxes due from individuals could not be enforced against the assets of the insolvent firm, neither could their individual exemptions.

State, Billingsley, v. Spencer, 64 Mo. 355, 27 Am. Rep. 244; *Re Corbett*, 5 Sawy. 206; 2 Bates, Parta. § 1131.

The circuit and district courts of the United States and the supreme courts of almost every state in the United States have passed upon the question and expressly denied the right of a partner to exemptions out of the partnership assets.

Giovanni v. First Nat. Bank, 55 Ala. 305, 28 Am. Rep. 723; *Giovanni v. First Nat. Bank*, 51 Ala. 176; *Terrell v. Hurst*, 76 Ala. 588; *Levy v. Williams*, 79 Ala. 171; *Schlapback v. Long*, 90 Ala. 525; *Aiken v. Steiner*, 98 Ala. 355; *Richardson v. Adler*, 46 Ark. 48; *Bishop v. Hubbard*, 28 Cal. 514, 83 Am. Dec. 132; *Kingsley v. Kingsley*, 89 Cal. 665; *Cowan v. Their Creditors*, 77 Cal. 408; *McOrrimmon v. Linton*, 4 Colo. App. 420; *Bates v. Callender*, 3 Dak. 256; *State, Peck, v. Fowden*, 18 Fla. 17; *Troubridge v. Cross*, 117 Ill. 109; *Love v. Blair*, 72 Ind. 281; *Smith v. Harris*, 76 Ind. 104; *State, Talbot, v. Emmons*, 99 Ind. 452; *Ex parte Hopkins*, 104 Ind. 157; *Drake v. Moore*, 66 Iowa, 58; *Hoyt v. Hoyt*, 69 Iowa, 174; *Guptil v. McFee*, 9 Kan. 80; *Stauffer's Succession*, 21 La. Ann. 520; *White v. Heffner*, 30 La. Ann. 1280, 81 Am. Rep. 238; *Thurlow v. Warren*, 82 Me. 164; *Pond v. Kimball*, 101 Mass. 105; *Holmes v. Winchester*, 188 Mass. 542; *Baker v. Sheehan*, 29 Minn. 235; *Prosser v. Hartley*, 85 Minn. 340; *Robertshaw v. Hanway*, 52 Miss. 718; *Woodridge v. Irving*, 23 Fed. Rep. 677; *State, Billingsley, v. Spencer*, 64 Mo. 355, 27 Am. Rep. 244; *Julian v. Wrightsman*, 78 Mo. 569; *Lindley v. Davis*, 6 Mont. 453; *People, Till, v. Roy*, 3 Neb. 261; *Wise*

v. Frey, 7 Neb. 184, 29 Am. Rep. 880; *Linsinger v. Raymond*, 9 Neb. 40; *Rhodes v. Williams*, 12 Nev. 20; *Terry v. Berry*, 13 Nev. 514; *Arnold v. Hagerman*, 45 N. J. Eq. 186; *Gaylord v. Imhoff*, 26 Ohio St. 317, 20 Am. Rep. 762; *Bonsall v. Comly*, 44 Pa. 442; *Clegg v. Houston*, 1 Phila. 352; *Hawley v. Hampton*, 160 Pa. 18; *Spire v. Paxton*, 3 Lea, 75, 31 Am. Rep. 630; *Chalfant v. Grant*, 3 Lea, 118; *Gill v. Lattimore*, 9 Lea, 381; *Short v. McGruder*, 22 Fed. Rep. 46; *Re Hafer*, 1 Nat. Bankr. Reg. 647; *Re Price*, 6 Nat. Bankr. Reg. 400; *Re Blodgett*, 10 Nat. Bankr. Reg. 145; *Re Handlin*, 12 Nat. Bankr. Reg. 49, 3 Dill. 290; *Re Tonne*, 18 Nat. Bankr. Reg. 170; *Re Rupp*, 4 Nat. Bankr. Reg. 95; *Re Stewart*, 13 Nat. Bankr. Reg. 295; *Re Boothroyd*, 14 Nat. Bankr. Reg. 228; *Re Sauthoff*, 16 Nat. Bankr. Reg. 181, 8 Biss. 35; *Re Hughes*, 16 Nat. Bankr. Reg. 464; *Re Croft Bros.*, 17 Nat. Bankr. Reg. 324; *Re Melvin*, Id. 543; *Re Bjornstad*, 18 Nat. Bankr. Reg. 282; *Re Corbett*, 5 Sawy. 206; *Commercial & Sav. Bank v. Corbett*, Id. 543.

Laughlin, J., delivered the opinion of the court:

The appellants assigned three grounds of error in the court below for reversal, but only one of which will be considered, as that is sufficient for a full determination of the case on its merits. That assignment is in the following words, to wit: "Third, the court erred in refusing to grant to the respective petitioners the exemptions prayed." The provisions of the statute under which appellants seek to establish their right to the exemptions claimed in their petitions in this case are as follows, to wit:

"Sec. 1. Every person who has a family, and every widow, may hold the following property exempt from execution, attachment, or sale for any debt, damage, fine, or amercement, to wit: . . ."

"Sec. 19. Any resident of this territory, who is the head of a family, and not the owner of a homestead, may hold exempt from levy and sale real and personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding \$500 in value, in addition to the amount of chattel property otherwise by law exempted."

"Sec. 10. This act shall be so construed as to apply to all species of indebtedness, against exempted property, except taxes. . . ." Laws 1887, p. 72.

The act of the legislature under which this assignment was made and authorized provides as follows, to wit:

"Sec. 35. All property, both real and personal, exempt from execution under the laws of this territory shall not be conveyed by deed of assignment, and if enumerated therein shall not pass to the assignee, but shall be reserved for the benefit of the assignor, or his family, to be set off and appraised by the appraiser mentioned in the first part of this act." Laws 1889, p. 158.

The quotation of the last statute is given in full, to show that the appellants lost none of their rights by the deed of assignment, if any they had under the exemption statute. And this leaves for determination the proposition contended for by counsel for appellants with

much force and seriousness, which is, Can each and every member of an insolvent partnership, who is a resident of the territory, the head of a family, and not the owner of a homestead, claim and hold out of the partnership assets of the insolvent firm \$500, or the equivalent in property? We think not. Appellants contend in their brief in support of this proposition that property owned by a debtor as a member of a partnership is alike within the letter and spirit of the exemption laws. The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity, and of the probable destitution to which its loss might reduce the family depending on him for support. Freeman, in his work on Executions (§ 231), says: "It often happens that property designated as exempt by statute belongs to two or more persons, either as cotenants or copartners. The question then arises whether this property must be treated as exempt to the same extent as if held in severalty,"—and says that "cotenants and copartners have been placed on the same footing in a majority of the states, and both have been given the full benefit of the exemption laws. This position, even where the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by the general rule that these statutes must be liberally construed, so as to promote the policy on which they are based, and accomplish the purposes to which they are directed." The proposition stated here, that the question had been so decided by a majority of the states, may have been true at the time the text was written; but it is not true at this time, as it will be found on an examination that a majority of the state courts and Federal courts have held that partnership property is in the nature of a trust fund, and held for the benefit of the creditors of the partnership, and that the partners cannot claim and hold exemptions out of the partnership assets. In support of the propositions stated by Mr. Freeman, *supra*, and contended for by the appellants, the following citations are made: *Stewart v. Brannen*, 37 N. Y. 350, 93 Am. Dec. 578; *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232; *McCoy v. Brennan*, 61 Mich. 362; *Waite v. Mathews*, 50 Mich. 392. In *Skinner v. Shannon*, *supra*, the court says: "That the several members of a copartnership come within the language of the statute and Constitution, there should be no question, and that they, by becoming members of a firm, do not place themselves beyond the pale of the reason of the law, would seem clear. The same reason which exists for protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of a firm. The whole object of the law is to prevent a person from being stripped of all means of carrying on his business, and in this respect no distinction can exist between those who are members of a firm and those who are not. . . . The creditor, in selling goods to an indi-

vidual, knows that a certain portion of his debtor's property is not, and will not be, subject to his demands. And so, if he sells to a firm, and the firm or each member thereof is entitled to a statutory exemption, the creditor sells in view of the hazard." In the case of *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474, which is similar in all respects to the case at bar, the court says: "The theory of the plaintiff in error is that the partnership property must go to the payment of the partnership debts, before any individual interest can exist, whereas, in fact and in law, the individual members of the firm are the real owners of the partnership property. And although the law directs how debts shall be paid, it never loses sight of the fact that a partnership is made up of individuals who own the assets." It will be seen on a careful examination of all the authorities in support of this proposition that the courts so holding have apparently ignored a well-settled principle of law; that is, that the assets of an insolvent firm is a trust fund for the benefit of the creditors of the firm. This position is supported by Federal as well as state authorities, in a long line of well-reasoned cases, as well as by a number of text-writers. "The joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity. A long series of authorities (as has been truly said) has established this equity of the joint creditors, to be worked out through the medium of the partners; that is to say, the partners have a right, *inter se*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right except to his own share of the residue; and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners, as being the ultimate *cestuis que trustent* of the fund to the extent of the joint debts." Story, Eq. Jur. 5th ed. § 1253; 5 Kent, Com. 86. "Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors." *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 885, 37 L. ed. 1117. "It has repeatedly been determined, both in the British and American courts, that the property or effects of a partnership belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; consequently that no greater interest can be derived from a voluntary sale of his interest by one partner, or by a sale of it under execution. In *Taylor v. Fields*, 4 Ves. Jr. 396, it was said, that a party coming into the right of a partner, . . . 'comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the

partnership debts.'" *Fourth Nat. Bank v. New Orleans & O.R. Co.* 78 U. S. 11 Wall. 624, 20 L. ed. 83. "It is a rule, too well settled to be now called in question, that the interest of each partner in the partnership property is his share in the surplus, after the partnership debts are paid; and that surplus only, is liable for the separate debts of such partner." *United States v. Hack*, 33 U. S. 8 Pet. 271, 8 L. ed. 941; *Murill v. Neill*, 49 U. S. 8 How. 414, 12 L. ed. 1185. There seems to be no doubt at this time but that the partnership assets of an insolvent firm constitute a trust fund for the benefit of the creditors of the partnership. And the only way in which individual partners of the insolvent firm could avail themselves of an exemption out of the partnership assets, before the partnership debts are paid, would be by a direct statutory remedy, and we have no such statute here. It is true that in the case of *Stewart v. Brown*, 37 N. Y. 350, 98 Am. Dec. 578, the court held that, where the word "person" was in the statute, it meant "persons" in the plural, and that construction was given because of a general statute in that state. And, while we have a statute to the same effect (Comp. Laws 1884, § 2614), such a construction as placed upon the statute by the court in the case above cited is, in our opinion, unwarranted, in the face of the authorities above cited. Bates, in his work on the Law of Partnerships (§ 1181), says: "On execution against the partnership property on judgment for a partnership debt, no exemption or homestead is allowed either to the partnership as a body or to the individual members thereof, out of the joint assets. The partnership as a body cannot claim it because the homestead and exemption statutes apply to several and not to joint claims, and the partnership is neither an entirety, an individual, nor the head of a family. An individual partner cannot claim it, because no partner has a proprietorship in any specific chattel, his interest being a share in the surplus after payments of debts and copartners' claims,"—but that "the contrary rule prevails in Georgia, Michigan, New York, North Carolina, Texas, and Wisconsin." In the case of *Re Handlin*, 8 Dill. 290, Circuit Judge Dillon says: "There is no exemption to the firm, as such; nor is it contended that there can be. But each of the partners claims an individual exemption to the amount of \$2,000 out of the firm property, and at the expense of the firm creditors; and if the claim is valid, it would be equally so if there were six partners, instead of two. . . . While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate, at the expense of the joint creditors." The supreme court of Kansas, in a very able opinion, in the case of *Guptil v. McFee*, 9 Kan. 30, says: "But if we adopt the theory, which is the true one, that the exemption is in favor of individuals only, and not in favor of copartnerships or corporations, we are equally led to the conclusion that partnership property is not exempt from execution." And in *Pond v. Kimball*, 101 Mass. 107, the supreme court of that state, as early

as 1869, held that, "property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his account with the firm." There is almost a limitless number of adjudicated cases supporting this doctrine, both Federal and state, and it is only necessary to cite a few in addition to those already referred to: *McCrimmon v. Linton*, 4 Colo. App. 420; *Aiken v. Steiner*, 98 Ala. 355; *Richardson v. Adler*, 46 Ark. 43; *Kingsley v. Kingsley*, 39 Cal. 665; *State, Peck, v. Bowden*, 18 Fla. 17; *Ex parte Hopkins*, 104 Ind. 157; *Hoyt v. Hoyt*, 69 Iowa, 174; *Terry v. Berry*, 13 Nev. 514; *Short v. McGruder*, 22 Fed. Rep. 46; *Hawley v. Hampton*, 160 Pa. 18.

A long list of Federal decisions are cited by counsel for appellee receiver from the bankrupt register in support of these authorities.

If the contention made by the appellants is sound,—that each of the partners of an insolvent copartnership is, under the statute, entitled to claim and have an exemption of \$500 out of the partnership assets at the expense of the partnership creditors, as the equivalent of his homestead, when he is not the owner of one,—then it is sound as to any number and all the copartners under like circumstances; and if one member of the copartnership furnishes all the capital, and the others conduct the business as profit partners only, and contract partnership obligations, and become insolvent, then each of the profit partners would be entitled to an exemption out of the assets at the expense, first, of the partnership creditors, and, secondly, at the expense of the partners who furnished all of the capital for the enterprise or business, if he should happen to have private property out of which the partnership debts could be collected; thus affording the profit partners an opportunity to secure and hold the exemptions out of the property in which they never had any interest, and out of a business in which they never invested a dollar of their own money. Such a proposition is neither sound in morals nor in law. There is no principle of the law better settled than that partnership assets must first be applied to the payment of partnership debts. And to attempt to establish any other rule would be to encourage the thriftless and unscrupulous at the expense of

the fruits of honest labor, and would be contrary to business principles, and tend to destroy commercial confidence. Suppose one partner had put into the business three fourths, and the other one fourth; it would be clearly unjust and inequitable to hold that he who had put into the business only one fourth of the capital should be permitted to withdraw from the firm assets an equal moiety with him who had invested three fourths of the capital; and, if the principle contended for is sound with respect to any partnership, it is sound with all partnerships.

It is contended by appellants' counsel, with considerable force, that statutes allowing exemptions should be and are construed with great liberality in favor of the "poor debtors." That, no doubt, is true, and it is the proper construction; but this is not the class of cases requiring a liberal or sympathetic construction, because common experience of every-day life teaches that in perhaps a majority of the cases of insolvency the members of the insolvent firm, while doing a thriving business on the capital of their creditors, live in opulence, contract obligations with that other class of people known as "poor creditors," who are unable to lose the results of their honest toil for the benefit of those who have lived in luxury while holding themselves out to the world as amply and financially responsible for all their obligations, and then make a deed of assignment, and, as if by the hand of the magician, they are converted into "poor debtors," and raise the alarm that they are being pursued and oppressed by their creditors. Our statute is fairly liberal in providing exemptions to the poor and needy. It exempts a homestead to the heads of families, to the amount of \$1,000, and the proceeds of the homestead when sold to that extent for one year, and other personal property amounting to several hundred dollars, and the personal earnings of the debtor, or his minor child or children, for three months, and it is this class of debtors upon whom the law always sheds its mantle of charity in its protecting care of the weak against the strong, and in whose favor the law is, and should always be, construed liberally.

There was no error in the court below in refusing to grant the prayer for exemptions as prayed for by the appellants, and for the foregoing reasons *the judgment of the Lower Court is affirmed.* And it is so ordered.

Smith, Ch. J., and Bantz and Hamilton, JJ., concur.

LOUISIANA SUPREME COURT.

George W. McCONNELL.

v.

David LEMLEY, *App't*.

(49 La. Ann. —.)

*1. A member of a surprise party visiting the house of a friend for the purpose of spending an evening in social amusement, sustaining injury by means of a falling gallery.—*Held*, that she cannot recover damages of the owner of the building, who had leased it as a place of residence to the friend whose house the party visited.

*2. Rev. Civ. Code, arts. 670, 2322, must be construed together as laws in pari materia; and, being thus construed, they exclusively relate to the injuries which may be inflicted by falling walls, or materials composing them, upon neighbors or passers-by, and not to those resulting to occupants of the buildings, or guests therein assembled.

(April 6, 1896.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to recover damages for personal injuries to plaintiff's daughter which were alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

*Headnotes by WATKINS, J.

NOTE.—*Liability of landlord for injuries to tenant's guests and servants from defects in premises.*

McCONNELL v. LEMLEY and STENBERG v. WILCOX, although somewhat distinguishable on their facts, are not decided squarely upon this distinction. And they contain expressions which indicate that the courts by which they were decided entertain somewhat different views of the law which should govern them. In McCONNELL v. LEMLEY the court says: "The guests of the tenant have no claim against the landlord for damages they have sustained while on the premises." In STENBERG v. WILCOX the court makes the express or implied knowledge of the guest as to the defect a material element in the consideration of the landlord's liability. It appears to be the first case in which that element has appeared. The person whom the tenant invites upon the premises is universally regarded as so far identified with the tenant that his right of recovery against the landlord is the same that the tenant's right would be had the accident happened to him. The guest is regarded not as a stranger with independent rights. Consequently the question whether or not the guest knew or might have known of the defect has been treated as immaterial.

Duty the same towards tenant and tenant's guest or servant.

In Bowe v. Hunking, 135 Mass. 380, 44 Am. Rep. 471, which was an action by the wife of the tenant for injuries caused by a defect in the premises, the court says persons who occupy by permission of the tenant or as members of his family cannot be considered as occupying by invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant.

In Cole v. McKey, 68 Wis. 500, 37 Am. Rep. 203, which was the case of an injury in a common pas-

Meurs. James Wilkinson, R. H. Lea, and Farrar, Jonas, & Kruttschnitt, for appellant:

Article 2322 of the Civil Code provides that "the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

This article applies, and was intended to apply, only to passengers on the public highways and to neighbors, and it was not intended to apply to persons voluntarily entering private premises, and there suffering an injury.

This is the necessary result of a comparison of article 2322 with article 670 of the Civil Code.

Camp v. Church of St. Louis, 7 La. Ann. 825.

At common law, both the authorities and the text-writers are in our favor.

Edwards v. New York & H. R. Co. 96 N. Y. 245, 50 Am. Rep. 659; *Shearm. & Redf. Neg.* 4th ed. § 711, p. 598; *Buswell, Personal Injuries*, p. 124; *Whittaker's Smith, Neg.* pp. 83, 84.

The French authorities sustain the same view.

Fuzier Herman, Code Annoté, Commentary on C. N. art. 1886, No. 16, and authorities there cited, including particularly: *Demolombe*, Vol. 31, No. 659; *Aubry & Rau*, vol. 4, p. 772, § 448, note 14; *Larombière*, Commentary on article 1889, No. 3; *Laurent*, Vol. 20, No. 644.

anyway, the court says the rightful subtenant, servant, employee, or even customer of the lessee is in the same condition as to right to recover for injuries that the tenant is, because he enters under the same title and hence assumes the same risks.

In *Martin v. Richards*, 155 Mass. 361, in which the action was by the tenant, his wife, and the administrator of his deceased child, the court says it is agreed that the same disposition is to be made of the three cases, and therefore the court treats the cases as an action by the tenant alone.

In *Minor v. Sharon*, 113 Mass. 477, 27 Am. Rep. 122, minor children of the tenant sued for injuries caused by their contracting small pox, with which the tenement was infected to the knowledge of the landlord, but which fact he did not communicate to the tenant. The action by the children was tried with the action by the father for a similar cause, and the court places the liability on the same ground, and approves a finding in favor of plaintiffs.

In *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, although the injury was to the wife of the tenant, the husband was joined as plaintiff in the action, and the court treats the case as one of landlord and tenant.

Landlord not generally liable.

Invited guests of a tenant must seek their remedy against him, and not against the landlord, for injuries caused by defective repair of the leased premises. *Marshall v. Heard*, 59 Tex. 206.

If a guest enters and while upon the premises is injured without his own fault by some defect in the premises he must seek his damages from him whose invitation impliedly assured him he could enter safely, and who alone is responsible for the defect which caused the injury. In such a case the guest can have no greater claim against the lessor

Even as to passengers and neighbors, the owner of a building is answerable for the damages occasioned by its ruin only where it is caused by his neglect to repair it, or when it is the result of a vice in its original construction.

Burton v. Davis, 15 La. Ann. 448; Civ. Code, art. 2822.

Even a subtenant cannot acquire greater rights than the tenant.

Talley v. Alexander, 10 La. Ann. 627; *Norton v. Ormsby*, 1 Mart. N. S. 875.

Any person entering upon the premises enters either under the contract of lease, or as a trespasser.

Upon the first hypothesis, the rights of such person cannot be greater than those of the tenant. Upon the second, there is no privity of contract between the person entering and the owner of the property, and if the person entering be injured, he, or she, must look to the person with whom he or she had an implied contract as to his or her safety as a guest.

O'Connor v. Illinois O. R. Co. 44 La. Ann. 339.

The tenant cannot recover damages by reason of the failure of the landlord to make repairs, when the rent is sufficient to enable the lessee to make them, because in such a case the lessee is authorized to make them himself and to deduct the cost from the rent.

Lewis v. Pepin, 33 La. Ann. 1417; *Caldwell v. Snow*, 8 La. Ann. 892; *Pesant v. Heatt*, 22 La. Ann. 292; *Diggs v. Maury*, 23 La. Ann. 59; *Larguier v. White*, 29 La. Ann. 156; *Laurence v. Letièvre*, Manning's Unreported Cases, p. 11.

than the lessee himself and the members of his family have. *McKenzie v. Cheatham*, 3 Me. 543.

In *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, where the plaintiff, wife of a sublessee of the property, was injured by an explosion of a water boiler on the property, the court held the landlord not liable, the evidence showing that there was no reason to believe that the owner knew of the unsafe condition of the boiler. The court says the owner of a building is not, in the absence of fraud or any agreement to that effect, liable to the tenant or others lawfully on the premises by his authority for their condition, or bound to see that they may be safely and conveniently used for the purposes for which they are apparently intended.

Although the landlord puts fixtures in a store in an unsafe manner, and neglects to remedy the defect when notified of it by the tenant, he will not be liable for injuries to the tenant's customer caused by the defect, since the remedy of the customer is solely against the one who invited him into the dangerous place. *Burdick v. Cheadle*, 28 Ohio St. 393, 20 Am. Rep. 767.

The owner of property leased for business purposes is not, in the absence of covenant in the lease, bound to repair the premises, and therefore is not liable to the employee of the tenant for injuries caused by defects in a stairway used in connection with the premises. *Willson v. Treadwell*, 81 Cal. 58.

Where the daughter of a lessee who had covenanted to keep the premises in repair was injured by the falling of a veranda, the court held that she could not be considered a stranger, and had no right of action against the lessor for the injury so received. *Mehr v. McNab*, 24 Ont. Rep. 653.

Defect in premises when let.

A landlord who lets a house in a dangerous state
84 L. R. A.

Messrs. Frank E. Rainold and A. G. Brice for appellee.

Watkins, J., delivered the opinion of the court:

Plaintiff seeks to recover \$10,000 damages of the defendant, as owner of the house at the corner of Julia and St. Charles streets, in the city of New Orleans, it being at the time occupied as a residence by one W. H. Burgess as his tenant, under the following circumstances, as related in his petition, *viz.*: "On the 16th November, 1894, Burgess entertained a party of friends at his home. They had come as a 'surprise party,' and were welcomed by Burgess as guests. Among them was the daughter of plaintiff, and she was made welcome by the host and his wife. A little after 1 o'clock, Miss Virgie McConnell was standing on the veranda or gallery that surrounded the dwelling, and on which a number of doors opened. She had stepped upon the gallery for the purpose of enjoying the fresh air, as the evening was a warm one, while the other young ladies were putting on their hats, preparatory to leaving. While she was standing on this gallery, which was a structure extending along both the Julia and St. Charles street sides of the house, being about 12 feet wide, with a railing encircling it, the fire bells rang, and about a dozen of the guests came out to watch the fire engine pass. The engine house was nearly opposite, and they viewed the preparations of the firemen, and departure of the engine out Julia street, towards the woods. . . . The engine had scarcely crossed St.

is not liable to his tenant's customers or guests for accidents happening in consequence during the term. *Robbins v. Jones*, 15 C. B. N. S. 221, 33 L. J. C. P. N. S. 1, 10 Jur. N. S. 229, 9 L. T. N. S. 523, 12 Week. Rep. 248.

In *Burchell v. Hickson*, 50 L. J. Q. B. N. S. 101, plaintiff, a child four years old, went with his sister to a house which had been let without any agreement as to repair, and fell through a broken rail at the top of a flight of steps and was injured. The court does not discuss the question of liability as between defendant and the tenant, but places its ruling for defendant upon the ground that defendant never invited such a person as plaintiff to come to the premises without an attendant, and if he had an attendant there was no concealed danger, which alone would render defendant liable.

In *Ten Broeck v. Wells, F. & Co.* 47 Fed. Rep. 639, where the plaintiff, a guest at a hotel, received an injury by falling from the front steps because of the absence of a railing, and sued the owner of the hotel, who had leased it to a third person, the court held that the defect being patent the risk was assumed by the guest, and she could not recover for injuries caused by it.

The owner of a building leased to a tenant who occupies it is not liable for injuries to a person who is injured by falling down an embankment while walking from the street to the house for the purpose of transacting business with the tenant, although the premises were in that condition when they were leased. *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 655.

The landlord is not "able to any person entering under the title of the tenant or upon the premises by his invitation, where there is no agreement to repair and he has not been guilty of any fraud or concealment as to the safe condition of the prem-

Charles street before the section of the gallery upon which Miss McConnell, with about seven or eight other guests, was standing, suddenly gave way and fell, and precipitated her and others to the hard flag pavement of the sidewalk, a distance of about 18 feet. Two others fell on top of her. Her right leg was broken above the knee, and she was bruised all over the body. She remained six weeks in bed in the Charity Hospital, suffering excruciating pains and agony; and she could not walk without a crutch for months after the accident. After healing, her injured leg was found to be shorter than the uninjured one. Dr. Schmitt, who had not measured the extent of the shortening, thought it was between $\frac{1}{2}$ to $\frac{3}{4}$ inch. Dr. E. J. Graner, who made a critical examination, testified that it was about $\frac{1}{2}$ inch. Both physicians concur in pronouncing the injury permanent, and that Miss McConnell will be a cripple for life. She will always limp. The cause of the falling of the gallery was fully proved. It was rotten to such an extent that no repairs could have rendered it safe. The inspector of public buildings of the city of New Orleans, Mr. Peeler, made an examination of that portion of the structure that did not give away, and ordered it torn down, as dangerous to human life."

Admitting his ownership of the premises in question and the lease of Burgess, the defendant, for answer, avers that it was rented for the uses and purposes of a residence, and was in thoroughly good condition at the time the accident happened, and that it was amply safe for its usual, ordinary, and contemplated pur-

poses; that there was no defect in said gallery which was apparent to an observer, and that he had effected all the repairs which were necessary a short time before the accident, and, if any further repairs were desired, it was the duty of the tenant to have notified him to make same, and, in default of his so doing, to have made same, and deducted the cost from the amount of rent due or to become due. He denies that plaintiff's daughter went on the premises with the knowledge or consent of himself, or even with the request or at invitation of his tenant. He avers that his tenant possessed and used the gallery daily, and, had same been in the dangerous condition it is represented to have been, it would have been the duty of the tenant to have warned the young people composing the surprise party of the danger there was of crowding thereon, as they are admitted to have done; that the proximate cause of the accident and of the injury which was inflicted upon plaintiff's daughter was the sudden rushing of the dozen of young ladies out upon the gallery simultaneously, same not having underneath any proper and suitable support, as is usual when it is expected to be resorted to by an unusual assembly of persons. As matter of law it was contended by the defendant's counsel: That the precept of our Code which provides that the owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it (Rev. Civil Code, § 2322), applies only to passers-by upon the public highway and to neighbors, and not to persons voluntarily entering upon private premises, and there suffer-

ing, and the defects in the premises are obvious. *Harpel v. Fall* (Minn.) 65 N. W. 913.

A landlord is not liable for injuries caused by a fall of a child of a subtenant by reason of the absence of a fence between the property and the street when the fence was removed before the beginning of the term during which the injury occurred. *Peterson v. Smart*, 70 Mo. 34.

In *Moyrhan v. Allyn*, 163 Mass. 270, which was a case of an injury on a platform used in common by all the occupants of a tenement building, the court refused to permit a recovery on the ground that the defect was patent and in the same condition when the lease was made, and that it was the duty of the tenant to provide against injuries upon it.

The owner of a building is not liable for injuries to a child of his tenant which were caused by its attempted use of a fire escape as a balcony. *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555.

But in the trial court there had been a recovery by plaintiff upon the ground that the fire escape was required by statute, and therefore the landlord was liable for not providing a safe one. *McAlpin v. Powell*, 1 Abb. N. C. 427.

A child injured by falling from a window upon a roof and through an unprotected skylight therein cannot recover therefor against the landlord, although the landlord owed the duty of maintaining the roof in a safe condition for the tenant to hang clothes over. *Miller v. Woodhead*, 104 N. Y. 471.

A landlord is not liable for the death of a child of a visitor of his tenant who is drowned in an open hole 58 feet from the rear of the dwelling house, which was dug at tenant's request. *Moore v. Logan Iron & S. Co. (Pa.)* 4 Cent. Rep. 508.

The owner of an hotel is not liable for injuries to a guest by reason of defects in the walk or platform forming the approach to the building. *Texas & P. R. Co. v. Mangum*, 68 Tex. 342.

34 L. R. A.

The owner of an hotel is not liable to a guest for the fall of an awning known to be unsafe, unless he is bound by the lease to keep the awning in repair. *Fellows v. Gilbubier*, 82 Wis. 630, 17 L. R. A. 577.

A landlord is not liable to a servant of his tenant for injuries occasioned by a dangerous condition of the premises existing at the time of the lease, although he subsequently promises without a new consideration to repair the premises, if there is no covenant to repair in the lease. *Peres v. Rabaud*, 76 Tex. 191, 7 L. R. A. 620.

In Lower Canada the landlord is bound to deliver his premises to the tenant in good repair, and the owner of property is liable for injuries caused by its ruin through want of repair, and the wife of a tenant may recover for injuries caused to her soon after taking possession by the giving way of a portion of the building through want of repair. *Simmons v. Elliott*, Mont. L. R. 5 S. C. 182.

There is a case in one of the lower courts of New York which seems to be out of harmony with the line of authorities upon this question.

The child of a tenant may recover for injuries received by the falling upon it, in the yard, of a large stone which had been left standing perpendicularly against the fence in such a way as to be a trap for children, if it was there when the premises were leased. *Schmidt v. Cook*, 12 Misc. 449.

If the stone was in the condition described, the defect would certainly be patent, and the tenant and consequently his child would assume the risk.

Effect of concealment by landlord.

If the landlord is guilty of anything like bad faith, so that he leases the premises with a concealed defect upon them, he will be liable for the injuries caused by such defect. What will render him guilty of bad faith has not been fully deter-

ing an injury. That a person who thus enters the premises of another by the permission of the tenant is, with respect to the owner, a mere licensee, and sustains a relation to him somewhat like that of a subtenant, and can acquire no greater rights than the principal lessee; and if he enters without permission of the lessee, he is a trespasser, without any privity of contract with respect to the owner, through the medium of the lease. That a tenant cannot recover damages of the landlord by reason of his failure to make repairs, when the arrearages of rent are sufficient to enable the lessee to make them in case of the lessor's failure to make same after he has received due notification of the necessity of same being made. And he avers that at the time of the happening of the accident the tenant was in arrears a sufficient amount to have defrayed the cost of the necessary repairs.

On the trial there was judgment for \$2,500 against the defendant, predicated upon the verdict of a jury, from which he has appealed; and in this court plaintiff has demanded that this allowance be increased to \$5,000.

The proof at the trial substantially conforms to the foregoing statement *pro et con*. It shows: That shortly after he rented the premises to Burgess the defendant sent carpenters to the leased premises, with instructions to place it in good order, and that materials were ordered and delivered for that purpose, and used by the carpenters. That all the repairs necessary were voluntarily made by the defendant, and that no demand was subsequently made by the tenant for additional repairs.

Of course if he knows of the concealed defect, and fails to make it known to the tenant, he will be guilty of bad faith. The point which is not settled is whether or not the landlord owes any active duty to search for concealed defects. The idea that he owes such duty seems to have arisen very recently, and very little discussion of the matter is found in the reports. If such duty is found to exist, then it logically follows that if he fails to give the property such examination as a landlord should give his property before renting it for the use to which he knows the tenant will apply it, and such examination would have disclosed the defect, he will be guilty of actionable negligence. This is the rule of reasonable care and diligence which is applied in *STENBERG v. WILCOX*. But the adoption of that rule immediately raises the further question whether the care required of the landlord for the discovery of defects is greater than that required of the tenant. *STENBERG v. WILCOX* implies that it is, and is apparently supported by statements in some of the cases. But the old cases applied the rule of *caveat emptor* to the tenant, and the most that can be said is that the doctrine that the landlord has the duty to search for concealed defects is a new one, recently broached, and has not yet received consideration enough by the courts, at least in cases involving liability to tenant's guests or servants to indicate what rule will be adopted. See *note to Hines v. Wilcox*, *post*.

If the premises contain a hidden defect which by reason of its location is likely to cause injury, and the landlord knows of the defect but fails to notify the tenant of it, the landlord will be liable for injuries to the tenant's child which are caused by reason of its presence. *Coke v. Gutkese*, 80 Ky. 508, 44 Am. Rep. 499.

If the owner of an hotel places therein a chandelier which is hung so insecurely as to be in danger

That at the time of the accident the tenant was in default in making payment of his rent, and was subsequently notified to vacate the leased premises on account of his nonpayment of rent. That the gallery was not in a condition to stand this unusual strain is not denied, but, on the contrary, was generally known among the guests; and that during the course of the evening that the accident happened the visitors were warned and admonished to desist from dancing, as the gallery would not stand the strain it would produce. That, notwithstanding that warning, the guests rushed out on the gallery when the fire bell rang, causing it to give way and fall beneath their accumulated weight, causing the injury complained of to the plaintiff's daughter. Plaintiff's counsel puts his client's right of recovery upon the following provision of our Code, *viz.*: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction." Rev. Civil Code, § 2322. And the further provision, *viz.*: "Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill." *Id.* § 2316. These provisions of the Code treat of offenses and quasi offenses towards the general public, and they impose upon the owner of a building the general duty of keeping it in such a state of repair and preservation that it will not occasion damage to anyone; and, in case of his failure so to do, they declare that he is answerable in damages to one who shall suffer injury in consequence of his

of falling, but which defect is not patent, he will be liable for injuries to a servant of the lessee who is injured by the fall. *Reichenbacher v. Pahlmeyer*, 8 Ill. App. 217.

A railroad company over whose tracks another company by virtue of a contract runs its trains, is liable in tort to the latter's brakeman, who, while in the due performance of his duty on the employer's train, receives a personal injury solely by reason of the negligent construction of the owner's station house. The court says it is settled law that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their insecurity to persons lawfully upon them. *Nugent v. Boston, C. & M. R. Co.* 80 Me. 63.

That statement of settled law is true only when applied to one of the exceptions to the rule, and cannot be accepted as an accurate statement of the general liability of the landlord to the tenants, guests, or servants.

A landlord is not liable for injuries to a visitor of his tenant which are caused by a defect in the premises at the time they were leased, unless he knew, or by reasonable diligence might have known, of their dangerous condition. *Borman v. Sandgren*, 37 Ill. App. 160.

A landlord is not liable to an employee of his lessee for illness caused by defective plumbing where he is not charged with fraud or deceit, or with any more knowledge of the defects than the lessee had. *Angevine v. Knox-Goodrich (Cal.)* 18 L. R. A. 264.

A landlord is not liable to the employee of a tenant for injuries caused by an explosion of gas in adjoining property owned by him by reason of de-

neglect, imprudence, or want of skill. But counsel for the defendant contend that the article first cited must be construed in connection with the provisions of article 670, which are as follows *viz.*: "Everyone is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the *neighbors* or *passengers*, under the penalty of all losses and damages, which may result from the neglect of the owner in that respect." (Our italics.) These articles have been frequently construed by this court, but in no case of which we are aware have they been applied to a case circumstanced as this case is. They have been construed as applying to persons injured while walking along the street. *Hoss v. New Orleans*, 12 La. Ann. 481; *Barnes v. Beirne*, 38 La. Ann. 280; *Tucker v. Illinois C. R. Co.* 42 La. Ann. 114. And they have been applied to persons occupying an adjoining building, who have sustained injuries by reason of another building falling against and demolishing it. *Knoop v. Alter*, 47 La. Ann. 570; *Steppe v. Alter*, 48 La. Ann. 363. These are obvious and necessary safeguards the law has provided for the denizens of towns and cities, to whom old and dilapidated or badly designed and constructed buildings are a constant menace while attending to the ordinary and every-day concerns of life. But it is not readily perceptible upon what principle of duty or equity these precepts of the Code are to be extended to the accidental occupants of a house, having no contractual relations with either the proprietor or his tenant. But it must be ob-

served that the articles cited do not rest upon contractual relations at all, but the liability of the owner arises *ex delicto* alone. He is held liable because he is deemed guilty of a fault in not keeping his building in such a safe condition as it will not do any member of the public an injury. It is the thing which offends, and the owner suffers the consequences of the offense. The imposition of the penalty results from the idea that the faulty or defective building is an invasion of the security that municipal government guarantees to the citizen or wayfarer in the public thoroughfare of the city. This reason and spirit of this rule does not seem to apply to the person who seeks admission to the premises, or who goes there upon the invitation of the owner or tenant, either on business or pleasure; for in such case the ordinary rules of trespass or contract would apply. Visitors are, in a certain sense, members of the family. Looking at the evidence as we have related it, it is manifest that, if the members of the surprise party had passed along the banquette underneath the gallery of defendant's house, and had not entered the building at all, it would not have fallen, and plaintiff's daughter would have suffered no injury; consequently, we must look to some different principle of law on which, if at all, the defendant can be held bound. In our opinion, the guests of the tenant have no claim against the landlord for damages they have sustained while on the premises. The guests of the tenant are not guests of the landlord. During the term of the lease the owner may be said to have, for a consideration, parted with

fects in gas fittings put in by a former tenant, where there is nothing to show that the latter was guilty of negligence in having the work done, or that the landlord knew that there were defects in the fittings. *Metzger v. Schultz* (Ind. App.) 43 N. E. 898.

In *Gwinnell v. Eamer*, L. R. 10 C. P. 658, 32 L. T. N. S. 836, a person went up to the window of a leased building for the purpose of conversing with another person in the room, and in so doing stepped upon a grating which gave away, and he was injured. It did not appear that the landlord knew of the unsafe condition of the grating and the lease contained a covenant binding the tenant to repair. The court held that the owner was not liable for the injury.

One branch of the question of the landlord's bad faith is the construction of a building which is not sufficient for the use to which it is put.

The owner of a storehouse which was erected under his own superintendence to lease to the United States government is liable to a person whose goods are destroyed by the falling of the building in consequence of its insufficiency for the purpose for which it was erected. *Carson v. Godley*, 25 Pa. 111, 67 Am. Dec. 404.

That case followed the principle of *Godley v. Hagerly*, 20 Pa. 387, 59 Am. Dec. 731, which was the case of the fall of a building used for a government storehouse and the injury of a laborer at the time rightfully upon the property.

But in the latter case it appeared that the owner built loosely, carelessly, unskillfully, and negligently, at the same time knowing that the building was to be used as a government storehouse which would require a well-constructed building. Of course such conduct made him guilty of bad faith.

Effect of duty to repair.

The agents of a foreign owner having full charge of a building which they hold for rent, who lease it 34 L. R. A.

with a heavy door on it in a dangerous condition at the same time, promising to put it in a safe condition, will be liable to a person who goes there to deliver goods to the tenant, and who is injured by the falling of the door. *Baird v. Shipman*, 38 Ill. App. 508.

If the landlord has agreed to keep the premises in repair, and after notice neglects to do so, he will be liable to an employee of the tenant, who is injured by the defect. *White v. Sprague*, 9 N. Y. S. R. 220.

The owner of a wharf which is let under the agreement that the owner will make the necessary repairs will be liable to a person who goes upon the wharf for the purpose of delivering goods on board a vessel loading at the wharf who is injured by falling into a hole in the planking which is caused by decay and has existed for some time. *Campbell v. Portland Sugar Co.* 63 Me. 552, 15 Am. Rep. 508.

In case a tenant sublets a portion of the premises, and the goods of the subtenant are injured by the falling of the walls, he cannot recover of the landlord for the injury unless the landlord had notice or knowledge of the subletting, since he was under no obligation to keep the premises in repair for the subtenant. *Donaldson v. Wilson*, 60 Mich. 83.

Under the Georgia Code the landlord has the duty of maintaining the premises in repair, and if he permits steps leading to a rented storehouse, and which also lead to his own storehouse, to get out of repair to the injury of one who goes to the storehouse to transact business with the tenant, he will be liable therefor. *Archer v. Blalock*, 97 Ga. 719.

If the landlord has not been notified by the tenant to repair he cannot be held liable for injuries to a guest of the tenant which were caused by the defective condition of the premises. *Ploen v. Staff*, 9 Mo. App. 309.

his exercise of the right of ownership. If the tenant be neglectful of the safety of his guests, they have their recourse against him personally, and not against the owner of the building. In such case it is the duty of care the occupant owes his guest, and not the duty the owner of the building owes to the public, that controls the recourse of an injured party. If, on plaintiff's theory, a person, upon invitation of a tenant, should enter any old and dilapidated building, and suffer injury, and the owner would be responsible, the consequences would be disastrous to landlords; for who could afford to lease property under the circumstances, and take the risk of suffering thousands of dollars in damages for the carelessness or imprudence of tenants on their failure to make, as in instant case, some trifling repairs, the cost of which he could have easily reimbursed himself from the arrearages of rent in his hands. We are fully convinced that the articles of the Code on which plaintiff's counsel rely were never intended to govern this kind of a case; and this becomes more evident when we take into consideration the article of the Code which counsel for the defendant has cited as being *in pari materia*. Counsel has also referred us to several pertinent common-law authorities, but we prefer to rest our decision upon the prin-

ciples of our own statutes. But if, on the other hand, the members of the surprise party were uninvited, and to be treated and considered as trespassers, or mere licensees, the plaintiff's only recourse must be against the person by whose tacit permission they were on the premises. *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 399; *Snyder v. Natchez, R. River & T. R. Co.* 42 La. Ann. 302. But, in any event, the evidence satisfies our minds that the defendant, as owner of the building, has exonerated himself from liability by making all the repairs which he supposed to have been necessary to the safety and security of the building; and, if any fault there was on his part, the tenant and his guests contributed in some degree to the accident by not desisting from rushing out upon the gallery as they did, after having been warned against the danger of dancing on it. A case for damages is not made out.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the plaintiff's demands be rejected, at his costs in both courts.

Rehearing denied November 16, 1896.

The owner of an hotel is not liable to the guest of the lessee for injuries caused by a fall into an elevator well by reason of a defect in the door spring, although he had agreed to make repairs, if he had no notice of the defect and it was not shown to have existed any length of time. *Hutchinson v. Cummings*, 156 Mass. 330.

Where the premises were not out of repair when they were leased, and the owner made no covenant to repair, the mere fact that a portion of the outside wall became out of repair and fell on a servant of the tenant will not give him a right of action against the owner of the building for the injuries. *Nelson v. Liverpool Brewery Co.* L. R. 3 C. P. Div. 311, 46 L. J. C. P. N. S. 675, 25 Week. Rep. 877.

The owner of land which is leased for a lumber shed and a way appurtenant to it is not liable for an injury to a customer of the lessee by reason of a defect in the way. *Abbott v. Jackson*, 84 Me. 449.

In the absence of covenant by the landlord to repair, he is not liable to a tenant of the lessee for injuries received by reason of the premises becoming out of repair. *O'Brien v. Capwell*, 59 Barb. 497.

A child of a tenant cannot recover for injuries caused by the giving way of a railing along a piazza which had been constructed for hanging out clothes, if it was in good condition when the lease was made and had been to the knowledge of the tenant gradually decaying until its condition had had become dangerous. *Flynn v. Hatton*, 48 How. Pr. 383.

If the landlord has paid the tenant to repair the defect, the landlord will not be liable to a visitor of the tenant injured by reason of the defect. *Sterger v. Van Stolen*, 23 N. Y. S. R. 637.

The landlord who has leased premises to an athletic association is not liable for injuries to a visitor by falling against a glass door upon slipping on a walk between the bath room and the dressing room, although the door is needlessly standing in the passageway, where it does not appear that it was there when the premises were leased. *Heath v. Metropolitan Exhibition Co.* 33 N. Y. S. R. 823.

The owner of a mill is not liable to an employee of the tenant for injuries caused by defects in the machinery in the mill. *Johnson v. Tacoma Cedar Lumber Co.* 3 Wash. 723.

34 L. R. A.

A landlord is not liable to a visitor of his tenant for an injury resulting from the condition of the premises caused by the tenant's own act. *Eyre v. Jordan*, 111 Mo. 424.

If the act of the tenant makes the premises dangerous the owner is not liable to a person employed by the tenant to do work on the premises. *Handy-side v. Powers*, 145 Mass. 123.

The owner of a building is not liable for injury to an employee of a lessee of one floor who is injured by attempting to pass between a partition erected by the lessee and a shaft placed there by the landlord before the lease, since the act of the lessee, if anything, caused the premises to be unsafe. *Ryan v. Wilson*, 87 N. Y. 471, 41 Am. Rep. 384, 63 How. Pr. 172, Affirming 12 Jones & S. 273.

The owner of an hotel who gives the lessee the right to complete an uncompleted portion of the building is not liable for injuries to a guest who is injured by defects resulting solely from the improvement. *Glass v. Colman*, 14 Wash. 635.

Structure for use of public.

There is some tendency by the courts to require greater care and hold the landlord to a stricter liability in case the structure is designed for public use or will be frequented by the public.

Owners of a wharf who let it are liable for injuries to an employee of the tenant who is injured by reason of defects which are not so hidden that they could not have been discovered by such examination as the uses to which the wharf will be placed reasonably require. *Wendell v. Baxter*, 12 Gray. 494.

The owners of a pier are liable for injuries sustained by reason of its defective construction and dangerous condition, notwithstanding the premises are in possession of the lessee, who has covenanted to keep them in repair if the defects existed when the owners leased the property. *Moody v. New York*, 43 Barb. 232, 34 How. Pr. 238.

The owner of a wharf who leases it knowing of a defect in it will be liable to one rightfully using the wharf for injuries caused by the defect. *Joyce v. Martin*, 15 R. I. 553.

If a pier is in an unsafe condition when it is leased, the owner is liable to a person rightfully

TENNESSEE SUPREME COURT.

Morris B. STENBERG and Wife, *Appts.*,
v.

James M. WILCOX, Jr.

(36 Tenn. 163.)

A landlord is liable to a boarder on premises leased for a boarding house for injuries sustained by reason of the unsafe and dangerous condition of the premises, which was known to, or might by the exercise of reasonable care and diligence have been known to, the landlord at the time of the lease, but not to the boarder.

(January 31, 1906.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Davidson County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion, and in the opinions to the case of *Hines v. Wilcox*, *post.* —.

thereon for injuries caused by the defect. *Swords v. Edgar*, 50 N. Y. 28, 17 Am. Rep. 296.

Where the owner of a wharf leased it to a tenant, and at the time of the lease it was in an unsafe condition, and the owner then knew or could by reasonable diligence have known of such condition, he will be liable to one lawfully thereon for injuries received by reason of such unsafe condition. *Albert v. State*, Ryan, 66 Md. 325, 59 Am. Rep. 159.

The lessor of a wharf is not liable for injuries to an employee of the lessee caused by defects in the wharf, unless it is shown that he knew or with reasonable care might have known of the existence of the defect when the wharf was leased. *State, Bashe, v. Boyce*, 78 Md. 469.

But even in these cases the rule governing other cases of the general class has sometimes been applied.

Thus, a lessee of a pier, who has covenanted with the owner to repair and has sublet without any covenant with the subtenant to repair is not liable to a person rightfully on the pier for injuries caused by a defect in the pier which arises after the lease was made. *Cianoy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391.

In *Stratton v. Staples*, 59 Me. 94, where plaintiff was injured by falling into an unguarded railway communicating with the basement while going into a rented store for the purpose of finding the owner of the building, the owner was held liable for the injury.

A person who builds stores several feet from the sidewalk, and connects them with the walk by a pavement leaving an unguarded opening to admit light to the basement in front of the show window of one store, and leases the store in that condition, will be liable to a person who upon going to look at articles in the window falls into the opening and is injured. *Tomie v. Hampton*, 129 Ill. 352.

The owner of a building, who has leased it for a public entertainment with an understanding that he shall have control of all receipts at the box office until a certain sum is realized, is liable to a person injured by the fall of the front platform upon which he was standing waiting for the doors to open. *Oxford v. Leathe*, 165 Mass. 254.

A person who lets a hall for an entertainment in 34 L. R. A.

Messrs. J. W. Gaines, Hamilton Parks, and Edwin A. Price, for appellants:

The court failed correctly to state to the jury the law applicable to the case, or to correctly declare the law governing the liability of the landlord, as developed by the proof, or the liability of the former for injuries received by the plaintiff.

Peil v. Reinhart, 127 N. Y. 381, 12 L. R. A. 843, and *note*.

It is the duty of the landlord, when he leases property, to disclose to the tenant the true condition of the same, and to make known to the tenants such defects as he knows to exist, or which he could know by reasonable diligence; and if he fails to do so he is liable to the tenant and third persons for injuries sustained by reason of the dangerous or unsafe condition of the premises.

Coke v. Gutkese, 80 Ky. 598, 44 Am. Rep. 499; *Cesar v. Kurutz*, 60 N. Y. 229, 19 Am. Rep. 164; *French v. Vining*, 102 Mass. 133, 8 Am. Rep. 440; *Edwards v. New York & H. R. Co.* 98 N. Y. 249, 50 Am. Rep. 659; *Godley v. Hagerty*, 20 Pa. 337, 59 Am. Dec. 731; *Carrson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404.

the third story of a building, which is reached by two flights of steps with doors similarly arranged at the bottom of each, one opening on the street and the other on an unguarded piazza roof, will be liable to a person who attends the entertainment and in attempting to leave mistakes the doors and goes out upon the roof, from which he falls and is injured. *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282.

But in another case it was held that the owner of property who lets it for a public exhibition, the lessee to make any and all alterations necessary, is not liable for injuries caused by the fall of a gallery which was built for a limited number of people but which the lessee uses for the accommodation of all which it will hold, if there is nothing to show that the lessor knew that the gallery was not sufficient for the uses to which it was likely to be placed, or that it would be used in a way which would endanger its security. *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659, *Affirming* 25 Hun, 684.

And the principle of that case was followed in *Bard v. New York & H. R. Co.* 10 Daly, 620.

Liability of reversioner.

In *Gandy v. Jubber*, 5 Best & S. 78, 33 L. J. Q. B. N. S. 151, 10 Jur. N. S. 632, 9 L. T. N. S. 800, 12 Week. Rep. 628, the plaintiff was injured upon turning away from speaking to the tenant who stood in the doorway of her house, by falling through a grated covering over an opening adjoining the footpath of the highway. The court discusses the question of the liability of a reversioner who received the title while the tenant was in possession, but the discussion goes upon the general question of liability, and the fact that plaintiff might have been considered the tenant's guest is not noticed. The court of Queen's bench decided in favor of the plaintiff, but the exchequer chamber (5 Best & S. 485, 13 Week. Rep. 1022) recommended the plaintiff to accept a *set processum*, which was accordingly done.

Persons who acquire title by descent to a pier during the period of an outstanding lease are not liable for defects in the property, although they existed when the lease was made. *Abern v. Steele*, 115 N. Y. 208, 5 L. R. A. 449, *Reversing* 48 Hun, 517.

It was not necessary to show that the landlord had actual knowledge of the defect complained of. His duty was due care, and ignorance was no defense.

Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; *Readman v. Conway*, 126 Mass. 874; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Watkins v. Goodall*, 138 Mass. 533; *Lindsey v. Leighton*, 150 Mass. 285.

The house was rented for quasi-public purposes, and for the use of all boarders, patrons, or lodgers who might patronize the tenant, and such persons while on the premises were there as of right and in accordance with the contemplated use of the property at the time of the renting.

The learned trial judge gave the law to the jury in direct conflict with the well and thoroughly established doctrine of both the American and English courts.

Swords v. Edgar, 58 N. Y. 28, 17 Am. Rep. 295; *Albert v. State, Ryan*, 66 Md. 325, 59 Am. Rep. 159; *Godley v. Hagerty*, and *Carson v. Godley*, *supra*; Ray, Negligence of Imposed Duties, Personal, pp. 40, 48-53; *Coke v. Gutkese*, and *Gill v. Middleton*, *supra*.

Messrs. R. McPhail Smith and R. T. Smith, for appellee:

The responsibility of a landlord for the condition of the premises is different in different cases:

1. To strangers—third persons—the public—synonymous terms.
2. To the tenant and those upon the premises by the tenant's license or invitation.
3. In exceptional cases of fraudulent concealment or culpable negligence as to defects not ascertainable by the tenant by ordinary care in examining the premises.
4. Property public in character, such as railroads, docks, wharves, piers, places of public entertainment.

Contributory negligence.

A guest of a tenant, who after dark attempts to go along a passageway to the rear of the house without knowing what is there, while the building is in a dilapidated condition, is guilty of such negligence that he cannot recover from the owner if he is injured by falling down some steps which are out of repair. *Kammerer v. Gallagher*, 58 Ill. App. 561.

The owner of property upon the rear of which are leased buildings is not liable for injuries to a visitor to one of the buildings who attempts to reach it by going through an unfinished house upon the front of the lot, where he provided a way through an adjoining lot and subsequently opened an alley along the front of the house, although the alley was temporarily closed at the time the visitor attempted to go through the house. *Boulston v. Clark*, 3 R. D. Smith, 366.

Portion of building in landlord's possession.

If the owner of the building is himself using and exercising control over the portion of the building which is defective, he will be liable for injuries to employees of the lessee. *Poor v. Sears*, 154 Mass. 530.

But the rule in that class of cases is entirely distinct from that in those cases where the entire premises are in possession of the tenant. The cases upon this subject are collected in a note to *Jones v. Millsaps* (Miss.) 23 L. R. A. 155.

Dangerous agency on adjoining premises.

If the landlord collects a large body of water

While there is no implied warranty of safety by the lessor of private buildings, there is in the lease of buildings meant to be used for public exhibitions; the lessor holding out here to the public that the structure is safe for its purpose, and being bound to use all reasonable precautions to protect those who attend from all known imperfections.

Ruger, Ch. J., in *Edwards v. New York & H. R. Co.* 98 N. Y. 260, 50 Am. Rep. 659; *Swords v. Edgar*, 59 N. Y. 33, 17 Am. Rep. 295.

The cases at bar belong to class 2.

The landlord is liable to strangers, third persons—the public for injuries from a nuisance which he has leased. This rule does not belong to the law of landlord and tenant.

Penruddock's Case, 5 Coke, 100b; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449; *Gandy v. Jubber*, 5 Best & S. 78; *Rosewell v. Prior*, 2 Salk. 460; *Todd v. Flight*, 9 C. B. N. S. 377; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Jessen v. Sveigert*, 66 Cal. 182; *Albert v. State, Ryan*, 66 Md. 325, 59 Am. Dec. 159; *Waggoner v. Jermaine*, 8 Denio, 506, 45 Am. Dec. 474; *Durant v. Palmer*, 29 N. J. L. 544.

Specimens of cases belonging to class 3, are: *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164, where the landlord concealed from the tenant that the premises were infected with small pox; *Minor v. Sharon*, 113 Mass. 477, 27 Am. Rep. 122, a similar case, and *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, based on the landlord's actual knowledge of the defect of the premises and neglect to warn the tenant, who could not, by ordinary care, ascertain the given defect.

In this class of cases, where the landlord has the knowledge of dangerous defects not ascer-

upon premises adjoining the leased property, and keeps it so negligently that it escapes and destroys the leased house, he will be liable for injuries to a guest of the tenant who is at the time upon the leased property. *Denance Water Co. v. Olinger* (Ohio) 32 L. R. A. 736.

In the rehearing opinion of *STENBERG v. WILLCOX*, which is reported with the case of *Hines v. Willcox*, *post*.—the court says the landlord's liability, leaving the contract of lease out of view, is the same to the tenant as to his servant, or his guest, or his customer, or his wife or child, or to the stranger passing along the streets or on the premises for any legitimate purpose. The force of the clause "leaving the contract of lease out of view" is not just apparent, but from the general tenor of the opinions it would seem that the court intends to state that the liability of the landlord to his tenant or the tenant's guest, in the absence of any express provision in the lease upon the question, is the same as his liability to a stranger passing along the street. If that is the intention it is certainly not supported by the authorities, as will be seen by reference to the citations in the present note and in the notes to *Lee v. McLaughlin* (Me.) 26 L. R. A. 197, and *Hines v. Willcox*, *post*.—There is a very marked distinction between the liability of the landlord to the tenant or the person on the premises under the tenant's title and to the person passing along the street. See note upon liability for fall of building or walls to *Ryder v. Kinsey* (Minn.) *ante*, 557.

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tainable by the tenant, by ordinary care, and conceals or negligently omits to disclose them, he is liable to anybody who is injured by reason of them.

Nugent v. Boston, O. & M. R. Co. 80 Me. 62; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Edwards v. New York & H. R. Co.* 98 N. Y. 260, 50 Am. Rep. 659,—are instances of *lass 4*.

The transaction involved in this case was the renting of an ordinary dwelling house the back porch of which was defective, but this was unknown to the landlord and his agents, though probably ascertainable by an examination with ordinary care. The inmates swore they had no idea it was dangerous, after living there eleven months. Their next-door neighbor swore that the porch could be seen from an upper window to pull away from the house, and that she repeatedly warned them of its condition.

The case was not one of hidden defects known to, and concealed by, the landlord.

There is no implied covenant that the demised premises are fit for occupation, or for the particular use which the tenant means to make of them.

1 *Thomp. Neg.* 828; 1 *Taylor, Land. & T.* 197, 294, 381; *Wood, Land. & T.* 855, note; *Cowen v. Sunderland*, 145 Mass. 363; *Jaffe v. Harteau*, 56 N. Y. 898, 15 Am. Rep. 438; *Kentes v. Earl Cadogan*, 10 C. B. 591; *Krueger v. Ferrant*, 29 Minn. 385, 48 Am. Rep. 223; *Mullen v. Rainear*, 45 N. J. L. 520; *Chadwick v. Woodward*, 18 Abb. N. C. 441; *Oleves v. Willoughby*, 7 Hill, 83; *McGlashan v. Tallmadge*, 37 Barb. 313; *Howard v. Doolittle*, 3 Duer, 464; *Dutton v. Gerrish*, 9 Cush. 89, 59 Am. Dec. 45; *Banks v. White*, 1 Sneed, 614; *Southern Oil Works v. Bickford*, 14 Lea, 657; *Young v. Bransford*, 12 Lea, 344; *Pingrey, Real Prop.* §§ 592, 587; *Shearm. & Redf. Neg.* § 711; *Ray, Negligence of Imposed Duties*, p. 61.

Upon the general duty of self-protection, see *Cooley, Torts*, 2d ed. p. 570; *Brown v. Leach*, 107 Mass. 364.

The boarder, being on the dangerous premises by the tenant's invitation, and not the landlord's, must look to the tenant alone for damages from their defects.

Shearm. & Redf. Neg. § 711; *Tiedeman, Real Prop.* 2d ed. § 189; *Burdick v. Oheadle*, 26 Ohio St. 898, 20 Am. Rep. 767.

In *Young v. Bransford*, *supra*, it was held that where machinery defective through the bailor's negligence was bailed, gratuitously or for hire, and a third person was injured by the defect, the bailor was not liable to the injured party.

The landlord owes no duty to the tenant's guest or boarder.

Mellen v. Morrill, 126 Mass. 545, 30 Am. Rep. 695.

Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 232, is not in point here.

Wilkes, J., delivered the opinion of the court:

The facts in this case and the result of the trial in the court below, are the same, substantially, as in the case of *Hines v. Wilcox*, 96 Tenn. 148, *post*, —, except that the plain-

tiff, Mrs. Stenberg, was a boarder in the house which Mrs. Hines occupied as a tenant of defendant, Wilcox. She was injured at the same time and by the same accident as that which resulted in the injury to Mrs. Hines. The plain-tiffs have appealed, and assigned errors. The same errors are assigned as in the *Hines Case*, and others especially applicable to this, and not to that, case.

We need not go over the ground already occupied in that case, but merely content ourselves with saying that, if plaintiffs can recover at all in this case, it must be upon the ground that the landlord leased premises in a dangerous and unsafe condition, when he knew, or might, by the exercise of reasonable diligence and care, have known, of such unsafe condition, and upon the further ground that plaintiffs did not know of such unsafe condition, and could not have known of it by the exercise of reasonable diligence and care, and not upon any contract between the defendant and Mrs. Hines, of which Mrs. Stenberg may have known nothing, and to which she was not a party.

The court charged the jury that "if an owner of a building leases it while it is in a dangerous condition, he is liable to persons injured on account thereof, provided such persons stand upon their rights strictly as third persons. For illustration, if a house be rented where the wall fronting on a street is in a decayed and defective condition, and during the time of the lease it falls upon a passer-by in the street, then the owner is liable for injuries so sustained. But those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the party extending the invitation. If they are guests of the tenant, or boarders of the tenant, then the tenant, not the owner, must be held liable for injuries to such persons, even though the defects existed when the lease was made. The reason of this is [continues the learned judge] that such persons would never have suffered injury from the defects, if they had not entered the premises, and such entry was not made at either the request or invitation of the owner, but upon the invitation of the tenant, who holds herself out to the public as a keeper of a boarding or lodging house." The language is substantially the same as in *Shearman & Redfield on Negligence* (§ 711), but the same authors say, in the same section: "If the landlord lets the place for a purpose for which he knows, or ought to know, it to be unfit, knowing that strangers will be invited there, it has been held that he is liable to them." And the same authors say (§ 709): "Even the entire surrender of control over land to a lessee does not relieve the owner from liability to third persons for defects which existed in it when he parted with its control—not even if the tenant has agreed to make repairs, etc. It clearly appears by the proof in this case that the defendant knew the premises were to be used as a boarding house, recommended it for this purpose, and urged its location, near the Union Depot, as a desirable feature for this purpose. The court also charged: "It is admitted in this case that the plaintiffs were boarders with the tenant when injured; and, in consequence,

there is no liability to them, upon the part of defendant, upon the ground that he rented premises while in a dangerous and defective condition. So, as to that theory of the case, you will not inquire, but will find for the defendant." These charges are assigned as errors, among others. Upon the legal questions raised by these assignments, the able counsel have furnished elaborate arguments, and have cited many authorities.

In the case of *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, the owners, and not the lessee, of a pier used in unloading vessels, were held liable for injuries sustained by a longshoreman by reason of defects which existed at the time of the lease. The court held that the plaintiff, being in the employ of the vessel, was there by invitation, and was entitled to the protection which would result from having the pier in an ordinary state of strength and security. In *Albert v. State, Bryan*, 66 Md. 325, 59 Am. Rep. 159, plaintiff's parents were drowned by reason of the defectiveness of a wharf in the occupation of defendant's tenant. The jury were charged that if they found "that the defendant was the owner of the wharf, and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and that the accident happened in consequence of such condition, the plaintiff was entitled to recover." Approved on appeal as correct. In *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Rep. 781 (approved in *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404), it was held that where the owner of real estate erected thereon a row of buildings, with the intention of renting them to the government as a bonded warehouse, and with the knowledge that they would be obliged to stand very great weight, he was liable in damages for an injury to a person employed in one of the storehouses, occasioned by its fall, after having been so rented, though the immediate cause of the accident was the storage of heavy merchandise in the upper story; it appearing that the building had been constructed on defective plans, and of insufficient strength. See also cases collected and digested in Ray, *Negligence of Imposed Duties*, Personal pp. 48-53. In *Waggoner v. Jermaine*, 8 Denio, 306, 45 Am. Dec. 474, it was held that the seller of premises upon which a nuisance existed at the time of sale was liable on the ground that the nuisance existed when the conveyance was made: and the same principle is recognized in *Suttonsall v. Banker*, 9 Gray, 105, where the court said that if the nuisance existed at the time of the lease the landlord would be liable. And in *Durant v. Palmer*, 29 N. J. L. 545, the landlord was held liable for a nuisance arising from the structure of the building. *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282, was a case where defendant owned an inn or boarding house. In the third story was a hall, which he rented out to certain parties, who used it for the purpose of giving a dance. Plaintiff bought a ticket, and attended the ball. He left about 11 o'clock at night, somewhat under the influence of liquor, and instead of going to the ground floor, leading to the street, he walked out through an

open door on to the top of a piazza, which had no railing around it, and from there stepped off to the ground. Held, that the landlord was liable. In *Jessen v. Sweigert*, 66 Cal. 183, it was held that the owner, and not the tenant in possession, was liable for injury resulting to a third person from the fall of an awning in front of the building.

It is the duty of the landlord, when he leases the property, to disclose to the tenant the true condition of the same, and to point out and make known to the tenant such defects as he knows to exist in the premises, or which he could know by reasonable diligence; and if he fails to do so, and the tenant or person relying upon his representations is injured, the landlord is responsible therefor. This principle was settled in *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499. This was an action for damages resulting to appellant by reason of a defective privy floor, through which she fell into the vault below and was injured. The petition alleged, in substance, that the father of the plaintiff had rented from the defendant the premises on which the privy was situated, for one year, and at the time he rented the defendant knew the timbers upholding the floor were unsafe, but did not disclose, but suppressed, his knowledge of its condition from the father; that neither she nor her father could discover the dangerous condition of the floor, by reason of the character of its construction; that she fell through the floor, and was precipitated into the vault below, and was greatly damaged physically and mentally by the fall, for which she prayed judgment for \$10,000 as damages. The court said that, "although the law presumes that it was her father's duty to repair the premises in the absence of an agreement otherwise, still we are of the opinion that if the appellee rented the premises knowing that the privy was in the condition alleged, it was his duty to disclose his knowledge, because it was a portion of the premises which he knew, as all men know, would be in daily use by his tenant and family, and, unless apprised of the hidden danger, they would inevitably be injured, and the younger and more helpless perhaps lose their lives. And if, as alleged, he failed to disclose his knowledge, but nevertheless rented the dangerous tenement to the plaintiff's father, with whom she lived, he is responsible for the injury she received." To the same effect, see the holding of the New York court in *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164, where the landlord knowingly rented to the tenant premises infected by a contagious disease, without notifying the tenant thereof. The landlord was held to be liable, in a case where the disease was communicated, for the damages sustained. In *Edwards v. New York & H. R. Co.* 98 N. Y. 249, 50 Am. Rep. 659, it was held that it is the duty of the landlord to disclose to the prospective tenant any defective condition from which danger or accident is likely to arise. The court says: "If he demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. . . . If guilty of negligence or other *delictum* which

leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of anyone who may lawfully be upon the premises using them for the purposes for which they were demised. If one builds a house for public amusements or entertainments, and lets it for those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness. And this rule of responsibility goes far enough for the protection of lessees and of the public generally." In the case of *Ahern v. Steele*, 115 N. Y. 208, 5 L. R. A. 449, numerous cases are cited by Earl, J., holding that, if the landlord lease premises with a nuisance on them, he will be responsible in damages. In support of the position the learned judge cites the case of *Rosewell v. Prior*, 2 Salk. 460, where a tenant for years erected a nuisance, and afterwards made an underlease, and the question was whether, after a recovery against the first tenant for years, for the erection, an action would lie against him for the continuance after he had made an underlease; and it was held that it would, "for he transferred it with the original wrong, and his demise affirms the continuance of it." Again, "in *Todd v. Flight*, 9 C. B. N. S. 377, it was held that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them to remain so until by reason of the want of reparation they fall upon and injure the house of an adjoining owner." Again, in *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 811, it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition, in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy." Again, in *Woodfall, Land. & T.* 18th ed. 735, it is said: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, and the only exceptions to this rule appear to arise when the landlord has either (1) contracted with the tenant to repair, or (2) when he lets the prem-

ises in a ruinous condition, or (3) when he has expressly licensed the tenant to do acts amounting to a nuisance." Again, in *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, 77, Virgin, J., writing the opinion, said: "It is settled law that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity, to persons lawfully upon them; for by the letting for profit he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a nonfeasance." Again, in the case of *Gandy v. Jubber*, 5 Best & S. 78, the owner of premises, attached to which was an area, let the same to a tenant from year to year, and died, having devised the property (with an iron grating over the area, improperly constructed and out of repair, so as to amount to a nuisance) to the defendant, who, having notice of the nuisance, suffered the tenant to remain in occupation of the premises upon the same terms as before, receiving the rent; and it was held that he was liable for the damage caused by the nuisance, on the ground that he had relet the premises with the nuisance thereon. Again, quoting from *Wood, Land. & T.* 2d ed. p. 1279: "The landlord's right to possession being suspended during the term, it follows that his liabilities in respect to the possession are also suspended, except as to such matters or defects in the premises as existed when the premises were let, arising from the manner of use, or defective construction. If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant is liable for the damages resulting to third persons therefrom, although it becomes a nuisance only by the act of the tenant in using it for ordinary purposes." This we understand to be the holding of this court in *Young v. Bransford*, 12 Lea, 244, citing 1 Thomp. Neg. 817; Whart. Neg. § 817. See also collation of authorities holding the same doctrine in 12 Am. & Eng. Enc. Law, pp. 690, 691, and notes; Taylor, Land. & T. 8th ed. § 175; Shearm. & Redf. Neg. §§ 175, 175a.

We think there was error in the charge of the learned trial judge, upon the liability of the landlord to plaintiff, under the facts of this case; and the judgment is reversed, and cause remanded for a new trial. The appellee will pay the costs of the appeal.

A rehearing was denied in this case on March 5, 1896, and the opinion is printed in connection with the case of *Hines v. Willook*, post, —.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Simon OTTENBERG *et al.*, *Appts.*,
v.W. J. CORNER *et al.*

(76 Fed. Rep. 268.)

A chattel mortgage executed and delivered, no matter how short a time before the making of an assignment for creditors, is not invalid, although the mortgagor contemplated the making of the assignment, where the mortgagee acted in good faith in demanding and accepting the mortgage, and without knowledge of the mortgagor's purpose to make an assignment.

(Sanborn, Circuit Judge, dissent.)

(October 5, 1896.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the District of Kansas in favor of defendants in an action brought to recover the value of certain property which had been assigned by chattel mortgage to the defendant bank and by it appropriated to its own use, but which complainants claim should have been applied to the benefit of all the creditors of the assignor. *Affirmed.*

Before *Caldwell*, *Sanborn*, and *Thayer*, Circuit Judges.

The facts are stated in the opinion.

Messrs. J. V. Daugherty, R. R. Vermilion, and Kos Harris, for appellants:

Every voluntary assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all of the creditors of the assignor in proportion to their respective claims, and every such assignment shall be proved or acknowledged and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed.

Kan. Gen. Stat. 1889, chap. 6, § 1.

A debtor in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, cannot at the same time make valid preferences of certain of his creditors, by chattel mortgages or otherwise.

Wyeth Hardware Co. v. Standard Implement Co. 47 Kan. 428; *John Shillito Co. v. McConnell*, 130 Ind. 41; *Watkins Nat. Bank v. Sands*, 47 Kan. 591; *Jones v. Kellogg*, 51 Kan. 268.

The Federal courts have uniformly held the same doctrine as that laid down by the supreme court of Kansas in construing similar statutes regulating assignments for the benefit of creditors, where it was sought to avoid the statute prohibiting preferences, by giving chattel mortgages or otherwise.

White v. Cotzhausen, 129 U. S. 329, 32 L. ed. 677; *Martin v. Hausman*, 14 Fed. Rep. 160; *Kerbs v. Ewing*, 23 Fed. Rep. 698; *Freund v. Yaegerman*, 26 Fed. Rep. 812; *Gould v. Mulanphy Planing-Mill Co.* 32 Fed. Rep. 181; *Kellogg v. Root*, 23 Fed. Rep. 525; *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1186.

In determining the question as to whether or not the assignment and the instrument creating the preference are to be taken together as one transaction and in violation of the statute, the dates of the several instruments with reference to each other, and the filing of the same, are in no way controlling in determining that question. But in reaching a conclusion we should take into consideration all of the evidence and circumstances, and determine whether or not the making of the assignment was in contemplation at the time of making the instrument or before, and it is not a question as to whether or not the making of the assignment was "seriously" considered at the outset.

South Branch Lumber Co. v. Ott, 142 U. S. 622, 35 L. ed. 1136; *Watkins Nat. Bank v. Sands*, 47 Kan. 591; *Jones v. Kellogg*, 51 Kan. 268.

The question of the knowledge of the bank, or want of knowledge, is immaterial.

Watkins Nat. Bank v. Sands, *supra*.

When a mortgagee takes possession of the mortgaged chattels for the purpose of selling the same at private or public sale to satisfy the indebtedness thereby secured, it is the duty of the mortgagee to act fairly, and so handle the property that it will bring its full value as near as possible.

Wygal v. Bigelow, 43 Kan. 477; *Jones v. Franks*, 38 Kan. 497; *Alexander v. Rodriguez* ("Villa v. Rodriguez"), 79 U. S. 12 Wall. 333, 20 L. ed. 406; *Franks v. Jones*, 39 Kan. 236.

Where sales are made by the mortgagee under the mortgage by him personally or by any person acting for him, he is not only required to act fairly and obtain full value, but the price of every dollar's worth of goods is a satisfaction of the debt, *pro tanto*, whether the same is actually paid over or not.

Conkling v. Shelley, 28 N. Y. 860, 84 Am. Dec. 848; *Bannon v. Bowler*, 84 Minn. 416; *Warren v. His Creditors*, 3 Wash. 49; *Weill v. First Nat. Bank*, 106 N. C. 1; *Izenberg v. Fansler*, 36 Kan. 402; *Overman v. Quick*, 8 Biss. 134; *Hawkins v. Hastings Bank*, 1 Dill. 463.

The mortgagee in possession of mortgaged chattels, having sold enough property to pay the debt, is liable to the mortgagor for the balance of the property, or its fair market value in case he withholds the same, or converts the same to his own use.

Cobbey, Chat. Mortg. § 1084; Ilor v. Baker, 82 Mich. 226.

Petition for rehearing.

The court followed the decision of the supreme court of Missouri in construing the assignment laws of Kansas, under the apparent impression that the Missouri statute was the same as that of Kansas, when, as a matter of fact, the Missouri statute on the subject of assignments is not only radically different from the statute of Kansas, but the decisions of the Missouri courts are in conflict with the decisions of the Kansas courts on the same subject.

NOTE.—For participation by a creditor in the fraudulent intent of his debtor which will avoid

34 L. R. A.

a transfer in payment or for security, see note to *Rice v. Wood* (Ark.) 31 L. R. A. 809.

In Missouri the assignee is designated by the assignor, and the courts of Missouri hold that the assignee steps into the shoes of his assignor, and the relation of these parties is controlled by the contract, and the assignee has no power except such is conferred upon him by the contract, and he could not assert any claim to any assets fraudulently conveyed, which his assignor could not assert, and that the assignee took simply the title of the assignor, subject to all equities, and under this theory the deed of assignment could not be set aside for fraud unless the assignee participated in the fraud and the fraudulent intent.

Dyrns v. Becker, 42 Mo. 264; *State, Patrick, v. Keeler*, 49 Mo. 548; *Roan v. Winn*, 93 Mo. 508; *Heinrichs v. Woods*, 7 Mo. App. 286.

In determining the validity of assignments under the Kansas statute, it is held that it is the fraudulent intention and acts of the assignor that control, and that it is not necessary to show that the assignee participated in the fraud.

Kayser v. Heavenrich, 5 Kan. 325; *Smith v. Hunter*, 4 Kan. App. 377.

It is also held that the assignee not only has power to do so, but that it is his duty to bring suits to set aside fraudulent conveyances, and to recover and distribute all of the assets *pro rata* among the creditors.

Chapin v. Jenkins, 50 Kan. 385; *Walton v. Eby*, 58 Kan. 261; *Marshall v. Van De Mark*, (Kan.) 46 Pac. 808; *Withrow v. Citizens Bank*, 55 Kan. 378; *Goodman v. Kendall*, 56 Kan. 440; *Wyeth Hardware Co. v. Standard Implement Co.* 47 Kan. 428; *John Shillito Co. v. McConnell*, 130 Ind. 41.

Messrs. Fred W. Bentley and David Smyth, for appellee:

If the mortgage was honestly made it is valid, no matter how short a time intervenes before the making of the assignment.

Fuller & F. Co. v. Mehl, 134 Ind. 60, citing *Stitz v. Sadler*, 109 Ind. 254; *Gilbert v. McCorkle*, 110 Ind. 215; *Carnahan v. Schwab*, 127 Ind. 507; *John Shillito Co. v. McConnell*, 130 Ind. 41; *Pood v. Elliott*, 134 Ind. 586; *Farwell v. Cunningham*, 86 Iowa, 67; *Gage v. Parry*, 69 Iowa, 605; *Aulman v. Aulman*, 71 Iowa, 194, 60 Am. Rep. 783; *Perry v. Vezina*, 63 Iowa, 26; *Clement v. Johnson*, 85 Iowa, 568.

It must appear that the bank had full knowledge.

Thayer, Circuit Judge, delivered the opinion of the court:

This action was brought by Simon Ottenberg, Henry Ottenberg, and Herman Ottenberg, the appellants, against the Wichita National Bank, W. J. Corner, H. R. Farnum, W. S. Corbett, and W. B. Hanscom, the appellees, to recover from said Wichita National Bank the value of certain property that had come into the possession of the bank, and had subsequently been sold by the bank and converted to its own use. The bill of complaint alleged, in substance, the following facts: That Simon Ottenberg, Henry Ottenberg, and Herman Ottenberg, who were engaged in business in the city of New York under the firm name of Simon Ottenberg & Bros., were general creditors of W. J. Corner, H. R. Farnum,

and W. B. Hanscom, three of the appellees above named, who were engaged in business at Wichita, Kansas, under the firm name of Corner & Farnum; that on July 2, 1891, the firm of Corner & Farnum was in a failing condition, and insolvent; that said last-mentioned firm on said day executed a chattel mortgage covering its entire stock of merchandise, in favor of the Wichita National Bank, to secure an alleged indebtedness of said firm to said bank in the sum of \$24,534, and at the same time also executed a deed of assignment, whereby said firm conveyed to W. S. Corbett, one of the appellees, all of its property for the benefit of all of its creditors, the property so conveyed being the same property that was conveyed and described in the aforesaid chattel mortgage. The bill charged, in substance, that the determination to execute both the chattel mortgage and the deed of assignment was arrived at after a consultation had between the firm of Corner & Farnum and the president of the Wichita National Bank; that the intention to execute the mortgage and the deed of assignment was communicated to said bank by Corner & Farnum before either instrument was in fact executed; that the chattel mortgage and the deed of assignment were executed at the same time, and constituted one transaction, the intent being by such device to give the Wichita National Bank a preference over the other creditors of Corner & Farnum. The bill charged, in substance, that the Wichita National Bank had taken possession, under its chattel mortgage, of all the property of Corner & Farnum therein described, and had caused the same to be sold at public and private sale, and had thereby realized a large sum of money, which it had appropriated to its own use; that W. S. Corbett, the assignee named in the deed of assignment, had been requested to bring an action against the aforesaid bank to compel it to account for the money and property by it received, and that he had refused to bring such a suit. In view of the premises, the complainants below, who are now the appellants, prayed that an account might be taken of the property that had been appropriated by the Wichita National Bank under the aforesaid chattel mortgage, and that it be compelled to pay the value thereof to W. S. Corbett, assignee, to the end that it might be distributed *pro rata* among all the creditors of Corner & Farnum, pursuant to the laws of the state of Kansas regulating general assignments. The circuit court sustained the validity of the chattel mortgage, but, inasmuch as the proof showed to its satisfaction that the Wichita National Bank had realized out of the property conveyed to it more than enough to satisfy the mortgage debt, it decreed that the bank pay the excess of money in its hands to a special master appointed for that purpose, to the end that it might be distributed by him *pro rata* among all the creditors of Corner & Farnum who had proved their demands against the assigned estate. The complainants below have appealed from that decree.

One of the questions discussed at considerable length on the hearing of the appeal was whether the assignment that was executed by Corner & Farnum to W. S. Corbett was a valid assignment, the contention on the part of

the appellees being that it was invalid, for the reason that it was not signed by W. B. Hanscom, one of the members of the firm of Corner & Farnum. Since the case has been under advisement in this court, the assignment in question has been adjudged to be a good and sufficient conveyance by the supreme court of Kansas in the case of *Corbett v. Cannon* (Kan.) 45 Pac. 80, where that was the sole question in controversy. We fully agree with the conclusion announced in that case, and for that reason shall follow the ruling there made, and accept the decision as controlling authority upon the point raised in the case at bar.

The appellants, who are general creditors of Corner & Farnum, found their right to maintain the present action upon the deed of assignment, and, inasmuch as that instrument must be treated as valid, it becomes necessary to determine whether the chattel mortgage which was executed by Corner & Farnum was also a valid conveyance, and operated to create a lien in favor of the Wichita National Bank. The appellants contend that the chattel mortgage was void, because the mortgage and the deed of assignment were executed at the same time, and constituted but one transaction, and because they were so executed, as it is claimed, in pursuance of a previous understanding or agreement between Corner & Farnum and the bank to the effect that the two instruments should be thus executed for the purpose of giving the bank a preference over other general creditors of the assignors. The weight of evidence shows, we think, that the execution and delivery of the mortgage to the mortgagee preceded the execution and delivery of the deed of assignment to the assignee by about two or three hours, so that the two instruments cannot be said to have been executed at the same time. Nevertheless, the execution of the assignment was so closely related to the execution of the mortgage in point of time that it is perhaps fair to infer that Corner & Farnum had in fact resolved to make an assignment when they executed and delivered the chattel mortgage. It is a much more debatable question, however, whether, as is claimed by the appellants, the firm of Corner & Farnum and the Wichita National Bank did in fact agree that the delivery of the mortgage should be followed immediately by the execution of a general assignment, and whether the bank did in fact accept the mortgage with that understanding. With reference to this latter issue the evidence was somewhat conflicting. The trial court evidently found, in accordance with the bank's contention, that it demanded security for its debt from Corner & Farnum, and obtained security in compliance with its demand, and that it was not advised of the mortgagor's purpose to execute a general assignment until some hours after it had accepted and recorded the chattel mortgage. This finding by the trial court upon a disputed issue of fact, depending, as it does, upon the weight of conflicting testimony, is entitled to every reasonable presumption in its favor. This court and the Supreme Court of the United States as well, have frequently declared that the findings of a chancellor on an issue of fact should be taken as presumptively correct, and that a decree should be permitted to stand, unless

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some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. *Warren v. Burt*, 12 U. S. App. 591, 600, 7 C. C. A. 105, and 55 Fed. Rep. 101; *Gaines v. Granger*, 32 U. S. App. 342, 15 C. C. A. 228, and 68 Fed. Rep. 69; *Paxon v. Brown*, 27 U. S. App. 49, 10 C. C. A. 135, 144, and 61 Fed. Rep. 874; *Snider v. Dobson*, 74 Fed. Rep. 757; *Tuighman v. Proctor*, 125 U. S. 136, 31 L. ed. 684; *Camden v. Stuart*, 144 U. S. 104, 36 L. ed. 385; *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 557; *Furrer v. Ferris*, 145 U. S. 132, 36 L. ed. 649. It is also well settled that a decree will not be reversed by an appellate tribunal merely upon a doubt created by conflicting testimony. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. De G. Steam Towboat Co.* 64 U. S. 23 How. 209, 16 L. ed. 433; *Morewood v. Enequist*, 61 U. S. 28 How. 491, 16 L. ed. 516. Applying these rules to the case at bar, we are unable to say, after an attentive examination of the testimony, that the trial court was mistaken in its view of the evidence, and that it erred in finding, as it appears to have found, that the bank was not privy to the alleged scheme whereby the execution of the chattel mortgage in its favor was to be immediately followed by a deed of assignment. The conclusion which the trial court reached on this branch of the case, that the bank simply demanded security for its debt and obtained it, and that it was not a party to, nor in any way concerned in, the subsequent acts of Corner & Farnum, is not an unreasonable conclusion, when judged in the light of the evidence. The finding of the trial court on this issue is supported by the oral statements of several witnesses, and, so far as we can see, it is not inconsistent with any of the admitted facts or circumstances in the case. For these reasons we think that the presumption which exists in favor of the finding of the trial court has not been overcome, and that such finding should be adopted by this court.

It is contended, however, by counsel for the appellants, that the chattel mortgage was and is void, even though it be true that the bank was not concerned in the execution of the deed of assignment, and was not advised, prior to the delivery of the mortgage, that an assignment was to be executed. It is urged in substance that, although the Wichita National Bank may have acted in good faith in demanding and accepting the chattel mortgage, and without knowledge of the purpose of Corner & Farnum to forthwith execute a deed of assignment, yet, as the members of the firm of Corner & Farnum had both of these conveyances in contemplation at the same time, and executed them on the same day, the chattel mortgage is necessarily void. In support of this contention the following decisions by the supreme court of Kansas are cited and relied upon: *Wyeth Hardware Co. v. Standard Implement Co.* 47 Kan. 423; *Watkins Nat. Bank v. Sands*, Id. 591; *Jones v. Kellogg*, 51 Kan. 263. We think, however, that the cases thus cited may be fairly distinguished from the case at bar. In each of the cases to which our attention is directed it appeared that a debtor in failing circumstances, who desired to prefer a

particular creditor, of his own volition, and without a previous conference with his creditor, had executed a mortgage in favor of the creditor, and at the same time, as a part of the same transaction, had also executed and delivered a deed of assignment conveying the same property. In each instance the evidence showed that the deed of assignment was delivered to and accepted by the assignee before the mortgage then in question had been delivered to the creditor, and before the creditor had elected to accept it, or was even aware of its existence. Upon this state of facts the court held that the mortgages in question were inoperative and void.

The facts developed in the case at bar are essentially different. The chattel mortgage which is now in controversy was executed and delivered to the creditor before the deed of assignment was either executed or delivered, and before it was known to the creditor that an assignment would be made. The mortgage was also executed in compliance with a demand made by the creditor for such security. It became operative, therefore, from the moment it was delivered to the mortgagee, unless it be held that it was invalid when delivered, and never had any legal operation or effect, because, when delivered, the mortgagor entertained a secret intent, not communicated to the mortgagee, to thereafter execute a deed of assignment. If such an intent on the part of a mortgagor, when carried into execution, will serve to invalidate a mortgage that was executed two or three hours before the execution of a deed of assignment, then we are unable to see why the existence of such an intent should not have the same effect when an assignment is executed two or three days, or even two or three weeks, subsequent to the execution of a mortgage. The Federal bankrupt law of March 2, 1867 (14 Stat. at L. 517, chap. 176, § 85), did invalidate conveyances by way of preference that were made by an insolvent debtor in contemplation of bankruptcy within a certain period, to wit, four months prior to the execution of an assignment; but no such law exists in Kansas, and, in the absence of a statute upon the subject, the courts cannot say that a mortgage or other security is void, simply because it was executed a few hours or a few days prior to the execution of an assignment for the general benefit of creditors. We think, therefore, that it matters not how short a time may have intervened between the execution of the mortgage and the deed of assignment, if, as we find the fact to be, the mortgage was executed and delivered, and thereby took effect before the making of the deed of assignment. The transactions were separate and distinct, and took place between different parties. *Waggoner-Gates Mill. Co. v. Ziegler-Zais Commission Co.* 128 Mo. 475, and cases there cited. Moreover, as we construe the decisions cited from the state of Kansas, it has never yet been held in that state that a mere intent on the part of a debtor, when he executes a mortgage securing a particular creditor, to thereafter execute a deed of assignment, will have the effect of invalidating the former security, although the mortgagee was ignorant of such intent, and was in no sense a party to the execution of the assignment.

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Entertaining these views, we conclude that the decree of the circuit court was for the right party, and it is hereby affirmed.

Sanborn, Circuit Judge, dissenting:

May a chattel mortgage upon all their valuable property to secure a pre existing debt, made by insolvent debtors two hours before they made a general assignment, and after they had resolved to do so, be sustained under the laws of Kansas, either because the mortgagee pressed the debtor for security, or because it did not know that they intended to make the assignment until after it was made? In support of an affirmative answer to this question the case of *Waggoner-Gates Mill. Co. v. Ziegler-Zais Commission Co.* 128 Mo. 473, is cited. It may be that the mortgage in question in this case could have been sustained if it and the assignment had been made in the state of Missouri, and if they were to be construed and governed by the decisions of the supreme court of that state. But they were not. They were made in the state of Kansas, and their effect and the validity of the chattel mortgage must be determined by the statutes of that state as they have been interpreted by its highest judicial tribunal. The statute of Kansas, under which this assignment was made, provides: "Every voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by a debtor to any person, in trust for his creditors, shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims." Kan. Gen. Stat. 1889, chap. 6, § 1.

In *Waggoner-Gates Mill. Co. v. Ziegler-Zais Commission Co.* *supra*, the supreme court of the state of Missouri declared that it had been repeatedly held in states having assignment statutes similar to those in Missouri and Kansas, where an insolvent debtor had executed different mortgages on all his property, when he intended at the same time to make, and shortly thereafter did make, an assignment subject to such mortgages for the benefit of all his creditors, that the mortgages and the assignment were one and the same transaction, and that the mortgages were void. Among the decisions which it cited as sustaining this proposition are *Wyeth Hardware Co. v. Standard Implement Co.* 47 Kan. 423; *Watkins Nat. Bank v. Sands.* 47 Kan. 591; *Jones v. Kellogg.* 51 Kan. 263; *Preston v. Spaulding.* 120 Ill. 208; *Van Patten v. Burr.* 52 Iowa, 518; *Ellison v. Moses.* 95 Ala. 221; *Holt v. Bancroft.* 80 Ala. 198; *First Nat. Bank v. Bard.* 59 Hun, 529; *Berger v. Varielmann.* 127 N. Y. 281, 12 L. R. A. 808; *Peed v. Elliott.* 134 Ind. 536; *Berry v. Cutts.* 42 Me. 445. After citing these decisions, the supreme court of the state of Missouri announced that there were a large number of authorities of equal merit which held to a contrary view, and that among the latter class were those of the state of Missouri. An examination of the cases in the supreme courts of Kansas and Missouri which involve this question has convinced me that this is a correct statement of the standing of the decisions of the highest courts of those states upon this issue. If this be so, this court ought not to be governed, in determining the validity of this chattel mortgage, by the decisions of the su-

preme court of Missouri, but by those of the highest judicial tribunal of Kansas. Upon this subject the Supreme Court of the United States said in a recent case: "The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States. *Brashear v. West*, 82 U. S. 7 Pet. 603, 615, 8 L. ed. 801, 804; *Massey v. Allen* ('*Allen v. Massey*'), 84 U. S. 17 Wall. 851, 21 L. ed. 542; *Lloyd v. Fulton*, 91 U. S. 479, 485, 23 L. ed. 863, 865; *Sumner v. Hicks*, 67 U. S. 2 Black, 532, 534, 17 L. ed. 855, 856; *Jaffray v. McGeehe*, 107 U. S. 861, 865, 27 L. ed. 495, 496; *Peters v. Bain*, 133 U. S. 670, 686, 33 L. ed. 696, 702; *Jencks v. Quidnick Co.* ('*Randolph's Executor v. Quidnick Co.*'), 185 U. S. 457, 34 L. ed. 200. The decision in *White v. Cotzhausen*, 129 U. S. 329, 32 L. ed. 677, construing a similar statute of Illinois in accordance with the decisions of the supreme court of that state as understood by this court, has therefore no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different states is immaterial. As observed by Mr. Justice Field, speaking for this court: "The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one state from what it is in the other." *Christy v. Pidgeon*, 71 U. S. 4 Wall. 196, 203, 18 L. ed. 322, 324. See also *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260." *Union Nat. Bank v. Bank of Kansas City*, 186 U. S. 223, 235, 34 L. ed. 341, 345.

The very different effect which similar transactions have, under the opposing decisions of the courts of different states upon the validity of chattel mortgages, executed after the mortgagor has resolved to make a general assignment, and at about the same time that he makes it, is well illustrated by the case just cited, which is based on the decisions in Missouri, and in the case of *White v. Cotzhausen*, 129 U. S. 329, 32 L. ed. 677, which rests upon the rulings of the supreme court of Illinois. In the former case preferences are sustained that would have been avoided, if they had been given in Illinois, and in the latter case those are avoided that might have been sustained under the decisions in Missouri. Now, the decisions of the supreme court of the state of Kansas upon the question under consideration are in accord with those of the supreme courts of Illinois, Iowa, Maine, and New York. As I understand them, they do not rest upon the proposition that preferences made by an insolvent debtor, after he has resolved to make an assignment, are void because he or his preferred creditors intended thereby to hinder, delay, or defraud his other creditors. They rest on the ground that such preferences in themselves constitute a violation of the letter and spirit of that provision of the assignment law which requires the assigned property to be distributed *pro rata* among all the creditors of the

insolvent. This provision is as much violated when preferred creditors are ignorant as when they are aware of the intention of the debtor to immediately follow their preferences with an assignment. It is as much violated when they have urged the insolvent to give them the securities as when he has done so voluntarily. It is as much violated when he gives the preferences, and they accept them in good faith, with the intent that the preferred creditors shall thereby secure the payment of their bona fide claims, as when the debtor and the creditors intend to delay the unsecured creditors. The question under this statute is not, What was the knowledge or the intent of the secured creditors? It is not whether the debtor or the creditors intended by the preferences to hinder, delay, or defraud unsecured creditors, but the only question is, Did the insolvent debtor contemplate, and intend to make, the assignment, when he was making the preferences? Did he intend to dispose of his property when he entered upon the transaction by the use of the instruments which gave the preferences and the assignment which immediately followed them? As Judge Love well said in deciding in the court below the case of *South Branch Lumber Co. v. Ott*, 142 U. S. 622, 630, 35 L. ed. 1136, 1139. "The intention of the assignor must be the true and guiding principle of decision." A careful reading of the opinions of the supreme court of Kansas had led me to the conclusion that a chattel mortgage in that state cannot be sustained under those decisions either on the ground that the mortgagee was ignorant that the mortgagors had resolved to make a general assignment when they made the mortgage, or on the ground that the mortgagee had urged them to give the securities. In *Wells Hardware Co. v. Standard Implement Co.* 47 Kan. 423, and in *Watkins Nat. Bank v. Sands*, 47 Kan. 591, the mortgagors made the mortgages just before making the assignments. The preferred creditors had no notice or knowledge that the mortgagors intended to make general assignments, and they had not pressed them for payment of their debts, nor asked for security, and yet the mortgages were set aside by the supreme court of Kansas. That they were not void on the ground that such preferences were made with intent to hinder, delay, or defraud creditors is demonstrated by the fact that the court found in the latter case that the debts secured were actual, that the mortgages and the assignment were made in good faith, and that for this reason an attachment could not be sustained on the ground that the debtor intended to hinder, delay, or defraud his creditors; and yet it held that the mortgages were void, that they gave no preferences, and that the proceeds of the property must be distributed *pro rata* among all the creditors under the assignment. 47 Kan. 593. In *Jones v. Kellogg*, 51 Kan. 263, 274, the creditors who procured one of the chattel mortgages upon the property of the debtor, presented their claim to him, and demanded payment of it, or security for it, on November 17, 1886, and the debtor promised to give the security in case of any trouble. On November 29, 1886, he made a chattel mortgage to secure this claim and followed it with a general assignment, which he made on the same day. The supreme court of Kansas held

that the mortgage was voidable. The opinion discloses the fact that an attempt was made in that case to distinguish it from the cases cited from 47 Kan. on the ground suggested in the opinion of the court in this case, namely, that the mortgage was not voluntarily given. The court answered this argument in these words: "It is claimed by the defendants in error, plaintiffs below, that the mortgage given to Charles P. Kellogg & Co. was not given by Townley of his own volition and unsolicited, as were the mortgages mentioned in the cases above cited, but were given because of importunities, demands, and active vigilance on the part of Charles P. Kellogg & Co. through their agents, in attempting to collect their claim or to obtain security thereon, and because of a promise on the part of Townley, the debtor, made several days before the execution of the mortgage, and before the assignment was contemplated, to give security upon the claim if trouble should arise. These things are not thought by this court to be material, however, for the reason, among others, that no intention was really formed by Townley to execute any mortgage to Charles P. Kellogg & Co. until the intention was also formed by him to execute a general deed of assignment for the benefit of all his creditors. When the mortgage was executed, it was not the carrying out of an agreement previously entered into between the parties, upon a new and sufficient consideration passing at the time when the agreement was made, and an agreement intended to be fulfilled by one of the parties in executing a mortgage to the other, but it was simply the carrying out of an intention formed at the very time that another intention was also formed, to execute a general deed of assignment. It does not appear that anything was said prior to this time with regard to mortgages, or that any new consideration passed for the mortgages; hence, as before stated, the mortgages must be considered as void." 51 Kan. 278.

In view of these decisions and the rule of the Supreme Court of the United States that they constitute the law of the state of Kansas which the national courts are bound to enforce, I am of the opinion that the chattel mortgage in this case should be set aside and the judgment which sustains it should be reversed.

Rehearing denied.

(Sixth Circuit.)

RICHMOND & IRVINE CONSTRUCTION COMPANY, *App't.*

RICHMOND, NICHOLASVILLE, IRVINE, & BEATTYVILLE RAILROAD COMPANY *et al.*

And Ten Other Cases.

(51 U. S. App. 704.)

I. The fact that a contract company

NOTE.—As to the control of one corporation by another, see *Farmers' Loan & T. Co. v. New York & N. R. Co.* (N. Y.) 34 L. R. A. 78.

As to the parties who may claim liens as laborers,

dominates and controls a railroad company having the same stockholders will not make its engagements operate in legal effect as those of the railroad company with respect to one who is fully aware of the relations of the companies when making a contract with the former for work on the railroad.

2. A construction company becomes a subcontractor, and not an original contractor with a railroad company, when, with full knowledge that a contract company is unable to complete the work, it agrees with it to do so for an agreed sum in cash and bonds, with a provision that it shall have a "subcontractor's lien," although the railroad company has consented to the subletting of the contract, and that the construction company shall have a contractor's lien.

3. Payment in bonds under a contract by an embarrassed railroad contractor to pay a construction company for completing the contract, \$1 for each \$1 expended, and an equal amount in bonds of the railroad company, which were worth about 40 per cent of their face value when the contract was made, and greatly depreciated thereafter, will be applied ratably on the lienable and non-lienable expenditures, and the part applicable to the former, like other payments to subcontractors, will be applied on the excess of the claim over the security of the subcontractor's lien.

4. An implied promise to pay interest after a specified date is made in a contract fixing the time of payment but providing that until a later date specified it shall bear no interest.

5. Money expended by a subcontractor in paying salaries of its corporate officers and office expenses, and to secure a guaranty on its contract for purchase of material, will not sustain a subcontractor's lien.

6. Procuring rights of way for a railroad is not the furnishing of materials within the meaning of a lien law.

7. The agreed contract price of railroad construction payable in bonds should be diminished for the purpose of limiting the amount of subcontractor's liens by the amount of unpaid interest which the contractor had agreed to pay on the railroad bonds in order to maintain the credit of the railroad company until after completion of the road.

8. Interest on overdue claims of subcontractors may be included in the amount of their liens, although the owner of the property is insolvent and the allowance of interest will diminish the fund applicable to inferior liens.

9. A lien for furnishing new material and replacing it in a bridge cannot be claimed by a subcontractor whose employees by negligence had made the new material and work necessary.

10. Legal or other services rendered in acquiring rights of way for a railroad do not constitute "services" within the meaning of a lien law.

11. Failure to file a statement of lien in "each county" in which the labor was performed," as required by statute, will not prevent enforcing a lien for the proportionate part of the

etc., see *note* to *Tod v. Kentucky Union R. Co.* (C. C. App. 6th C.) 18 L. R. A. 306.

For the effect of payment to contractors or subcontractors as affecting liens of subordinate claimants, see *French v. Bauer* (N. Y.) 20 L. R. A. 560, and *note*.

labor which was done in one county in which it was filed.

12. Materials not actually used or delivered to a contractor are not "furnished" for the purpose of creating a subcontractor's lien, although they were worthless for any other purpose and were prepared for the contractor under a contract which he broke by refusing to accept them.

(May 7, 1895.)

APPEALS by claimants of liens upon the property of the Richmond, Nicholasville, Irvine, & Beattyville Railroad Company from a decree of the Circuit Court of the United States for the District of Kentucky settling the priority of the liens upon funds arising from the sale of the road. *Modified and affirmed.*

Before *Taft and Lurton*, Circuit Judges, and *Severens*, District Judge.

Statement by Lurton, Circuit Judge:

These were appeals in the suit of *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 68 Fed. Rep. 90, severally taken by the Richmond & Irvine Construction Co., L. F. Mann, J. E. Dougherty, G. W. Gourley, W. B. Smith, D. Shannon & Co., J. W. Walker and others, John Mitchell & Co., M. A. Sullivan, Dickason & Crawford, and John McLeod, from the decree of the circuit court settling the priorities among the various claimants of the fund arising from the sale of the railroad.

Each of the appellants named above has prosecuted a separate appeal. The general facts out of which the questions presented by them arise have been stated in the opinion filed upon appeal of *Central Trust Co. v. Richmond, N. I. & B. R. Co.* (being No. 240 on this docket) 68 Fed. Rep. 90. These general facts need not be again stated. Many of the questions arising upon the separate assignments of error filed by the several appellants are fully covered by the opinion in the case above referred to. The court, in this opinion, will confine itself to such questions as were not necessarily involved in the former case.

Messrs. Stone & Sudduth, for appellants:

The right of the owner to pay the contractor without seeing the subcontractor's claim satisfied is suspended during the whole time within which the act gives the subcontractor the right to file a lien.

Ballou v. Black, 21 Neb. 181; *Courtney v. Insurance Co. of N. A.* 49 Fed. Rep. 809, 4 U. S. App. 140; *Havighorst v. Lindberg*, 67 Ill. 466; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 71; *Clough v. McDonald*, 18 Kan. 114.

In this case the mortgage itself put the mortgagee upon notice that the road was not built when the bonds were issued, for it recites the fact that the road is to be built, and when the bondholders purchased from the contract company their bonds, they were charged with notice that those who furnished the materials and built the road would be entitled to a lien.

Brooks v. Burlington & S. W. R. Co. 101 U. S. 448, 25 L. ed. 1057; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 35 L. ed. 961; 34 L. R. A.

Courtney v. Insurance Co. of N. A. supra. Phillips, Mechanic's Liens, § 1; *Davis v. Bitland*, 85 U. S. 18 Wall. 659, 21 L. ed. 969; *Taylor v. Burlington, O. R. & M. R. Co.* 4 Dill. 575; *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 382.

Under statutes which give the subcontractors a direct lien, the amount for which the property may be charged is not limited by the amount that may be due from the owner to the contractor, nor does it in any way depend upon the state of the account between them.

2 Jones, Liens, § 1804; *Hunter v. Truckee Lodge No. 14, I. O. O. F.* 14 Nev. 24; *Shellbarger v. Thayer*, 15 Kan. 619; *Delahay v. Goldie*, 17 Kan. 268; *Clough v. McDonald, supra.*

The subcontractor is not bound by the terms of the original contract.

Benedict v. Hood, 184 Pa. 289; *Mulrey v. Barrow*, 11 Allen, 152; *Hartman v. Berry*, 56 Mo. 487; *McLaughlin v. Reinhart*, 54 Md. 71; *Clough v. McDonald, supra.*

A subcontractor has two sources of payment. He has a right to look to the solvency of the original contractor for payment, and, that failing, he has the right to rely on his lien against the railroad.

Phillips, Mechanics' Liens, § 812.

The only limitation upon the right of the subcontractor to have his lien is that the aggregate amount of the liens shall not exceed the contract price of the original contractor.

The proper construction of this contract gave to the railroad company the right of election as to whether it would pay in money or in the securities, and wherever this right of election on the part of the debtor exists, then it is an alternative contract, and the contract price in this case should be measured in money.

Cleveland & P. R. Co. v. Kelley, 5 Ohio St. 180; *Roberts v. Beatty*, 2 Penr. & W. 68, 21 Am. Dec. 417; *Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 250, 11 L. R. A. 740; *Marlor v. Texas & P. R. Co.* 21 Fed. Rep. 383; *Texas & P. R. Co. v. Marlor*, 128 U. S. 687, 31 L. ed. 808.

It is the duty of the debtor to seek the creditor for the purpose of paying the debt.

18 Am. & Eng. Enc. Law, p. 198; *Sanders v. Norton*, 4 T. B. Mon. 464.

The mere agreement of the owner to pay the mechanic in securities, which if delivered by the owner to the mechanic would prevent a lien, does not waive a lien at all.

McMurray v. Brown, 91 U. S. 257, 23 L. ed. 821; *Chicago & A. R. Co. v. Union Rolling Mill Co.* 109 U. S. 708, 27 L. ed. 1081; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 35 L. ed. 961; *Reiley v. Ward*, 4 G. Greene, 21; Phillips, Mechanics' Liens, § 129; 2 Jones, Liens, 2d ed. § 1536.

The aggregate amount of liens, as spoken of in the 2d section of the act of 1888, means the liens that were perfected and asserted by the subcontractors; the expression in the statute does not mean the mere amount of work done by the various subcontractors.

Othmer Bros. v. Clifton, 69 Iowa, 656.

The circuit court erred in refusing to allow any of the lien claimants interest on their demands.

Henderson Cotton Mfg. Co. v. Lowell Machine Shops, 86 Ky. 668; *Young v. Godbe*, 82 U. S.

15 Wall. 562, 21 L. ed. 250; *Massachusetts Ben. Asso. v. Miles*, 137 U. S. 689, 84 L. ed. 884; *Chicago & A. R. Co. v. Turrill*, 101 U. S. 836, 25 L. ed. 1009; *Sneed v. Wister*, 21 U. S. 6 Wheat. 690, 5 L. ed. 717; *Thomas v. Western Car Co.* 149 U. S. 95, 87 L. ed. 663; *Williams v. American Bank*, 4 Met. 817; *Thomas v. Minot*, 10 Gray, 263; *Bowman v. Wilson*, 2 McCrary, 394; 1 Am. Lead. Cas. 516; *Schultz's Appeal*, 11 Serg. & R. 182; 11 Am. & Eng. Enc. Law, p. 380; *Harmonson v. Wilson*, 1 Hughes, 207; *Redfield v. Ystalyfera Iron Co.* 110 U. S. 174, 28 L. ed. 109.

The construction company's lien was that of a contractor—not a subcontractor.

Beach, Priv. Corp. § 295; *McDonald v. Charleston, C. & C. R. Co.* 93 Tenn. 281; *Central Trust Co. v. Bridges*, 57 Fed. Rep. 763, 16 U. S. App. 115.

Liens might be claimed for amounts expended for right of way.

Provot v. Chicago, R. I. & P. R. Co. 57 Mo. 256, 69 Mo. 633; *Gillson v. Savannah & C. R. Co.* 7 S. C. N. S. 173; *Walker v. Ware, H. & B. R. Co. L. R.* 1 Eq. 195; *Ross v. Adams*, 18 Bush, 870; Ky. Gen. Stat. § 24, art 1. chap. 63, p. 832.

Attorneys have liens for legal services under the statute.

Phillips, Mechanics' Liens, § 158; *Davis v. Alford*, 94 U. S. 545, 24 L. ed. 283; *Flagstaff Silver Min. Co. v. Cullins*, 104 U. S. 176, 26 L. ed. 704; *Stryker v. Cassidy*, 76 N. Y. 50, 82 Am. Rep. 262; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 358.

Mr. Ernest McPherson for John Mitchell & Co. appellants.

Mr. Matthew O'Doherty for D. Shannon & Co.

Mr. Alexander P. Humphrey for J. W. Walker.

Mr. St. John Boyle for Louisville Trust Co.

Messrs. A. E. Richards and J. B. Baskin for Central Trust Co.

Lurton, Circuit Judge, delivered the opinion of the court:

1. One of the principal questions presented by the appeal of the Richmond & Irvine Construction Company concerns the relation which it bears to the appellee the Richmond, Nicholasville, Irvine, & Beattyville Railroad Company. Its contention is that it is properly to be considered as a contractor with the railroad company, and it assigns as error that the circuit court did not so hold, instead of construing it to be a subcontractor under the Ohio Valley Improvement & Contract Company. As will appear more fully by the opinion of the court heretofore filed in the case of *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 81 U. S. App. 675, the Ohio Valley Improvement & Contract Company had contracted with the said railroad company to construct and equip the entire line of railroad of the said railroad company. The Ohio Valley Improvement & Contract Company, hereafter designated as the "Contract Company," after doing the larger part of the work and furnishing the greater part of the materials for that purpose, became financially embarrassed, and unable to complete its contract without assistance. It had

agreed to construct and equip the said line of railroad for the bonds and stocks of the railroad company. Thus all the assets of the railroad company had either been paid or pledged to it, and when the latter became unable to go on with the work the railroad company was in no condition, financially, to complete the construction itself. In this situation of affairs the contract company entered into an agreement with the appellant the Richmond & Irvine Construction Company, hereafter designated as the "Construction Company," that the latter should complete the work of construction between Richmond and Irvine, Kentucky, and furnish all necessary materials. It also agreed to purchase and hold certain coupons detached from the bonds of the railroad company, which coupons the contract company, under its agreement with the railroad company, was under obligation to pay, and to purchase and hold certain subcontractors' lien claims due by the contract company. The agreement between the construction company and the contract company provided that the former should have a subcontractors' lien" on the property of the railroad company. The subscribed capital stock of the construction company was estimated to be \$200,000. It contracted to do work and furnish materials of an estimated value of not more than \$140,000, and to expend the balance of its subscribed capital stock in the purchase of the coupons and "subcontractors' liens designated by the contract. The contract concluded in the following words:

"And said contract company agrees to pay the said construction company for said work, materials, and such claims as may be so purchased, the sum \$400,000, to be paid as follows: In the new 5 per cent first-mortgage bonds of said railroad company the sum of \$200,000 as soon as the bonds are printed and ready for delivery, and the sum of \$200,000 in money due and payable at the expiration of thirty days after the track of said railroad is laid and completed as aforesaid from Richmond, Kentucky, to the Kentucky river, opposite Irvine, Kentucky; but, should said sum not be paid at maturity, the same shall bear no interest until January 1, 1892."

It was signed only by the contract company and the construction company. The contention of appellant that this contract is to be construed as a contract of the railroad company, and in its relation as that of an original contractor, is based upon two propositions:

First. It contends that under the evidence in this case the contract company was, in legal effect, the railroad company, and that engagements made by it were, in legal effect, engagements made by the railroad company. In support of this, appellant has endeavored to show that the stockholders in each corporation were the same, and that the contract company dominated and controlled the railroad company. The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of

its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one. There is no pretense of any fraudulent concealment of the interest of the one corporation in the other, or of the fact that the persons controlling the one corporation likewise controlled the other. The officers and agents of the construction company were fully aware of the relations which existed between the two companies. They also knew that the contract company was under obligation to build and equip the railroad for the railroad company. With this knowledge of the relations of each corporation to the other, it deliberately entered into a contract with the contract company to do work for and under the contract company, as a subcontractor. The facts of this case are very much the facts which appeared in the case of *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. Rep. 753, 16 U. S. App. 115. In that case the court distinctly held, on substantially the same facts, that the corporations were to be treated as distinct entities, and that neither was to be treated as the agent of the other, when openly contracting for itself, and in its own corporate name.

Second. Appellant also rests its contention upon the legal effect of the action of the board of directors of the railroad company contained in certain resolutions found upon the minutes of the board, as follows:

"Whereas, the Richmond, Nicholasville, Irvine, & Beattyville Railroad Company, hereinafter designated the 'Railroad Company,' is informed by the Ohio Valley Improvement & Contract Company, hereinafter designated the 'Improvement Company,' that it desires to make a subcontract with the Richmond & Irvine Construction Company, hereinafter designated the 'Construction Company,' substantially as follows, to wit: First. That said construction company will finish the work of construction necessary to be done upon the railroad of the railroad company from Versailles to Irvine, according to the construction contract of October 11, 1888, which, it is estimated, will require something less than \$140,000. Second. That said construction company shall purchase and take up certain lien claims of subcontractors, now existing and unpaid, for work heretofore done and material furnished on the line of the railroad, the lien claims to be purchased, added to the cost of the work and materials, to aggregate \$200,000. Third. That said improvement company will pay to said construction company, in money, the amount so paid out both in construction and in the purchase of subcontractor's lien claims, amounting in the aggregate to \$200,000, and will pay to the said construction company, as an additional consideration, in 5 per cent bonds of this company, an amount equal, at par value, to the amount of money to be so paid by the improvement company to the construction company. Now, be it resolved, that the Richmond, Nicholasville, Irvine, & Beattyville Railroad Company does hereby consent to the subletting by said improvement company to said construction company upon substantially the terms above mentioned, and consents, so far as this company can lawfully do so, that said construction company shall have

a contractor's lien upon the railroad for all work done and material furnished and claims purchased as above mentioned."

These resolutions do not operate to make the railroad company a principal contractor, within the meaning of the Kentucky lien act of March 14, 1888, being §§ 2492-2495, Ky. Stat. 1894, revised by Barbour and Carroll, and which have been fully set out in the opinion of this court filed in the principal case. A contractor, within the meaning of that act, is one who does work or furnishes material for the owner, and upon a contract with the owner for the payment of the contract price. A subcontractor, within the meaning of that act, is one who contracts under and with the principal contractor. Now, nothing in these resolutions obligated the railroad company to pay the construction company for the work and materials which it was to do and furnish, and for the lien claims which it was to purchase and hold. The railroad company was obligated to the contract company to the extent of the contract price mentioned in the contract between them. The labor and materials which the construction company undertook to furnish are a part of the same labor and materials which the contract company had agreed to furnish, and for which the railroad company was bound to pay. There is nothing in these resolutions which indicates that the railroad company intended to personally assume liability to the construction company. The language that "it consents, so far as this company can lawfully do so, that said construction company shall have a contractor's lien upon the railroad for work done and material furnished and claims purchased," implies simply a lien by contract. In other words, it amounts to nothing more than this: That if the railroad company has the power to bind its property by a lien called a "contractor's lien," to secure the payment of an amount agreed to be paid by the contract company, the railroad company consents that its property shall be thus charged with such a lien. A contractor's lien, *per se*, is one that arises by operation of law, independently of the express terms of any contract. It springs out of the obligation to pay for the stipulated labor and the promised materials, when furnished, provided the contractor shall give the notice required by statute. *McMurray v. Brown*, 91 U. S. 266, 23 L. ed. 324. This, at most, is an agreement for a lien by contract. No lien dependent upon a contract for a lien would be effectual as against mortgages, or the liens of contractors or subcontractors created by the lien statute. We agree with the holding of the circuit court that the relations which existed between the Richmond & Irvine Construction Company and the railroad company were not those of contractor and owner, but of subcontractor and owner.

2. The nineteenth assignment of error filed by the construction company presents a question concerning the application of a payment of part of the contract price in railroad bonds, made by the contract company to the construction company. The rule in regard to partial payments made by the contract company to its subcontractors, and the effect of such payments upon the lien of such subcontractors, is fully stated and explained in the opinion filed

upon the questions involved by the appeal of the Central Trust Company, 81 U. S. App. 675, and need not be here repeated. That rule was applied to all payments made to subcontractors, except only the construction company. The learned district judge who heard this case in the circuit court deemed the contract between the contract company and the construction company so peculiar as to justify a departure from the general rule adopted with reference to partial payments made to other subcontractors by the contract company. The peculiarity of that contract consisted, not only in the great variety of things which the construction company undertook to do, but in the odd way in which the price was to be fixed which was to be paid for all its undertakings. The construction company was a corporation organized for the express purpose of helping the contract company out of its difficulties. It obligated itself to do all that the contract company had contracted to do, and had not done, on that part of the road between Richmond and Irvine, Kentucky. This involved the acquirement of rights of way, grading, track laying, bridge and depot building, the furnishing of all necessary materials, including steel rails, etc. The contract company bail, as more fully appears in the principal opinion, obligated itself to pay the interest upon the bonds of the railroad company during construction, and for one year thereafter. It owed a great deal of money to subcontractors for work finished and materials furnished. Its obligation to pay matured coupons, and to pay subcontractors having liens, had to be provided for, and so the construction company undertook to buy and hold matured coupons not exceeding \$12,000 in par value, and to purchase and hold for its benefit subcontractors' lien claims to be designated by the contract company. The total capital stock of the construction company was fixed at \$200,000. Of this capital it undertook to use \$140,000 in expenditures on the work of construction. The expenditures upon this account, it was provided, should include "the actual costs and expenditures" on account of labor done, materials furnished, and rights of way acquired, "including the salaries of said construction company's officers and agents." The remainder of its capital, estimated at \$40,000, was to be expended in the purchase of matured coupons and lien claims. Thus it was contemplated that the construction company should actually expend \$200,000 for the benefit of the contract company in the completion of a considerable part of the work undertaken by that company for the railroad company. How was it to be compensated for this use of its capital? What price was the contract company to pay for all the undertakings included in this rather unusual contract. This is answered by the contract. The concluding covenant is in these words:

And said contract company agrees to pay the said construction company for said work, materials, and such claims as may be so purchased, the sum of \$400,000, to be paid as follows: In the new 5 per cent first-mortgage bonds of said railroad company, the sum of \$200,000 as soon as the bonds are printed and

ready for delivery, and the sum of \$200,000 in money due and payable at the expiration of thirty days after the track of said railroad is laid and completed as aforesaid from Richmond, Kentucky, to the Kentucky river, opposite Irvine, Kentucky, but should said sum not be paid at maturity, the same shall bear no interest until January 1, 1892.

Subsequently, on February 7, 1891, a modification of the contract was agreed upon, as follows:

The agreement attached hereto between the undersigned, bearing date January —, 1891, was made with the expectation and understanding that the paid-up capital stock of the Richmond & Irvine Construction Company should equal the sum of \$200,000 in money which was to be expended in the prosecution of the work of constructing the R., N. I. & B. R. R. and the purchase of the lien claims mentioned in said contract. Now, this writing witnesseth, that if the said paid-up capital stock should fall short of the said \$200,000, then the Richmond & Irvine Construction Company shall only be paid under said contract an amount of bonds equal to said paid-up capital stock, and a like amount in money. In testimony whereof, we have hereunto subscribed our names, this the 7th day of February, 1891.

The capital expended did in fact fall short of that anticipated, and the bond payment made by the contract company was correspondingly reduced. This agreement comes at last to this: that in place of agreeing, in the first instance, upon a definite price to be paid for what the construction company agreed to do and expend, the parties to that contract agreed that the price to be paid should be the actual amount of the cash expenditures plus the value of an equal amount of securities, which, as shown by the master's report, were worth 40 per cent of their value. This arrangement settled definitely the profit allowed the construction company upon its entire outlay, provided the whole of the price should be paid or collectible. The contract may have been a hard bargain, as between the contracting corporations, and this view, in part, may account for the exceptional rule enforced in regard to the application of the partial payment so as to reduce the amount of its lienable claim, as well as the amount of its *pro rata* enforceable against the property of the railroad company. On the other hand, it is to be remembered, in mitigation, that this profit was more apparent than real. The market value of the bonds rapidly depreciated after their delivery, and, when these suits were instituted, had declined to perhaps 15 per cent of their par value. There was no probability of the payment of the cash part of the contract price, except through the enforcement of the statutory lien. The cost, delay, and uncertain result of a suit enforcing such a lien, as well as the uncertain and speculative value of the payment in bonds, were proper matters to be taken into consideration in fixing the gross price to be paid for all the construction company undertook to do and expend. The contract was one which did not affect the legal liability of the railroad

company, nor did it subject its property to any larger lien than was already fastened upon it. It had an indirect effect due to the fact that the railroad company had already paid the contract company more than its ratable share in the original contract price, and so it indirectly affected the holders of the mortgage bonds, and of subcontractors' lien claims. But this indirect effect would result from any unwise subcontract made by the principal contractor. In the absence of intentional fraud, such indirect consequences are not matters of which the parties affected can complain. What the court was called upon to do was to ascertain the contract price due from the principal contractor to each subcontractor, eliminate from that so much of the price as was for work or expenditures nonlienable under the statute, and then ascertain the *pro rata* of the original contract price properly earned by each subcontractor. The mere hardness of the bargain between the principal contractor and its subcontractors, not amounting to a fraud upon other lienors or the railroad company, should have no effect in determining the *pro rata* of each subcontractor in the original contract price. The first direction in the decree, for an apportionment of the bond payment ratably between so much of the claim of the construction company as was entitled to the benefit of the statutory lien and that which was nonlienable, seems to be justified by the terms of the contract, and is therefore affirmed. In substance, that agreement was, that for each \$1 of money expended, the contract company would pay \$1 in money and \$1 in bonds. The bond payment must be treated as having been made ratably upon the lienable and nonlienable expenditures. But so much of the decree as directed that that part of the bond payment applicable to its lienable claim should be again prorated between that part of its lienable claim as was in excess of, and so much of it as was within its *pro rata* share of, the original contract price, was erroneous. We see no reason for applying that payment in any other manner than was adopted with reference to other subcontractors' liens.

3. The same appellant assigns as error that the court disallowed interest on its *pro rata*, except from the date of the decree. We think this was error. The agreement between the contract company and the construction company provided that the actual cost of work and labor and expenditures for material, etc., made by the construction company for the contract company should be "payable at the expiration of thirty days after the track of said railroad is laid and completed as aforesaid from Richmond, Kentucky, to the Kentucky river, opposite Irvine, Kentucky, but should said sum not be paid at maturity, the same shall bear no interest until January 1, 1892." We think this is an express contract for payment upon the completion of the work, and an implied promise to pay interest from and after January 1, 1892. *Redfield v. Ystaferra Iron Co.* 110 U. S. 176, 28 L. ed. 110. Under this contract the appellant should have been allowed interest, in accordance with the terms of the contract, after January 1, 1892.

4. The contract between the construction company and the contract company provided 34 L. R. A.

for the doing of many things, and the expenditures of money on many accounts, which the circuit court held were not lienable matters. All these expenditures made by the construction company, and which were excluded from the lienable claim of that company, were made matters of exception to the report of the special master, and the ruling of the court thereon has been assigned as error. We are of opinion that the court's ruling was correct, with respect to each and all of these matters thus excluded from the lienable claim. Money paid for purchase of rights of way is neither work nor material, within the meaning of the lien act. Neither is money expended in the payment of the salaries of the president of the construction company and its other general officers, although properly chargeable to the contract company, as between it and the construction company. Nor were the expenses of the construction company for stationery, and like office material, lienable claims. The construction company paid \$2,346.29 to a trust company to secure its guaranty upon a contract made by the construction company for the purchase of steel rails. Appellant insists that this expenditure constitutes a part of the actual cost of the steel rails which it had contracted to furnish for the completion of the road. We think that that expenditure was one resulting alone from its own want of sufficient cash capital, or its own insufficient credit, and that no such expenditure was within the meaning or spirit of the contract between it and the contract company. If its own capital or credit had been sufficient, no such expense need have been incurred; and the contract makes no provision, directly or indirectly, for compensating the construction company for expenses directly due to its own insufficient capital or credit. The construction company paid out some \$10,000 for legal expenses incurred in purchasing or condemning rights of way. The court held such expenditures were not lienable. There was no error in this, for two reasons: First, because the furnishing of rights of way is not the furnishing of "materials," within the meaning of the lien act; second, legal services rendered by counsel are not "labor," within the meaning of the lien statute.

5. Each of the appellants has filed numerous assignments of error touching the improper exclusion of items of expenditure which it is now insisted should have been included in ascertaining the total original contract price entitled to the statutory lien, and to be prorated among all who contributed to the proper work of construction. It is sufficient to say that we have given careful attention to the various assignments and the evidence relating to them upon which this class of objections to the decree have been presented to this court, and we find that none of the assignments of error to the manner in which the original contract price was ascertained are well taken. The deduction from the gross contract price of a sum regarded as necessary on the evidence for the completion of the railroad seems to us to be well supported by the weight of proof. Error has been assigned because of an alleged erroneous deduction from the gross contract price on account of the agreement of the contract company to pay the interest upon the bonds of the

railroad company during its construction, and two instalments after the completion, of the road. We are of opinion that the ruling of the circuit court upon this point was correct. It was very essential to the contract company that the interest upon the bonds should be provided for during construction, and for such a period thereafter as it was reasonable to presume that the earnings of the road would be insufficient to pay. As the prospective owner of the bonds to be issued, it was directly interested in the maintenance of the credit of the railroad company. And so much of the contract as obligated the contract company to maintain the credit of the railroad company seems to have been based upon this obvious proposition. This agreement was not, in our judgment, at all dependent upon the operation of the road as completed by the Louisville Southern Railroad Company. It was an absolute contract to pay accruing interest for the time indicated, and formed a considerable element in the determination of the contract price. The interest unpaid was properly deducted from the contract price, and all the assignments of error relating thereto are overruled.

6. The decree allowed none of the subcontractors interest except from the date of the final decree. This has been assigned as error. We have already passed upon this matter, so far as the construction company is interested. The disallowance of interest seems to have been based upon the assumption that there was no contract between the contract company and the subcontractors for the payment of interest, and that the allowance of interest upon such claims, in the absence of a local statute, was within the sound discretion of the court. The court seemed also to attach importance to the fact that the litigation which has resulted in delay was not vexatious, but necessary for the proper marshaling of liens. The question divides itself: First, is interest properly allowable as between the contract company and its subcontractors? Second, is there any reason which should move the conscience of a chancellor to disallow interest because of its indirect effect upon the rights of another class of creditors? In general terms, it may be stated that the contracts between the contract company and its subcontractors provided for payments of a proportionate part of the contract price on monthly estimates as the work progressed, and for payment of all balances due on the completion of the work. There seems never to have been any serious controversy as to these balances due to subcontractors, except in regard to a claim for so-called extra work and materials asserted by the appellant Walker and others. Their claims were not paid because the contract company was unable to pay them, and not because it disputed its liability. As between the contract company and the subcontractors, there can be no serious contention but that interest should be paid from and after the completion of the work and the filing of their lien notices as required by statute. That filing is the full equivalent of the rendition of a stated account. In the case of *Young v. Godbe*, 82 U. S. 15 Wall. 566, 21 L. ed. 251, the court said with regard to the allowance of interest upon an open account: "If a debt ought to be paid at

a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest begins to run at once."

This rule announced by the Supreme Court of the United States seems to be in entire accord with the latest utterances of the supreme court of the state of Kentucky. In the case of *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 86 Ky. 668, 675, the court said, concerning the allowance of interest upon an account for machinery sold and payable at a definite time by agreement of the parties: "The true ground upon which to put the allowance of interest is the fault of the party who is to pay the debt. If he has made default of payment, then, *ex aequo et bono*, he should reimburse the creditor for keeping him out of the use of his money. He should render an equivalent for the use of what is not his own. If there be a specified time for payment, and a failure to then pay, or a demand of payment of a liquidated claim, and default, then the debt should, as a matter of law, bear interest from the time of such failure. This is the current of authority, and it is supported by both right and reason."

Neither is there anything in the case of *Redfield v. Ystalyfera Iron Co.* 110 U. S. 174, 28 L. ed. 109; or *Thomas v. Western Car Co.* 149 U. S. 116, 37 L. ed. 670, which conflicts with the doctrine as stated in *Young v. Godbe* and *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, cited above. In *Redfield v. Ystalyfera Iron Co.* Mr. Justice Matthews, in discussing this question, said, for the court: "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages, it is often matter of discretion. In cases like the present one, of recoveries for excessive duties paid under protest, it was held in *Erskine v. Van Arsdale*, 82 U. S. 15 Wall. 75, 21 L. ed. 63, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal exaction. But where interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld. *Bann v. Daltell*, 8 Car. & P. 876; *Newell v. Keith*, 11 Vt. 214; *Adams Exp. Co. v. Milton*, 11 Bush, 49."

In *Thomas v. Western Car Co.*, heretofore cited, there seems to have been no definite time agreed upon as to payment, and interest was disallowed because, as the court said, the delay in payment "was occasioned by resisting demands made by the car company, which the result of the litigation shows were excessive, if not extortionate." The contract company was in default, and interest is properly allowable from the time it failed to pay according to its promise, by way of compensation for the delay in payment. Neither is there anything in the fact that the railroad company is insolvent, nor

in the fact that the allowance of interest will diminish the fund to which the bondholders may look for the payment of their bonds. The language relied upon in support of the decree disallowing interest, from the opinion in *Thomas v. Western Car Co.*, that "as a general rule, after property of an insolvent passes into the hands of a receiver, or of an assignee in insolvency, interest is not allowable on the claims against the funds," was not a point upon which that case turned, and was doubtless intended to apply only to a case where the fund is insufficient to pay all, and the creditors are all of the same rank, as in the distribution of the assets of an insolvent bank, as in *United States, White, v. Knox*, 111 U. S. 784, 28 L. ed. 603, and *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. Rep. 872, 16 U. S. App. 465, 28 L. R. A. 281. This is not a case of the distribution of an insufficient fund among lienors of the same rank. The lien claims of the subcontractors are by the statute preferred over the mortgage, and the bondholders are entitled only to that which remains after senior liens are satisfied. If interest is properly due, as between creditor and debtor, the interest is just as much a part of the principal claim as the principal thereof. A like controversy arose in the case of *Central Trust Co. v. Condon* (decided by this court March 5, 1895), 81 U. S. App. 887, 67 Fed. Rep. 84. There, as here, the contest was between subcontractors and mortgage creditors. The distinctions between the two cases is that, under the Tennessee statute construed in that case, the lien of the subcontractor was derived from, and subordinate to, the lien of the contractor, and his recovery against the property of the owner was limited to such sum as might be found due the principal contractor at the time the several subcontractors' liens accrued. The question in that case was as to the extent of the liability of the railroad property to the contractor. Judge Taft, who delivered the opinion of the court in that case, concerning these subcontractors' liens, said: "They were liens superior to the bonds. They should bear interest, or, what is the same thing, the fund from which they are payable should bear interest until paid. The security and priority of the lien attach as well to interest as to principal. The aggregate of the subcontractors' claims exceeds by at least 50 per cent the sum due Eager, even with interest, so that in the distribution no interest need be calculated on the claims after December 15, 1890, for the share applicable to each will not be varied by adding interest to all claims for the same period from December 15, 1890, to the date of the decree. But the limit in the aggregate of the liens fixed on the property must be increased by interest until satisfaction. This is not a case where the distribution is to be made *pro rata* between the lienholders and the bondholders, in which case, of course, interest is not to be calculated upon the claims after the time of the sequestration of the property for sale and distribution, so long as the claims cannot be paid in full. *Chemical Nat. Bank v. Armstrong*, 16 U. S. App. 465, 8 C. C. A. 155, 59 Fed. Rep. 872, 28 L. R. A. 281. In the distribution of the proceeds of a common security between liens of different priorities, we know of no principle by which

interest can be stopped on the amount of the superior lien until its satisfaction. As between the bondholders and the lienholders, the lienholders are entitled to interest to the day of payment, and the decree should therefore include interest on the amount herein found due Eager from December 15, 1890, until it shall be entered."

One error assigned by appellant Walker and others needs to be especially noticed. J. W. Walker had a contract with the contract company for the erection of four bridges, for which he was to receive the sum of \$146,200. One of these bridges was known as the "Marble Creek Bridge," and its price was to be \$37,000. During the erection of this bridge a large portion of it fell into a deep ravine, destroying or seriously damaging a large part of the material which had been placed in the incomplected structure. New material, of the value of \$15,828.62, was furnished by Mr. Walker, and replaced in the bridge. The court declined to allow this claim, being of opinion that the loss should fall upon him, and not upon the contract company, nor upon the railroad company. The cause of the accident is unexplained. The employees of the bridge contractor were in the exclusive control of the work. The bridge fell, not from any violent storm, or by reason of any extraordinary natural cause. The clear inference is that it fell by reason of defective engineering; that it was insufficiently supported, or subjected by the bridge builders to some unnecessary strain. Appellant insists that he should be reimbursed for the new material: First. Because he alleges that the contract company agreed to reimburse him for the material destroyed by the falling of this bridge. We quite agree with the master and the district judge who tried this case, that appellant did not successfully sustain his contentions to an agreement to reimburse him for the new material necessitated by the falling of the bridge. Second. He insists that the title to the material damaged or destroyed was in the contract company, and that therefore it ought to sustain the loss. This contention is bottomed upon the fact that the agreement provided for the payment of the contract price in instalments, as the material was delivered on the ground, less 10 per cent of the value thereof. The contract concluded as follows:

The balance of the contract price for each structure, including the 10 per cent reserved on the monthly estimates, is to become due and payable as each structure is completed and inspected and approved, according to both specifications attached hereto. As payments are made upon the material, the title to the same is to become vested *pro rata* in the party of the second part.

The proof fails to show that the material was in fact paid for as delivered, to any considerable extent. But we are of opinion that, even if the material had been in part paid for, so that the title had vested in proportion to the payments in the contract company, under the circumstances of this case the appellant ought not to be allowed to recover the value of this material destroyed by an accident for which his own employees were manifestly respon-

ALABAMA SUPREME COURT.

Hinton E. CARR, *Appt.*,

v.

STATE of Alabama.

(106 Ala. 35.)

A constitutional provision "that no person shall be imprisoned for debt" is vio-

lated by act December 12, 1892, making it a misdemeanor for a person engaged in banking to receive a deposit when insolvent, and punishing it with a fine not less than double the amount of the deposit, one half of which shall go to the depositor, and that payment to him before conviction shall be a defense to prosecution.

(April —, 1895.)

NOTE.—*Constitutionality of imprisonment for debt.*

I. *General extent and construction of constitutional provisions.*

II. *What are debts.*

a. *Meaning of the word "debt."*

b. *In general.*

c. *Breach of promise to marry.*

III. *Action founded on tort.*

a. *In general.*

b. *Mense proflita.*

c. *Trespass.*

d. *Fraud.*

IV. *Fines and penalties as debts.*

a. *In general.*

b. *Fines imposed by city authority.*

V. *Taxes as debts.*

VI. *Costs as debts.*

a. *Debts in civil actions.*

b. *Not debts in civil actions.*

c. *Debts in criminal actions.*

d. *Not debts in criminal actions.*

VII. *Statutory, criminal, or quasi criminal cases.*

VIII. *Enforcing orders and decrees of court.*

a. *In general.*

b. *In decedents' estates.*

c. *In admiralty.*

d. *Alimony.*

e. *In bastardy.*

f. *Aggravated officers of the court.*

IX. *Due process of law.*

X. *No exeat.*

XI. *Debts owing to the United States*

The principal case of CARR v. STATE might be distinguished from similar cases upon the constitutionality of like statutes to be found in other states, upon the ground that the Alabama Constitution does not except fraud from the constitutional inhibition against imprisonment for debt, yet it is difficult to reconcile the decision with that of *Ex parte King* (Ala.) *infra*, VII., wherein the court upheld the constitutionality of an act passed for the protection of landlords against dishonest persons upon the ground that the party was punished, not for owing a debt, but for the wrongdoing, which was by the act made a crime. It would seem that if the act of a party violating the law as to landlords and others is to be deemed within the statutes passed against false pretenses, frauds, cheats, acts to injure and the like, so ought the act of a banker receiving a deposit when insolvent to be held within such statutes; and the courts of the other states have so held. See *infra*, VII.

So, there would seem to be a difference between the act of a banker refusing to honor or cash a check as shown in the case of *State v. Paint Rock Coal & C. Co.* 92 Tenn. 81, *infra*, VII., and that of a banker receiving money knowing himself or his bank to be insolvent.

The position of debtor and creditor exists in the first instance, while in the latter, although it exists, it is attained by fraud, false pretense, or other wrongful act.

I. *General extent and construction of constitutional provisions.*

The legality or illegality of imprisonment for 34 L. R. A.

debt depends entirely upon the construction to be placed upon the articles in the several state Constitutions prohibiting imprisonment for debt, and the state statutes passed for the purpose of carrying out such constitutional inhibitions.

As a general rule it may be stated that the inhibitions contained in the state Constitutions relate only to debts arising out of contracts, express or implied, that is, to actions *ex contractu*, and have no application to cases of tort wherein the action is *ex delicto* in its nature, for the reason that the damages recovered therein do not arise from any contract entered into between the parties, but are imposed upon the defendant for the wrong he has done, and are considered as a punishment therefor.

In this connection it has been stated that it is a sound rule, to be adopted in construing such constitutional provisions, that such charters of liberty are always to be interpreted, not only in the light of the common law, but also by comparison with previously existing Constitutions. *Ex parte Hardy*, 68 Ala. 303.

So, statutes in restraint of personal liberty are to be construed strictly with a reference to current decisions and the usual practice which existed at the time of and before their adoption. *Hamsay v. Foy*, 10 Ind. 498.

The object of such statutes being to prevent fraud, they should be strictly construed as to the debtor, and liberally as to the creditor. *Wendover v. Tucker*, 4 Ind. 381.

It is the policy of the law relating to arrests for debt to throw around the person of the debtor every proper safeguard, and the provisions relating thereto must be construed favorably to the personal liberty of the individual. *Newcomb v. Weber*, 1 Cin. Super. Ct. Rep. 12, 16.

So, the courts have held that such constitutions, so far as they prohibit imprisonment for debt, were designed to relieve from imprisonment debtors who were unable to fulfil their engagement, provided such debtors acted in good faith toward their creditors. *People, Brennan, v. Cotton*, 14 Ill. 414.

The following cases are the same in effect: *Cowles v. Day*, 30 Conn. 403, 412; *Ex parte Clark*, 20 N. J. L. 643, 45 Am. Dec. 394; *Moak v. De Forrest*, 5 Hill. 605; *National Bank v. Temple*, 39 How. Pr. 432, 435, 2 Sweeny, 344; *People, Latorre, v. O'Brien*, 6 Abb. Fr. N. S. 63; *Wanser v. De Baun*, 1 E. D. Smith, 261, 264; *State v. Manuel*, 4 Dev. & B. L. 20, 34; *Brown v. Walk*, 3 Fred. L. 517, 520.

No man can be imprisoned for mere inability to pay his contract debts, nor for failure to pay over to a receiver money which he does not have. *Warren v. Rosenberg* (Wis.) 69 N. W. 339.

The mere inability to pay debts is no longer to be regarded as deserving of punishment, such a remedy for the collection of debts being too harsh. *Armstrong v. Ayres*, 19 Conn. 540, 555.

The harshness which attended the old practice when a *capias ad satisfaciendum*, or a *capias ad respondendum* was allowed, led to the constitutional provisions, but yet they should not be construed as confined to arrests on such writs alone. *Goshorn v. Purcell*, 11 Ohio St. 641, 649; *White v. Gates*, 42 Ohio St. 109.

APPEAL by defendant from a judgment of the District Court for Cobert County convicting him of receiving, contrary to the pro-

visions of the statute, a deposit in his bank knowing at the time that the bank was insolvent. *Reversed.*

And even under state statutes regulating proceedings against debtors, in order to render the proceedings taken thereunder constitutional, the provisions of such acts must be substantially complied with in order to render the imprisonment of the debtor constitutional, for the reason that the mere fact that the defendant is in debt does not subject him to arrest, neither does the fact that he suffers an execution to remain in the hands of the officers unsatisfied, when he is of sufficient ability to pay it, even though it may clearly be his duty to do so, a mere neglect of duty not justifying the creditor in resorting to harsh measures. *Maher v. Huette*, 10 Ill. App. 58. Here § 12 of the Illinois Bill of Rights was construed along with §§ 62 and 63 of the Illinois Statutes of 1872, relating to judgments and decrees, which prescribed the manner in which and the circumstances under which an execution against the body of the defendant for the causes named in the exceptions in the state Constitution might be mentioned.

So, in view of the constitutional inhibition, it has been uniformly held that in order to justify a resort to arrest, all the provisions of the law relating thereto must be complied with. *Huntington v. Metzger*, 51 Ill. App. 222, 224.

Where the provisions of a state Constitution provided that "no person shall be imprisoned for debt, except in case of fraud," it was held that its provisions were so limited in their scope, so clear and well defined, that their full force was easily understood and applied without difficulty, whether they were considered as restrictions upon inherent, or conditions of granted power, to the full extent of the provision being tangible and definable, reaching to a single ill, full effect being given to it without difficulty. *State, St. Joseph & D. C. R. Co., v. Nemaha County Comrs.* 7 Kan. 555.

Such a constitutional provision practically precludes imprisonment, except as a punishment for acts of a criminal or quasi-criminal character, and leaves the unfortunate but honest debtor free from any possibility of personal restraint. *Doyle v. Boyle*, 19 Kan. 168, 172.

Again, in *Atchison Street R. Co. v. Missouri P. R. Co.* 31 Kan. 660, 665, such declarations were said to be clear, precise, and definite limitations of the power of the legislature, and of every officer and agency of the people, their meaning and extent being clear, limiting the power of the legislature; no act of that body being sustainable which conflicts with them.

So, it has been stated that the provisions of a state Constitution upon this question ought to have a common-sense interpretation; that is, they ought to be understood in the sense in which they were construed by those adopting them, and that even though it was a well-recognized canon of construction that where legal terms were used in a statute they were to receive their technical meaning unless the contrary clearly appears to have been the intention of the legislature, that principle does not apply to the organic law, which is to be construed, according to the acceptance of those who adopted it, as the supreme rule of conduct both for officials and individuals, the evident intention of such Constitution being to relieve those who could not pay their debts, and not to shield from punishment persons who had violated the public law. *State v. Mace*, 5 Md. 337, 350.

Where the state Constitution provided that no person should be arrested or imprisoned on any civil process issued out of any court of law, or on any execution issued out of any court of equity, in any suit or proceeding instituted for the re-

covery of any money due upon any judgment or decrees founded on contract, or due upon any contract express or implied, or for the recovery of any damages for the nonperformance of any contract, it was held that if its language was to be taken according to its ordinary acceptance and meaning, it must be intended to prohibit arrest and imprisonment on civil process absolutely, in existing as well as in future cases, the terms being clear and explicit, although under the rule of construction that no statute should be construed retrospectively, unless the intention of the legislature to give it such effect clearly appeared, it must be concluded that the legislature did not intend to make the law apply to pre-existing cases. *Bronson v. Newberry*, 2 Dougl. (Mich.) 33, 43. In that case, however, the subsequent section excluded such a construction, its language being too plain and positive to be misunderstood.

So, the true spirit of the New Jersey Constitution would seem to be, that the honest debtor who was poor and had nothing to pay with should be exempt from imprisonment at the mercy of his creditor. *Ex parte Clark*, 20 N. J. L. 648, 45 Am. Dec. 394.

And the same is the spirit of the North Carolina Constitution, when the insolvency of the debtor is bona fide. *State v. Manuel*, 4 Dev. & B. L. 20, 34; *Brown v. Walk*, 8 Ired. L. 517, 520; *Burton v. Dickens*, 3 Murph. (N. C.) 108; *Burgwyn v. Hall*, 108 N. C. 489.

In *Mims v. Lockett*, 20 Ga. 474, 476, it is stated that there are only three things for which a *ca. sa.* debtor may be imprisoned. If, when the court comes to which his case is returnable, he has failed to give notice to his creditor regarding his intention to take advantage of the insolvent debtor's act, or refuses at that time to take the oath, or is convicted of fraud by the jury, the debtor may be committed; and in the first two cases the confinement will terminate whenever he has complied with the requirements of the statute, and in the third case notwithstanding the fraud the debtor cannot be kept in custody after he has made a full surrender of his effects; and it is erroneous to suppose that when a debtor is incarcerated upon the finding of a jury, he is deprived of his liberty until he discharges the debt. Such law would be in the teeth of the Constitution; and in view of the state Constitution, to say nothing of the strong tendency of the public mind to abolish entirely imprisonment for debt, the insolvent laws are entitled to a liberal construction in favor of the debtor.

In *Messenger v. Lockwood*, 9 West. L. J. O. S. (Ohio) 621, the defendant was arrested upon a *ca. sa.* in a suit brought for breach of contract, the cause assigned for the writ being that he was a nonresident of the state, but he was discharged on common bail, the court stating that the incarceration of a man's body would not be tolerated simply because he did not reside in the state, no fraud or crime being committed within the meaning of the Constitution.

So, in *Morrow & Hazzard v. Finch*, 7 West. L. J. O. S. (Ohio) 144, it was held that nonresidence, or want of citizenship of a debtor, was not sufficient to authorize the arrest of a citizen of another state; and further, that to arrest a citizen of another state under the Ohio laws was a violation of art. 4, § 2, of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

The facts are stated in the opinion.

Messrs. Asa E. Stratton, James Jackson, and Isaac Orme for appellant.

Mr. W. C. Fitts, Attorney General, for the State.

McClellan, J., delivered the opinion of the court:

The defendant, **Hinton E. Carr**, is charged in one count as the president, and in another as a member, of a banking firm, with receiving

II. What are debts.

a. Meaning of the word "debt."

In considering the question of the constitutionality of imprisonment for debt, the question arises as to what are debts within the meaning of the constitutional provisions. There would, however, seem to be very little conflict in the authorities, which almost unanimously hold that the debt intended to be covered by the Constitution must be a debt arising exclusively from actions *ex contractu*, and was never meant to include damages arising in actions *ex delicto*, or fines, penalties, and other impositions imposed by the courts in criminal proceedings as punishments for crimes committed against the common or state law.

Such inhibition, however, exists only where the contract is free from fraud, the Constitutions of nearly all the states excepting cases of fraud, and making that a ground of imprisonment. Alabama would appear to be the only state which does not make the exception in cases of fraud. *Kennedy v. People*, 122 Ill. 649, 652; *People v. Brennan*, v. Cotton, 14 Ill. 414, 415; *McCool v. State*, 23 Ind. 127, 131; *Lower v. Wallick*, 25 Ind. 68; *Ex parte Bergman*, 18 Nev. 331; *Long v. McLean*, 88 N. C. 8; *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; *United States v. Walsh*, Deady, 231, 235.

Liabilities arising *ex contractu* are not punishable by imprisonment in Pennsylvania in the absence of fraud. *Hammer v. Ladner*, 17 Phila. 315.

It has been held that imprisonment for debt has been forbidden on process issuing from a court of the United States in any state where, by the local law, imprisonment for debt has been or shall be abolished, and all modifications, conditions, and restrictions upon such imprisonment provided by the law of any state are made applicable to Federal process, to be executed therein, under § 990 of the Revised Statutes; but imprisonment for debt as used in that and like statutory or constitutional provisions means debts arising out of contract, and does not extend to actions for tort, nor to fines or penalties arising from a violation of the penal laws of the state. *Deimel v. Arnold*, 34 U. S. App. 177, 185, 60 Fed. Rep. 937, 932; *Lathrop v. Singer*, 39 Barb. 393; *Kennedy v. People*, and *McCool v. State*, *supra*; *Hanson v. Fowle*, 1 Sawy. 497; *Long v. McLean*, *supra*; *United States v. Walsh*, 1 Abb. (U. S.) 66; *Harris v. Bridges*, 57 Ga. 407, 4 Am. Rep. 495, and *Ex parte Bergman*, *supra*.

So, in *Dixon v. State*, 2 Tex. 431, it is said the words "imprisonment for debt" have a well-defined and well-known meaning, and have never been understood or held to apply to criminal proceedings. It is not to be supposed, and it will scarcely be contended, that it ever entered into the minds of the framers of the Constitution that they were to be understood as having any application to the administration of the criminal laws, or that they were to have the effect of preventing the punishment of crimes.

Again, in *United States v. Walsh*, Deady, 231, 235, 1 Abb. (U. S.) 71, it is stated: "The word 'debt' is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume that this provision in the state Constitution was intended to prevent the useless and often cruel imprisonment of persons who, having honestly become indebted to another, are unable to pay as they undertook and promised to."

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In this view of the matter, the clause in question should be construed as if it read: "There shall be no imprisonment for debt arising upon contract express or implied except, etc."

And it has been stated that the word "debt" is of large import, including not only debts of record, or judgments, and debts of specialty, but also obligations under simple contract to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise. *Re Sutherland*, 3 Nat. Bankr. Reg. 314, in which case the question arose whether a fine amounted to a debt.

So, the legal acceptance of debt has been said to be a sum of money due by certain and express agreement. *Re Sutherland*, *supra*, citing 3 Bl. Com. 154.

Again, in *Turner v. Wilson*, 49 Ind. 581, 584, where the contention was that a sum of money ordered to be paid by the father of an illegitimate child for its support was a debt within the meaning of § 22 of art. 1 of the Indiana Constitution, the court stated that a debt was a sum of money due by agreement, which must be certain; as to amount and arise upon contract, and that under the system of common-law pleading, at the time of the adoption of the Indiana Constitution, and before the distinction between forms of action was abolished by the Code of that state, the word "debt" in law had no other meaning, and therefore it must be supposed that the framers of the Constitution so understood and used the word; and further, that the words of the Constitution could not be fairly understood in any other sense, inasmuch as in the section abolishing imprisonment for debt, the words "any debt or liability thereafter contracted" are expressly used.

And the cases *McCool v. State*, 23 Ind. 127; *Lower v. Wallick*, 25 Ind. 68; *Ex parte Tesque*, 41 Ind. 273; *State v. Billman*, v. Hamilton, 33 Ind. 502; *Reynolds v. Lamont*, 45 Ind. 303; and *Ex parte Volts*, 37 Ind. 237,—are to the same effect.

It must be a debt within the proper and legal meaning of that term. *McCool v. State*, 23 Ind. 127, 131.

The term "debt" as used by the convention in framing the Maryland Constitution was meant to be used in its popular sense, and was so understood by the people, and was regarded as a protection to the unfortunate, and not as an immunity to the criminal, the term "debt" being understood as an obligation arising otherwise than from the sentence of a court, or a breach of the public peace, or the commission of a crime. *State v. Mace*, 5 Md. 337, 350.

The term "debt," as employed in § 15 of the Constitution of North Dakota, is used in a broad sense, and will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract. *Granholm v. Sweigle*, 3 N. D. 473.

In *Perry v. Orr*, 35 N. J. L. 295, 298, it was stated that the 1st clause of § 17 of art. 1 of N. J. Const. 1844, "no person shall be imprisoned for debt in any action," was not confined to the technical meaning of debt, but included debt in the popular sense of a demand founded on contract, express or implied, and comprised all actions *ex contractu*, the purpose of the legislature being to abolish imprisonment for debt coextensive with the 1st and 2d sections of the Statute of 1842, leaving it to the legislature to define what should constitute fraud, and therefore the statute, after the Constitution was established, stood in harmony with its provisions, and was not repealed by it.

from Robert T. Abernathy for deposit \$355, knowing at the time, or having good cause to believe, that said firm was in a failing or insolvent condition. The indictment is drawn

under an act "to Prevent Banks, Bankers, Firms, Corporations, or Other Persons from Receiving Deposits of Bank Notes, Specie Money or Other Thing of Value, when in a

The provisions in Wis. Const. § 16, art. 1, "no person shall be imprisoned for debt arising out of or founded on contract, express or implied," clearly implies that there may be debts "not founded upon contract." *Smith v. Omans*, 17 Wis. 566, 397.

And the 39th section of the North Carolina Constitution has been held to have no application to debts due the state. *State v. Manuel*, 4 Dev. & B. L. 20, 26.

There would not, however, seem to be any authority holding that the constitutional inhibition has any greater import, or includes other debts, than those above specified.

This would seem to be so, for the reason that in construing the meaning of the word "debt," the court in the case of *United States v. Walsh*, 1 Abb. (U. S.) 71, Deady, 231, 235, stated that a person who willfully injures another in person, property, or character is liable therefor in damages, and in some sense he may be called the debtor of the party injured, and the sum due for the injury might be considered a debt to such a party, but he is in fact a wrongdoer and trespasser, and does not come within the reason of the rule exempting an honest man from imprisonment, because he is peculiarly unable to pay that which he has promised.

The construction given to the word "debt" by the court in the case of *United States v. Walsh*, *supra*, was commented upon and adopted by the court in *Norman v. Manclette*, 1 Sawy. 484, and also in *Hanson v. Fowle*, Id. 497, 505.

And the word "debt" when used in a statute without some plain or explicit declaration making it applicable thereto does not include taxes nor claims for unliquidated damages. The legal definition of the word is opposed to unliquidated damages, or a liability in the sense of an inchoate or contingent debt, or an obligation not enforceable by ordinary process. *Bolden v. Jensen*, 69 Fed. Rep. 745.

b. In general.

In *Ruddell v. Childress*, 31 Ark. 511, proceedings were taken by a surety against his principal under § 5694 of Gantt's Digest, which provides that a surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound before it is due, whenever any of the grounds exist upon which, by the provisions of chapters 8 and 9, an order may be made for arrest and bail or for attachment; and it was held that such proceedings were not contrary to the provisions contained in § 14, art. 1, of the Constitution of that state of 1868, which prohibits imprisonment for debt, but provides that the general assembly may provide for imprisonment or holding to bail persons charged with fraud in contracting said debt, the court stating that such a case was not the arrest of a debtor for debt, but was a proceeding to indemnify the surety in the manner pointed out by the section.

An amount due upon an open account was held to be a debt within the meaning of art. 1, § 15, of the California Constitution. *Re Vinich*, 86 Cal. 70.

So, the Michigan Constitution having abolished imprisonment for debt, except in certain cases therein set forth, an alleged balance between a principal and agent for which an action of debt is brought does not come within the exceptions to the Michigan laws passed to carry out such constitutional provisions, even though there may be an allegation of a refusal to account, and of a fraudulent conversion of the same by the agent to his own

use. *People, Singer Mfg. Co., v. McAllister*, 19 Mich. 215.

Again, where the claim against an agent was a debt, and the action was a civil one, and the process wherewith the defendant was arrested was a meane process, and there was nothing whatever to show any fraud, or suspicion of fraud, on defendant's part, or a demand or refusal of payment, the court held that § 15 of art. 1 of the California Constitution prohibiting arrest and imprisonment for debt applied, and that § 7 of the California practice act of 1860, upon which the plaintiff relied, should be construed so as not to conflict with the Constitution, and that if such construction were not possible the statute must yield to the Constitution. *Re Holdforth*, 1 Cal. 438.

And where the case made out, in an action commenced by capias, was that the defendant had collected moneys as superintendent of a company and had not accounted for the same upon demand, it was held that the defendant's arrest and imprisonment was illegal, being in conflict with the Michigan laws, the debt arising upon contract, it not being a loan, an action for which was allowed to be so commenced. *Re Stephenson*, 33 Mich. 60.

And, imprisonment for debt having been abolished by the Constitution of Georgia, an attachment for contempt is not a remedy for obliging the payment of a mere debt from executors under a will to a legatee, adjudged upon citation to account by the ordinary under § 2508 of the Code of that state. *Wood v. Wood*, 84 Ga. 102.

Again, a sum lost in gaming does not come within § 549 of the New York Code, as being an injury to property including the wrongful taking, detention, or conversion of personal property, for the reason that the same is a debt and recoverable in an action for money had and received, and therefore an arrest made in an action to recover the same is illegal, and the order therefore will be set aside. *Tompkins v. Smith*, 62 How. Pr. 409. In this case, however, there were no constitutional provisions to be construed, the question turning upon the right to imprison the defendant under the provisions of the Code.

In *Ex parte Prader*, 6 Cal. 239, where the petitioner was arrested on final process to answer a judgment obtained against him in an action for assault and battery, the court held that assault and battery was not a case of fraud, in the sense that the term was employed by the Constitution, and could not be made so by the legislature, and therefore the judgment was a debt as much as though recovered in an action of assumpsit. The defendant was therefore discharged from arrest.

Under the provisions of the Illinois Constitution prohibiting imprisonment for debt, any liability to pay money growing out of contract, express or implied, constitutes a debt within the meaning of such constitutional provisions; and therefore before a party can be held to bail on a capias ad respondendum, it must appear by affidavit that he has been guilty of fraud, or that there is a strong presumption that he is guilty, and the affidavit must show both the constitutional and statutory grounds before issuing the writ. *Parker v. Follensbee*, 45 Ill. 473, 478.

In Vermont the Constitution prohibits imprisonment for debt in cases where the debtor has delivered up his property for the benefit of his creditors in the manner provided by law, and it has been held that the provision of the Vermont statute of January, 1839, that no person who is a resident citizen of the state shall be arrested upon an execution is-

Failing or Insolvent Condition," approved December 12, 1892, which is in the following words:

sued upon a judgment recovered in an action founded upon contract, express or implied, was meant to embrace all kinds of contracts, whether by record, specialty, or parol. Therefore a judgment is a contract within the meaning of § 63 of chapter 28 of the Vermont Revised Statutes, and an execution obtained in an action of debt upon a judgment rendered after January, 1888, cannot be issued against the body of the debtor. *Sawyer v. Vilas*, 19 Vt. 43.

And in that state on all judgments rendered on contracts accruing before the 1st day of January, 1880, the creditor was entitled to an execution against the body of the debtor with some exceptions, but on judgment rendered on contracts, express or implied, made or entered into after that date, no writ or execution could issue against the body of the debtor if he was a citizen of Vermont. The statute which took away the remedy against the body of the debtor in the latter contracts made no provision for a case where the judgment was rendered on different contracts, some of which were before and some after that date. But the courts of that state were of opinion that if a party voluntarily embraced in any one declaration several acts on different contracts and several on which he would have been entitled to a capias, and on the others would not have been so entitled, he could not on such judgment have an entire execution against the body of the debtor, and the same principles would apply to a recovery in an action on a book account where part of the demand was since the passing of the statute abolishing imprisonment. *Witt v. Marsh*, 14 Vt. 303, 306.

Where, in a judgment on the report of an auditor, the court granted a certified execution as to so much of the judgment as was for money held in a fiduciary capacity, and the writ issued as an attachment, and the defendant took exception under the Vermont Statute, § 1728, which provides that no person who is a resident of the United States shall be arrested or imprisoned on mesne process, issuing on a contract express or implied, nor on an execution issued on a judgment recovered in an action founded on such contract, except as hereinafter provided,—it was held that as part of the judgment was not for a fiduciary debt, it was for a liability incurred when the defendant contracted to guarantee certain sales, and therefore a judgment founded in part upon the defendant's contract of guaranty could not be enforced against his body, nor could an execution on such a judgment lawfully issue against the body, the section of the statute in question expressly prohibiting the arrest upon a judgment founded in contract, and the statute nowhere provided for the arrest and imprisonment of a debtor on an execution issued on such a judgment as was recovered in that action. *Williams & C. Fertilizer Co. v. Rudd*, 68 Vt. 607.

In *Hosack v. Rogers*, 11 Paige, 603, it was held that since the passing of the New York act abolishing imprisonment for debt, a final decree against an executor for the payment of a debt due by the testator can only be enforced by execution against the individual property of the executor, where he has wasted the funds which came into his hands, the decree being made in a suit instituted for the recovery of money due upon a contract, and merely directing the payment of money in satisfaction of the amount due.

Where the action was brought on a warranty, but the narr. was in assumpsit, alleging fraud in the warranty, the court held that a ca. sa. would not lie. *Fleming v. Maguire*, 14 W. N. C. 210. The Pennsylvania Constitution abolishes imprisonment 84 L. R. A.

"Sec. 1. Be it enacted by the general assembly of Alabama, that any president, cashier, or other officer, by whatever title he may be called

for debt except in cases where the debtor has not delivered up his property for the benefit of his creditors as prescribed by law.

Where defendant, an agent, was sued in trover, required to find bail, and in default was committed to jail, and the plaintiff elected to take an alternative verdict for money, to be discharged on the defendant's delivering the package, and the defendant sought to be discharged upon the ground that he was imprisoned for debt contrary to the terms of the Constitution, the court held that the verdict authorized a judgment for money, which, when entered, became a judgment for money, or the highest form of debt known to the law, and therefore the defendant's imprisonment for such debt was contrary to the provisions of the state Constitution, although, had the verdict been for the delivery of the package alone, it would have been against the property, and not for debt, and therefore would not have been within the constitutional provisions. *Southern Exp. Co. v. Lynch*, 65 Ga. 240.

In *Meyer v. Berlandi*, 30 Minn. 435, 1 L. R. A. 777, § 3 of chap. 170 of the Minnesota General Laws of 1887, known as the mechanic's lien law, which made the mere failure of a contractor, who had received his pay from the owner, to pay his laborers and materialmen, although he might not be guilty of any fraud, a felony punishable by imprisonment in the penitentiary, was held unconstitutional, as fairly repugnant to § 13 of art. 1 of the state Constitution prohibiting imprisonment for debt, inasmuch as it was a return to the old barbarous fiction upon which imprisonment for debt was originally based, namely, that a man who owed a debt, and did not pay it, was a trespasser against the peace and dignity of the Crown, and for this supposititious crime was liable to arrest and imprisonment.

So, the act of bail indorsing his name on the writ has been held, in proceedings by way of *audita querela*, to be a contract between the bail and the creditor, and as such within § 63, chap. 28, of the Revised Statutes of Vermont, and therefore the execution against the body of such bail, in proceedings by way of *scire facias*, was illegally issued; and that the plaintiff (the debtor) was entitled to his writ. *Stoughton v. Barrett*, 20 Vt. 385.

And in *Atobison Bd. of Edu. v. Scoville*, 13 Kan. 17, 33, it was held that under § 16 of the Kansas Bill of Rights an order against a garnishee could not be enforced by his imprisonment, and that § 490 of the Civil Code, which provided that the court or judge may order the money to be applied towards satisfaction of the judgment, and "may enforce the same by proceedings for contempt in case of refusal or disobedience," probably did not mean that the court might imprison a garnishee for not paying money which he owed (a debt) into court, or to a judgment creditor, but even if they did so mean the words were unconstitutional to that extent.

In *Stroheim v. Deimel*, 73 Fed. Rep. 420, 436, where the action was on the case for false representations in obtaining goods on credit, the court held that although the general rule was, that constitutional provisions abolishing imprisonment for debt did not necessarily include or comprehend imprisonment on a judgment in an action *ex delicto*, yet in cases within the jurisdiction of the Federal courts, § 990, U. S. Rev. Stat., which prohibits imprisonment for debt, and declares that all modifications and restrictions imposed by state statutes shall apply, was to be construed as including under the term "imprisonment for debt" actions *ex delicto* in cases where the state statute was to be construed in favor of personal liberty, such a judg-

or known, of any bank, banking firm, or corporation engaged in a banking business, or any other person or persons, engaged in said busi-

ness, or the agent or agents thereof, who shall receive for deposit any bank notes, specie money, or other thing of value, knowing at

ment debtor being in fact "imprisoned for debt" within the fair scope of the words, the creditor's right being in the nature of a property right, which a statute or Constitution abolishing imprisonment for debt in effect takes away from the creditor.

The above case of *Stroheim v. Deimel* was, however, appealed (77 Fed. Rep. 802), and it was contended that the proposition in the opinion below, that § 900, U. S. Rev. Stat., was applicable to judgments for torts, was inconsistent with the opinion of the court in *Deimel v. Arnold*, 34 U. S. App. 177, 69 Fed. Rep. 987, wherein it was said that imprisonment for debt, as used in this and like statutory provisions, means debts arising out of contracts, and does not extend to actions for tort, nor the fines or penalties arising from a violation of the penal laws of the state; but the court stated that whether the circuit court was justified in treating that part of the opinion as a dictum intended simply as a reiteration of the rule that in a constitutional provision abolishing imprisonment for debt the word "debt" does not necessarily comprehend, and should not be considered as comprehending, judgments in tort, it did not deem it necessary at that time to consider.

It was not the design of the Wisconsin Constitution to wholly abolish what was formerly known as a writ of *ca. sa.*, but only to prohibit its use in a certain class of cases, the inhibition extending its use to imprisonment for debt, arising out of, or founded on, a contract, express or implied, thereby simply prohibiting what had been a remedy in the collection of debts so arising. *Re Milburn*, 59 Wis. 24, 31.

It has been stated that the language of the Wisconsin Constitution, taken in its broad and proper sense, indicated a right accruing, a sum of money or other thing due or deliverable by virtue of a contract express between the parties, or implied from their acts and circumstances, or on account of a breach of it in respect to some matter provided for or contemplated by them when it was made,—something springing out of the contract and for the enforcement of which resort must be had to it; and seems not to include damages for those wrongful acts which either party may possibly do, and which when done were remotely connected with it, but were not anticipated by them at the time of making it, the act in that case being precisely of that character. *Re Mowry*, 12 Wis. 52.

See also *The Blanche Page*, 16 Blatchf. 1, 8, *infra*, VIII. c.

a. Breach of promise to marry.

It has generally been contended that an action for breach of a promise to marry is based upon contract, the action being for damages for the breach thereof, and therefore within the constitutional provisions prohibiting imprisonment for debt, and such would seem to be the conclusions arrived at by the courts, the defendant being exempt from punishment except in cases where fraud is shown.

In *Re Tyson*, 32 Mich. 262, the applicant for a writ of habeas corpus and certiorari was arrested on a *capias* in a civil action issued upon an affidavit charging him simply with a breach of promise to marry. He was held to bail, which was given, but he afterwards surrendered in exoneration of his bail and remained in custody under the writ of *capias*. It was held that the cause of action was based simply upon a breach of promise to marry, and in the absence of any charge involving fraud it was within the constitutional inhibition against imprisonment for debt contained in art. 4, § 33, of the state Constitution.

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So where, in such an action, the defendant was arrested and held to bail, under chap. 17, § 149, N. C. Stat., which provided that the defendant might be arrested as hereinafter prescribed in the following cases, *inter alia*, on an action on a promise to marry,—the court held that such provision was a violation of the articles of the state Constitution, there being no fraud, a mere breach of promise to marry being no more a case of fraud than a breach of any other promise, and for that reason the prosecution could not be made to include a breach of promise to marry without extending it to a breach of any other contract, the words "except in cases of fraud" being used in a restricted sense, namely, as fraud in procuring a contract to be made, or fraud in attempting to evade performance. *Moore v. Mullen*, 77 N. C. 327.

The court distinguished the above case from the New Jersey cases *infra*, which upheld the defendant's arrest in actions of a similar character, upon the ground that in those actions the defendant, in addition to the breach of promise or contract, had been guilty of illegal acts, and had sought to abandon the plaintiff by fleeing from the state, there being additional circumstances which, in those cases, caused the court to consider the case as one of fraud and so within the provisions of the Constitution, while in the case in hand there was no fraud but a mere breach of contract.

A different opinion is, however, held by the court in cases where fraud exists.

In *Re Sheahan*, 25 Mich. 145, which was an application for a writ of habeas corpus, the petitioner being arrested on a *capias* in an action for a breach of promise to marry, the court held that whether in actions for breach of promise to marry in general the defendant was liable to arrest or not, yet a case like the one then before the court, which partook of the nature of fraud, seduction being proved, was within the exceptions contained in the provisions of the Constitution relating to imprisonment for debt.

So, where the defendant's contention was that a promise of marriage was a contract for a breach of which the defendant could not be arrested without proof of fraud, either in contracting the obligation, or in his subsequent action to avoid his responsibility, the court stated that if such were an action founded on a contract, it would be within the act respecting imprisonment for debt in cases of fraud, if it were not specially excepted in § 7 of that act, but that the provisions of that act did not extend to actions on promises to marry, the exemption not meaning that a writ of *capias* ad respondendum should not be awarded in such cases, the classification of such cause of action in the 7th section with contempts, etc., showing that a harsher rule was intended than was applied in cases of breach of ordinary contracts, and that a wider scope was to be given to judicial discretion in holding to bail in such cases, than that prescribed by the statute in mitigation of the rigor of the old law of imprisonment for debt, the New Jersey statute being an exposition of ¶ 7 of art. 1 of the state Constitution, the case being within the exception made in cases of fraud as contained in such constitutions, as fraud was proved against the defendant. *Perry v. Orr*, 35 N. J. L. 286.

And § 201, ¶ 2, of the Code of North Carolina, which provides that a defendant may be arrested for seduction, is valid and not in conflict with art. 2, § 16, of the state Constitution, though it provides that there shall be no imprisonment for debt, except in cases of fraud, and damages recovered in such a case not constituting a debt in the sense im-

the time said deposit is received, or having good cause to believe, that such bank, banking firm, corporation, person, or persons are in a failing or insolvent condition, shall for each

offense be deemed guilty of a misdemeanor, and on conviction thereof be fined not less than double the amount of said deposit.

"Sec. 2. Be it further enacted, that in all

plied by that provision. *Kinney v. Laughenour*, 97 N. C. 325, 327.

III. Actions founded in tort.

a. In general.

As to distinctions between debts and torts, see also *supra*, II.

The constitutional inhibition as to imprisonment for debt does not apply to cases founded upon torts committed by the defendant, even though it may be contended that the judgment for damages recovered in such action constitutes a debt owing by the defendant to the plaintiff, the Constitution only prohibiting such imprisonment in actions arising *ex contractu*.

In cases where the ground or form of action is *ex delicto*, or in tort for damages for a wrong committed, the courts generally hold that the constitutional inhibition does not apply, and therefore a defendant is liable to be imprisoned, not, however, for the debt he owes, but for the wrong he has done, either to the plaintiff himself, or to the public at large. *Kennedy v. People*, 122 Ill. 649, 652; *People v. Brennan*, 14 Ill. 414, 415; *McCool v. State*, 23 Ind. 127, 131; *Lower v. Wallick*, 25 Ind. 68; *Ex parte Bergman*, 18 Nev. 331; *Long v. McLean*, 68 N. C. 8; *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; *United States v. Walsh*, Deady, 281, 285.

The provisions of the Alabama Constitution prohibiting imprisonment for debt apply only to actions based on contracts express or implied, and they do not extend to actions originating in tort. *Ex parte Hardy*, 68 Ala. 303, 316.

In that case it was stated that it was yet to be supposed that the framers of the Constitution intended to prohibit the legislature from authorizing the remedy of incarceration as a means to coerce the payment of damages originating *ex delicto*, but only of a debt originating *ex contractu*. *Ibid*.

The provision of the Illinois Constitution exempting debtors from imprisonment has no application to an action for a tort, as such provision applies only to actions of contract, express or implied. *McKindley v. Rising*, 23 Ill. 337, 343.

And in such a case the statute must receive its natural construction without the restraining influence of the Constitution, which has been applied to it in cases *ex contractu*. *Ibid*.

It has been held that chap. 52, Ill. Rev. Stat., relates to arrests for debts, and has no application to arrests for torts, its object being to carry out the policy of the Constitution that a man shall not be imprisoned on account of his debts if he acts honestly and fairly toward his creditors, and it is confined exclusively to arrests made in suits brought upon contracts, express or implied, such intention being further manifest by the provisions of Ill. act Feb. 23, 1845, which prescribes a different mode for the discharge of those held in custody in final process, in cases not provided for by chap. 52, Rev. Stat. *People v. Brennan*, 14 Ill. 414.

A Constitution which abolishes imprisonment for debt does not prohibit the legislature from passing a law to imprison on judgments founded on torts. *Turner v. Wilson*, 49 Ind. 581, 584.

And the Indiana courts have stated that the distinction between tort and contract exists in the nature of things, and cannot be confounded or abolished by law. One arises by agreement, the other by wrong, and none but honest debtors are protected from imprisonment for debt; the wrongdoers and dishonest men cannot claim the exemption. *Ibid*.

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So, Me. Stat. 1831, chap. 520, for the abolition of imprisonment of honest debtors for debt, passed in order to carry into effect the provisions of the state Constitution abolishing imprisonment for debt, does not apply to actions founded on tort, or to process on judgments for costs. *Gooch v. Stephenson*, 15 Me. 129.

And in New York, where there does not seem to be any express constitutional inhibition, the act abolishing imprisonment for debt does not apply to suits founded in tort, though a contract between the parties is alleged by way of inducement. *Moduff v. Beddoe*, 7 Hill, 578.

In *Mallory v. Leach*, 23 How. Pr. 507, 509, where the action was on contract, and subd. 1, § 179, N. Y. Rev. Stat., declared that no defendant could be arrested except in an action for the recovery of damages on a cause of action not arising out of contract, the court stated that inasmuch as it was a question of personal right as distinguished from the rights of property, the law must be strictly construed, and that in order to arrest under subdivision 1, the action must be in tort as distinguished from an action on contract, and that such was the plain meaning of the language employed. The action must be for the recovery of damages, a term inappropriate when applied to the principal recovery in an action for debt; but usual and appropriate when applied to actions in tort.

Where, by the laws of the state, the owner of personal property was entitled to the possession thereof, and any deprivation of such property was a tort, the object of such statute being the more effectually to quiet and protect the possession of personal property, and to prevent the taking possession thereof by fraud or violence, it was held that the defendant's imprisonment in proceedings thereunder could not in any legal sense be considered as an imprisonment for debt, within the provisions of the Georgia Constitution of 1868, which declared that there shall be no imprisonment for debt. *Harris v. Bridges*, 57 Ga. 407, 24 Am. Rep. 495.

And where the record showed that a wrong had been committed, and that the defendant had embezzled the property of the plaintiff, and the latter was entitled to the remedy in case of tort, but brought his suit in form *ex contractu*, it was held that he was still entitled to process on his judgment, in the same manner that he would be entitled in an action of tort, although the Illinois statutes provide that "no execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant," the statute not saying that the plaintiff must necessarily pursue the form of an *ex delicto* action, in order to entitle him to an execution against the body of the defendant, if it appears on the record, and has been adjudged against him, that the real right of action was for a tort committed by the defendant. *Barney v. Chapman*, 21 Fed. Rep. 904.

Again, where a relator was under arrest on account of debt, and the judgment against him was founded upon a tort, it was held that the plaintiff had a right to sue out an execution against his body under § 90, chap. 59, Ill. Rev. Stat., and that he was not entitled to be discharged under chapter 52 of such Revised Statutes, but must proceed under the act of February, 1845. *People v. Brennan*, 14 Ill. 414.

Where the action was not brought to recover money loaned by the plaintiff to the defendant, but for the false and fraudulent representations of the defendant in respect to certain collateral securities,

convictions under this act, the fine shall be paid in lawful money of the United States only, one half of which shall go to the person who made the deposit.

"Sec. 8. Be it further enacted that the payment back to the depositor of the bank notes, specie money, or other thing of value deposited, before the conviction hereunder, and the

upon the faith of which the loan was made, it was held that the action was in form *ex delicto* and not *ex contractu*, and that therefore the defendant was not entitled to a discharge from imprisonment by virtue of the Pennsylvania act of 1842 abolishing imprisonment for debt, the gravamen being in form and in fact deceit. Tryon v. Hassinger, Clark (Pa.) 184.

In *Messenger v. Lockwood*, 9 West. L. J. O. S. (Ohio) 521, it was stated that the provision in the Ohio Constitution prohibiting imprisonment for debt was an explicit declaration that the people had reserved to themselves the sacred boon of personal liberty, and had denied to the government all control over their persons except for the commission of crimes, and the isolated case of fraud in their business transactions, such declaration being regarded as an ample safeguard without either legislative or judicial construction admitting of no such thing by either the one or the other department of the government.

In an action in case in the nature of a conspiracy, it was held that the action was for a tort, and not for a mere breach of contract, and therefore the court committed no error in committing the defendant on a *ca. sa.* *Kalbfus v. Rundell*, 184 Pa. 102.

In *Jack v. Shoemaker*, 3 Binn. 280, a *capias* was allowed in slander, the court stating that such a writ might issue for any cause of action whatever against a freeholder who neglected to put in special bail upon notice so to do.

So in the case of a judgment for damages and costs recovered in an action of replevin in the circuit court, imprisonment on an execution does not fall within the prohibition, either of article 6, § 88, of the Michigan Constitution, or of the nonimprisonment act of 1839 (2 Comp. Laws, chap. 166), of that state. *Fuller v. Bowler*, 11 Mich. 204, 209.

The Constitution of Wisconsin abolished imprisonment for debt, arising on contract, and superseded the territorial statute so far as it related to actions *ex contractu*, but so far as it related to actions *ex delicto* such statute would appear to remain in force until the Revision of 1849, when such revision continued the practice in actions of tort,—and the same practice of arrest on mesne process, or at any time before judgment in actions of tort upon order of the judge of the court, is still continued by law, and therefore, under the Constitution, the judges of courts of record have power at chambers to make an order to hold to bail in proper cases, and the arrest of the prisoner for the tort with which he is charged upon the order of the judge of the county court in which he was sued for tort is therefore legal, and such order warrants his imprisonment, unless its force has been arrested or spent. *Re Kindling*, 39 Wis. 85, 90.

In *Re Mowry*, 12 Wis. 52, the applicant for mandamus sought to be discharged from imprisonment under an execution rendered against his body, upon a judgment in an action for damages for the wrongful and fraudulent misapplication and conversion of school-land certificates deposited as security, his contention being that such execution would not lie, as the judgment was a debt arising out of a contract and therefore within the inhibition imposed by § 16, art. 1, of the state Constitution, and the court held that he was not entitled to the privilege from arrest therein contained.

b. Mesne profits.

Where a judgment in ejectment had been obtained, and an action of trespass for mesne profits 34 L. R. A.

was afterwards brought upon the judgment, and a *ca. sa.* issued against the defendant, who applied for a writ of habeas corpus, alleging that his detention was unlawful, the court remanded the relator or petitioner upon the ground that he was not exempt from imprisonment within the meaning of the Pennsylvania act of 1842, prohibiting imprisonment for debt, the action not being in contract. *Com. v. Bowman*, 8 Pa. Dist. R. 74.

A claim for mesne profits in an action of ejectment is not founded "upon any contract, or due upon any contract, express or implied," and the recovery is not for "any damages for the nonperformance of any contract," and therefore the defendant is subject to arrest under the exceptions contained in the Pennsylvania act of 1842 abolishing imprisonment, the action being founded upon the wrongful holding, the recovery of mesne profits arising from such wrong or trespass. *Hopkinson v. Cooper*, 8 Phila. 8.

In *Howland v. Needham*, 10 Wis. 466, the question was whether an execution could issue against the body of a defendant upon a judgment for damages for the withholding of real property, and the rents and profits, where, pursuant to § 88 of the Code of Procedure, the claim for such damages was united with the claim in an action for the recovery of such property, and the court held that such an execution was legal and not within the provisions of Wis. Const. art. 1, § 16, inasmuch as an action of ejectment was an action *ex delicto*, and that the wrongful receipt by the tenant in possession of the mesne profits, or the withholding of the possession from the lawful owner, was a tort for which by the common law an action of trespass might be maintained. See also *Lang v. Finch*, 166 Pa. 255, *infra*, VI. a.

c. Trespass.

In a case where a verdict was rendered in an action of trespass for damages for negligence on the part of an employer in not furnishing his employees with reasonably safe appliances for work, wherein a *ca. sa.* was issued upon a judgment, and it was contended that the same was illegal by reason of the Pennsylvania act of 1842, abolishing imprisonment for debt, it was held that the case did not come within the exceptions contained in the provisions of the statute, the court reversing the order of the court below setting aside the *ca. sa.* *Romberger v. Henry*, 167 Pa. 314.

Where the action was clearly *ex delicto*, although the statement commenced by reciting a contract, which was mere matter of inducement to show how the defendant became possessed of the property on which he afterwards committed the trespass, and such recital was wholly unnecessary, and the defendant contended that the judgment was founded upon contract, or represented judgments for non-performance of the contract, and hence came within the provisions of the Pennsylvania act of 1842 abolishing imprisonment for debt, and exempting him from arrest and imprisonment,—the court held that such was not the case, as it was the result of the trespass pure and simple, outside of the contract, and therefore a *capias ad satisfaciendum* would lie to enforce the judgment. *Dungan v. Read*, 167 Pa. 308.

And the arrest upon a *ca. sa.* issued pursuant to a judgment in an action brought before a justice of the peace, for trespass upon personal property upon which an execution had been issued and returned "no property found," was held not an arrest on account of a debt, the judgment being founded upon a tort which gave the plaintiff a right to sue

court costs thereof, which may have accumulated, shall be a good and lawful defense to any prosecution under this act." Acts 1892-93, pp. 94, 95.

By demurrer to the indictment and motion in arrest of judgment, defendant raised the

question of the constitutionality of the foregoing statute, and reserved the court's ruling, sustaining the indictment and statute, for our consideration.

1. The statute, it is insisted for the appellant, is violative of article 1, § 21, of the Con-

stitution, which provides that no person shall be put to death or imprisoned for debt, even in cases of fraud, even though fraud was excepted out of the earlier Constitutions, and therefore no exception can be made in that state on the ground of fraud. *Ex parte Hardy*, 68 Ala. 303.

d. Fraud.

As a general rule fraud is excepted by most of the state Constitutions, and therefore a debtor who has been guilty thereof cannot plead the unconstitutionality of his imprisonment as a means of securing his release from arrest.

Fraud is treated both by the legislature and the convention as in its nature criminal, and it is for this reason that arrests for this cause are tolerated, but it will not be allowed that without a specification of the facts and proof of them citizens should be placed beyond the protection of the Bill of Rights, and have their bodies incarcerated, simply because some frightened or hard creditor may believe that they intend to commit a fraud. *Messenger v. Lockwood*, 9 West. L. J. O. S. (Ohio) 521.

Persons may be imprisoned for a wrong by them maliciously done, a tort willfully and with malice committed, where, on account of such tort, damages have been recovered by the party injured. *Sawyer v. Nelson*, 44 Ill. App. 184, 185.

Alabama seems to be the only state in which fraud is not made an exception, and wherein imprisonment for debt is entirely abolished.

Every intendment must, however, be in favor of the liberty of the subject, and the liberty of the subject is not to be presumed away by the theory that the district courts have jurisdiction over the subject of fraud, nor is it to be presumed when its process issues that it has been issued in a proper case, for if such a rule of presumption were adopted there would not be a single case in which a party might not be arrested and imprisoned on final process, although fraud never entered into the elements of the original suit or controversy. *Matoon v. Eder*, 6 Cal. 57, 60.

In construing the provisions of the Constitution of California the court stated that fraud is a fact which must be proved, and the party undertook to do so when he issued out his process; it gave character to his judgment and determined his rights, and he should substantiate it. *Ibid*.

So, as a writ of arrest is only an intermediate remedy or process to secure the presence of a party until final judgment, the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process, and where this is not done no ca. sa. can properly issue against a judgment debtor. *Ibid*.

And this is so for the reason that the writ issues in the language of the statute in the "enforcement" of the "judgment." *Davis v. Robinson*, 10 Cal. 411, 412.

Where the case raised a strong presumption of fraud on the part of the debtor, in that he had conveyed large amounts of real and personal property to persons for the purpose of cheating and defrauding his creditors, it was held to be a sufficient case to justify his imprisonment under the Illinois Constitution. *Re Salisbury*, 16 Ill. 350, 352.

And it has been stated that fraud in contracting a debt in the ordinary nature of things means some fraudulent conduct at the time of the contract whereby the other party was deceived. *Van Kirk v. Staats*, 24 N. J. L. 121, wherein it was sought to imprison a debtor for debt, the plaintiff alleging fraud.

Alabama.

The Alabama Constitutions of 1868, 1875, entirely 34 L. R. A.

did away with imprisonment for debt, even in cases of fraud, even though fraud was excepted out of the earlier Constitutions, and therefore no exception can be made in that state on the ground of fraud. *Ex parte Hardy*, 68 Ala. 303.

Arkansas.

There does not seem to be any direct inhibition against imprisonment for debt in the Arkansas Constitution of 1836, but it has been held that the effect of the Arkansas act of February 2, 1843, abolishing imprisonment in civil cases, was not to enlarge the instances in which a capias or ca. sa. might issue, but to make all the statutes then in force authorizing arrest and imprisonment for debt inoperative, except in cases of fraud on the part of the debtor, alleged by the plaintiff and sustained by the affidavits prescribed by the act. *Hatheway v. Jones*, 20 Ark. 109, 111.

By the Constitution of that state of the year 1868, however, imprisonment for debt was abolished except in cases of fraud.

In *Ruddell v. Childress*, 81 Ark. 511, proceedings were taken by a surety against his principal under § 5694 of Gantt's Digest, which provides that a surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound before it is due, whenever any of the grounds exist upon which by the provisions of chapters 8 and 9 an order may be made for arrest and bail or for attachment; and it was held that such proceedings were not contrary to the provisions contained in § 14, art. 1, of the Constitution of that state of 1868, which prohibits imprisonment for debt, but provides that the general assembly may provide for imprisonment or holding to bail persons charged with fraud in contracting said debt, the court stating that such a case was not the arrest of a debtor for debt, but was a proceeding to indemnify the surety in the manner pointed out by the section.

By the Constitution of that state of 1874, art. 2, § 16, imprisonment for debt is abolished except in cases of fraud.

California.

As the Constitution of the state of California does not prohibit, but by implication authorizes, imprisonment for fraud, execution may be ordered against the person of the defendant who is adjudged guilty of fraud, as where the defendant has fraudulently purchased goods. *Stewart v. Levy*, 26 Cal. 159, 167.

And in *Re Vinich*, 86 Cal. 70, where an order of arrest was issued in a civil action by a justice of the peace, and it was conceded that the action was for the recovery of moneys claimed to be due upon an open account, it was held that, under art. 1, § 15, of the California Constitution, which prohibits imprisonment in any civil action, on mesne or final process, unless in case of fraud, before the defendant could be subjected to such imprisonment fraud must be shown to exist.

Connecticut.

The Connecticut Constitution, art. 1, § 10, provides: "No person shall be arrested, detained or punished except in cases clearly warranted by law."

The statutes of that state abolishing imprisonment in all actions for debt arising upon contract express or implied, except in cases of fraud and fraudulent dealings as therein specified, have defined the cases wherein such imprisonment is warranted, and therefore, in cases falling within the

stitution of the state, which provides "that no person shall be imprisoned for debt." It is to be observed in the outset that this provision of the organic law is essentially different from the provisions on this subject in many other state Constitutions, in that it contains no ex-

ception of "cases of fraud;" and, on the same line, is essentially different from the Constitutions of this state of 1819, 1831, and 1865, in each of which the language is that "the person of a debtor, where there is not strong presumption of fraud, shall not be detained in

exceptions named therein, imprisonment is justifiable, and not in violation of the Constitution.

It has been stated in construing the Connecticut statute relating to this subject that the gist of all actions is either *ex contractu* or *ex delicto*, that is, they sound either in tort or contract, and the statute is not intended to abolish the distinction; and that under the statute the mere inability to pay debts is no longer to be treated as deserving of imprisonment, such remedy for the collection of debts being too harsh, the legislature in very positive language abolishing it by the introductory clause of the statute, but all other causes of action enumerated under the proviso were left to be enforced as before, and remedies by action on the case for fraud were provided for even beyond former limits, so that all tortfeasors and fraudulent debtors should be discouraged and checked by danger of imprisonment. *Armstrong v. Ayres*, 19 Conn. 540, 545.

Where in an action on the case it was alleged that the defendant, indebted upon certain notes, had fraudulently conveyed away and concealed his property so as to avoid legal process, and had made false and fraudulent representations in obtaining the goods on credit and in giving the notes therefor, it was held that such action was in tort for the fraud committed, and within the proviso to the Connecticut statute of 1842 abolishing imprisonment for debt, under which the defendant might be lawfully arrested and held to bail. *Ibid*.

And this is so for the reason that it was not intended to abolish such imprisonment in respect to that dishonest class of debtors who were guilty of fraud in contracting their debts, or who concealed or conveyed away their property so that it could not be reached by the ordinary process of attachment. *Cowles v. Day*, 30 Conn. 403, 412.

The creditor is entitled to the benefit of the remedy in an action on the case, in which both the debt and the fraudulent act or acts, which, by the statute were to deprive the fraudulent debtor of the benefit of the act abolishing imprisonment for debt, were to be set forth and proved, in order to secure the benefit of an execution against the body as well as the property of the debtor, the fraud irrespective of the debt not being an injury to anyone pecuniarily; but accompanied by the debt it is an injury, since it deprives the party of the means of obtaining payment by an attachment of the property secreted or removed. The object of the Connecticut Statute of 1854 was to continue the remedy provided by the act of 1842 against fraudulent debtors. *Ibid*.

And it has been held that the statute regulating the levy and executions and warrants was made pursuant to a fundamental principle of the law, that personal liberty should not be unnecessarily restrained, but if a debtor, for whose benefit the rule exists, neglects to offer property or refuses to turn out when demanded, declaring that the proceedings are illegal, he waives the privilege the law gives him, and the officer is excusable if he levies on the body. *Allen v. Gleason*, 4 Day, 378, 382.

And in this connection it is the undoubted object of the law, in prevention of fraud, to render the imprisonment of such debtors as are able available to the collection of their debts; the Connecticut statute giving authority to the court, at their discretion, on notifying the parties concerned, and on due inquiry, to order the close confinement of

prisoners committed on execution. *Frisbie v. Fowler*, 3 Conn. 87, 89.

Georgia.

In the case of *Harris v. Bridges*, 57 Ga. 407, 24 Am. Rep. 495, the court stated that "If one man obtains the possession of the personal property of another by fraud or violence, or having possession of it, and there is reason to apprehend that it will be eloiigned or moved away, or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against, and be required to comply with the terms of the statute made and provided for such cases; and if the defendant should be imprisoned in accordance with the terms of the statute, on his failure to comply therewith, he cannot be said to have been imprisoned for debt," within the meaning of the provisions of the Georgia Constitution.

Illinois.

In discussing § 2, chap. 14, Ill. Rev. Stat. relating to the procedure therein established for holding the defendant to bail, the court stated that it was immaterial what the legislature might have said, as they could prescribe no rule for imprisonment for debt, except in conformity with § 15, art. 13, Ill. Const.; they might prescribe a mode by which the debtor should surrender his estate for the benefit of his creditors, and for his failure to do so they might provide for his imprisonment; or they might provide for his imprisonment in case of strong presumption of fraud; and the court construed such act in connection with, and under the influence of the Constitution, and understood them as meaning that the affidavit must show, by facts stated and circumstances detailed, what the Constitution requires. It must either be construed so as to harmonize with the Constitution or else be held to violate it. *Re Smith*, 16 Ill. 347, 349.

So the courts of that state have further held that the provisions of the Illinois Constitution are to be regarded as having effectually abolished imprisonment for debt, as practiced under the common law; and therefore where a debt is the basis of the action, in order to justify imprisonment the foundation must be laid under one or both of the exceptions contained in § 12 of art. 2 of the state Constitution, namely, a refusal to deliver up his estate for the benefit of creditors, or fraud either in contracting or evading payment of the debt, such provisions extending to a writ of *ne exeat*. *Malcolm v. Andrews*, 68 Ill. 100, 104.

So, the limited imprisonment permitted under the Illinois statutes in actions *ex contractu*, where a tort is not the basis of the action, is not for or on account of the debt, but because of the fraud committed in fraudulently withholding and concealing property so that the same cannot be applied to the discharge of the indebtedness. *Sawyer v. Nelson*, 44 Ill. App. 184, 185.

And the requirements of the statute and Constitution must be fully complied with before defendant can be imprisoned for debt. *Gorton v. Frizzell*, 20 Ill. 291, 296. To the same effect *Tuttle v. Wilson*, 24 Ill. 553.

The imprisonment of the debtor under the Illinois Constitution is for his wrongful act in endeavoring to evade payment, and therefore, if in that state there is no imprisonment for debt, the rigid rules of the common law cannot be applied; and therefore if such imprisonment is abolished,

prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law." Const. 1819, art. 1, § 18; Const. 1861, art. 1, § 18; Const. 1865, art. 1, § 22. This change was made in the Constitution of 1868 (art. 1, § 22), where the provision assumed its present form. In *Ex parte*

Hardy, 68 Ala. 303, 318, it was held—and we do not understand that there was any division of opinion on this point—that the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, whether they involved fraud

and it can only be had in cases of fraud or wrongful refusal to surrender his property for his creditor's benefit, it follows that the effect and consequences of imprisonment for debt at common law must fail. *Strode v. Broadwell*, 36 Ill. 419, 422; *Burnap v. Marsh*, 13 Ill. 585.

And the act of the debtor under such Constitution being an offense against the law, it should appear that all the elements required by the statute to render the act complete actually exist before the debtor forfeits the right to invoke in his behalf the general guaranty of personal liberty declared in the section of the Constitution, and before he can be said to be brought within the exceptions named. *Maher v. Huette*, 10 Ill. App. 66.

In *Stafford v. Low*, 20 Ill. 152, 154, it was held that Ill. Rev. Stat. 1845, chap. 14, p. 80, was directly in conflict with the Constitution, if, by such statute, it was intended to give a plaintiff the right to imprison his debtor merely by making an oath that the debt would be in danger of being lost or that the benefit of any judgment he might obtain would be in danger, unless the defendant was held to bail, for the reason that the Constitution prohibited imprisonment for debt, except when the debtor refused to surrender his property for the benefit of his creditors, or where there was a strong presumption of fraud; and until one of those causes was made to appear the writ could not issue, no matter what else might be established. Although the legislature undoubtedly imposed additional requirements, yet they had no power to abridge or dispense with those imposed by the Constitution, such requirements being indispensable to the validity of a writ to imprison a defendant for debt; and therefore unless the affidavit showed a compliance with the requirements of both Constitution and statute, the writ must not issue.

And it has been stated that the policy of the law in Illinois as shown by the Constitution is opposed to imprisonment for debt, and no person within that state can be so imprisoned, unless upon refusal to surrender his estate for the benefit of his creditors, as prescribed by law, or in cases where there is a strong presumption of fraud. *Kitson v. Farwell*, 122 Ill. 827, 834.

Where the respondent took into his possession or control a large sum of money, the proceeds of a stock of goods disposed of by him to different parties, and contumaciously refused to honestly, fairly, and truthfully testify in relation to such proceeds, and as to what he had done with them, and to turn the same over for the benefit of his creditors, it was held that such act came within the provisions of the Illinois statutes, and that he was not exempt from imprisonment, and therefore that his committal, although by way of contempt of court, was not illegal; and the court refused to release him and affirmed the judgment of committal. *Berkson v. People*, 154 Ill. 81, 85.

And where the debtor was charged with refusing to surrender his estate, and with fraudulently disposing of the same with a design to secure it to his own use, or to defraud his creditors, the court held that both of these grounds for arrest were within the contemplation of the Illinois Constitution of 1870, § 12, which provides that "no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases

where there is strong presumption of fraud. *Huntington v. Metzger*, 158 Ill. 272.

Indiana.

The Indiana courts in passing upon this question have held that every statute in restraint of personal liberty ought to be strictly construed, and construed, too, with reference to the current decisions and the usual practice which existed at the time of and before its adoption. *Ramsey v. Foy*, 10 Ind. 493.

So, in *Wendover v. Tucker*, 4 Ind. 381, the court in construing the statute of that state, abolishing imprisonment for debt, stated that as a law in favor of personal liberty it would seem that it ought to receive a liberal construction, but that such was not the rule theretofore adopted in that court, as in giving construction to a similar statute the court held the party to considerable strictness, stating that there were controlling reasons why such strictness should now be observed more rigidly. Imprisonment for debt was then the common mode of procedure to enforce payment, but it was abolished by the General Laws of 1842, p. 68, Rev. Stat. 1843, p. 752; 1 Rev. Stat. 1852, p. 346, and 2 Rev. Stat. p. 152.

Section 23 of art. 1 of the Indiana Constitution prohibits imprisonment for debt, except in cases of fraud, and in *Baker v. State*, Mills, 109 Ind. 47, 48, the court held that the leading, if not the only, purpose of the above section of the Constitution was to authorize imprisonment for fraud practiced in avoiding the payment of debts.

And it is only in case of fraud that a debtor can be either arrested or imprisoned under Ind. Rev. Stat. 1876, § 22, 104. *Swift v. State*, Clark, 63 Ind. 81.

Iowa.

Article 2, § 9, of the Iowa Constitution provides that no person shall be imprisoned for any debt in any civil action on mesne or final process, unless in case of fraud, and no person shall be imprisoned for a militia fine in time of peace. *Holmes v. State*, 2 G. Greene, 501, 503.

Section 19, art. 1, of the Iowa Constitution provides that no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud. In *Ex parte Grace*, 13 Iowa, 203, 213, 79 Am. Dec. 529, the debtor was imprisoned under an order made by a county judge sitting as judge, and not as a court, without power to hear witnesses or take testimony founded upon an examination as to his means, taken under chap. 123, Iowa Rev. Stat. 1880, from which it appeared that he had money in his possession which he refused to deliver up and apply toward satisfaction of the judgment, and it was held that such imprisonment was unconstitutional as contrary to § 9 and 10 of the state Constitution regarding the life and liberty of the subject and due process of law, the act conferring no jurisdiction. But yet with regard to § 19 of art. 1 of such Constitution the court stated that it did not consider the act in question a violation of such provision of the Constitution, for the reason that the failure of the debtor to surrender his property liable to execution to the payment of the judgment might well be such fraud as that, within the meaning of the Constitution, he would forfeit his right to claim exemption from imprisonment, and not only so, but that if the fraud was once found

or not. So that the statute we are considering can derive no aid from the idea that the receipt of a deposit by a banker under the circumstances stated is a fraud, and hence that the transaction would constitute "a case of fraud," since even in such cases there can be no imprisonment for debt.

2. The "imprisonment for debt" which the framers of constitutions embodying this provision doubtless had most prominently in mind was imprisonment upon process issuing in civil actions the object and sole purpose of which were the collection of debts. It was to remove the evils incident to the system of taking the

by a competent tribunal the correctness of that finding could not be reviewed in another court or by any judge, upon habeas corpus, but the imprisonment must be in a manner and under circumstances which came within the meaning of the provisions of the Constitution.

The case of *Eikenberry v. Edwards*, 67 Iowa, 619, 56 Am. Rep. 360, was one wherein proceedings were taken under § 8145 of the Iowa Code, which provides that a party disobeying the order of the court judge, or referee, duly served, is punishable as for contempt. It was there held that the imprisonment of the defendant for noncompliance with the order of the court was not unconstitutional, but was a proceeding in aid of execution, the court distinguishing the case from that of *Ex parte Grace*, *supra*, upon the ground that in the case then before the court such court had full jurisdiction.

In this case, however, there are two dissenting opinions which hold that the statute in question was unconstitutional, and that the case was governed by the prior decisions in that state in *Boyd v. Ellis*, 11 Iowa, 98; *Ex parte Grace*, *supra*; *Stewart v. Polk County Supers*, 30 Iowa, 9; *State v. Start*, 7 Iowa, 503, 74 Am. Dec. 573.

Kansas.

In *Howe Mach. Co. v. Lincoln*, 24 Kan. 123, it was stated that fraud alone under the Constitution of that state justified arrest for debt. In that case the defendant had been imprisoned for fraud in obtaining a mortgage given for the purpose of covering his defalcations as the agent of the plaintiff. The court set aside an order liberating him on a motion for his discharge, holding that there was a clear case of fraud within the provisions of the Constitution, and this opinion was affirmed upon appeal in 25 Kan. 312.

The case of *Tennent v. Weymouth*, 25 Kan. 21, was one wherein the defendants had assigned and disposed of their property, or a part thereof, with intent to defraud their creditors, but as the facts merely showed that the defendants sold and disposed of their entire stock of goods for a certain sum, receiving in payment a certain amount in cash and two farms; and that the title deeds were executed to their wives; and that the defendants commenced business with their cash capital; and that at the time of the sale they owed a certain specified amount,—the court stated that such facts did not prove fraud without which no arrest for debt could be had under the Kansas Constitution; fraud never being presumed but always proved, the law neither favoring nor encouraging arrest and imprisonment, such a remedy being the *dernier resort*, the end of the law, quasi criminal. The proof of fraud must be clear and strong. To the same effect are *Gillett v. Thiebold*, 9 Kan. 427; *Hauss v. Kohlar*, 25 Kan. 640.

In that state the person of the debtor is now only taken in case of fraud. *Randolph v. Simon*, 29 Kan. 403, 410.

And such fraud must be established and proved; it will not be presumed. *Re Roberts*, 4 Kan. App. 302.

So, if the facts show fraud in the contracting of the obligation, the court will deny the motion for the discharge of the debtor,—especially if he shows no reasonable grounds for the disposition of his property. *Heath v. Brown*, 40 Kan. 33.

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In *Re Heath*, 40 Kan. 333, 337, it was urged that a district judge, at chambers or in vacation, had no power to issue an execution against the person of a judgment debtor, but the court stated that the Kansas statute expressly conferred that power, and there was nothing in the Constitution forbidding the exercise thereof where fraud existed.

So, fraud must be proved before a court having jurisdiction to pass upon the question; consequently, before one in that state can be imprisoned for fraud, there must have been a judicial finding upon due process of law. *Re Roberts*, *supra*.

Louisiana.

And although there does not seem to be any express declaration against such imprisonment, yet under the Louisiana laws it has been held that as a general rule debtors cannot be imprisoned for debt, and the Louisiana act of 1855, authorizing their arrest under certain circumstances, must be regarded as an exception to the rule, and viewed in that light it must be construed strictly, and it therefore devolves upon the creditor who seeks such harsh remedy to make out his case and show that the party arrested is clearly one of those contemplated by the act. *Levi v. Levy*, 20 La. Ann. 552, 553.

Where a debtor had been imprisoned for debt and confessed judgment in favor of the plaintiff, it was held that, notwithstanding such confession, he was not entitled to have the term of imprisonment for such debt put an end to, where the facts showed that it was his intention to depart permanently from the state without leaving property sufficient to satisfy his creditor's demand, such an act being a fraud on the defendant's part. *State, Williamson, v. Fourth City Ct. Judge*, 37 La. Ann. 385. Following *Anderson v. Brinkley*, 1 La. Ann. 126; *State, Wung Chung, v. Orleans Parish Civil Sheriff*, 31 La. Ann. 790.

Massachusetts.

The 12th article of the Declaration of the Massachusetts Bill of Rights declares, *inter alia*, no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by a judgment of his peers or the law of the land.

By Mass. Stat. 1835, chap. 444, which took effect on the 4th of July of that year, imprisonment for debt was abolished, except in certain cases of fraud. *Dooley v. Cotton*, 3 Gray, 490.

In *Frost's Case*, 157 Mass. 550, 554, it was said that by the common law a creditor had the absolute right to arrest his debtor upon an execution for debt, but that this right was restricted by the Massachusetts statutes, which permitted an arrest on execution only where the creditor made affidavit, and proved to the satisfaction of the magistrate that he believed, and had reason to believe, that one of the six charges named in the statute was true. The affidavit and proof before the magistrate, for the purpose merely of obtaining the authority to arrest upon execution, were not proceedings in a criminal case, but were merely proceedings in the course of a civil suit for the collection of a debt to which the 12th article of the Declaration of Rights had no application, and therefore if a creditor made the affidavit as provided by the statute, and obtained a certificate of the magistrate duly annexed to the execution, he had complied with the require-

debtor's person upon a *capias ad satisfaciendum* that this organic inhibition came primarily to be ordained. But the effect of its ordination has been to establish a public policy much broader in its influence upon legislation and operation upon judicial proceedings than would have sufficed for the eradication of the ills

which attended upon the recovery, or at tempted recovery, of debts by restraint of the debtor's person. This policy is inimical alike to the incarceration of a debtor as a means of coercing payment, and to his punishment by imprisonment for a failure to pay, at least when such failure results from inability. And

ments of the statute and was justified in causing the arrest of his debtor.

In Massachusetts a purchase of goods with an intent not to pay for them is expressly recognized by statute as a fraud which will deprive the debtor of the benefit of the act for the relief of poor debtors, and may subject him to sentence of imprisonment without violating the constitutional provision. Gen. Stat. chap. 124, §§ 5, 34, Rev. Stat. chap. 98, §§ 31, 36. *Dow v. Sanborn*, 8 Allen, 181, 183. To the same effect, *Way v. Brigham*, 138 Mass. 384, 386, decided under the fifth charge contained in Mass. Stat. chap. 162, § 17; *Noyes v. Manning*, 162 Mass. 14.

Although poor-debtor proceedings under the Massachusetts statutes are in their main features of a civil and not of a criminal nature yet if a debtor is found guilty upon a charge of fraud, he may be imprisoned. *Noyes v. Manning*, *supra*. *Everett v. Henderson*, 160 Mass. 411, to the same effect.

Michigan.

In *Re Teachout*, 15 Mich. 346, the debtor was imprisoned for fraud in contracting the debt and in assigning his property with intent to defraud his creditors, and the facts as set forth in the affidavit showed a *prima facie* case of fraud. It was held sufficient to warrant the arrest and imprisonment under the Michigan statutes.

The provision of Mich. Const. 1852, art. 6, § 33, which declares that no person shall be imprisoned for debt arising out of or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers, or in any professional employment, was held to be understood and intended in precise accordance with the principles of the Michigan non-imprisonment law, and that the cases of fraud mentioned in such section included as well cases where the fraud was made use of to avoid payment of, as those where it was used in obtaining, the contract creating the debt. *Bromley v. People*, 7 Mich. 472, 487. In this case the plaintiff in error was arrested and committed by a circuit court commissioner under the Michigan statutes relating to the punishment of fraudulent debtors, the charge against him being that of fraud in contracting the debt and fraudulently assigning and disposing of his property.

Sections 7174, 7175, Mich. Comp. Laws, prohibit arrest in civil proceedings for the recovery of money on a judgment or decree founded on contract, or for recovery of money due on a contract, or for damages for the breach of a contract, and except from the prohibition proceedings for contempt to enforce civil remedies, actions for fines, penalties, or forfeitures, or for breaches of promise to marry, or for money collected by a public officer, or for neglect or misconduct in office, or in professional employment; and it has been stated that the exemption from imprisonment for debt has been extended by Mich. Const. 1852, so that there is now no power to arrest in some of the cases mentioned in § 7175 of the Compiled Laws of that state. *Badger v. Reade*, 39 Mich. 771.

Nevada.

Section 14, art. 1, of the Constitution of Nevada provides that there shall be no imprisonment for debt, except in cases of fraud.

In *Ex parte Bergman*, 18 Nev. 331, it was held that § 4 L. R. A.

the exemption contained in the above section of the Constitution did not apply to a case of a fraudulent disposition of property by a debtor with the intention of defrauding his creditors, as in cases of tort, and where debts were fraudulently contracted, or where there was an attempt at a fraudulent disposition of property with intent to delay the creditor or deprive him of payment, the body of the debtor was allowed to be seized and confined.

New Jersey.

The New Jersey statute allowing imprisonment for debt in cases where the debtor "unjustly and unlawfully" declines to surrender property in his control to the payment of his debts, does not conflict with the provisions of the Constitution which prohibit imprisonment for debt except in cases of fraud. *Ex parte Clark*, 20 N. J. L. 648, 45 Am. Dec. 394.

In *Ex parte Clark*, 20 N. J. L. 648, 649, 650, 45 Am. Dec. 394, it was contended that the Constitution of that state had entirely abrogated the act of 1842, and that therefore a man could only be imprisoned for a debt which had been fraudulently contracted; and that in such a case fraud must be judicially established by the judgment of a competent court, in due course of law, before the defendant could be imprisoned, but the court stated that such was not the intention of the framers of the Constitution; nor did the language of that instrument allow of, or give countenance to, such a construction. Its negative language, "no person shall be imprisoned for debt," coupled with the exception "except in cases of fraud," being equivalent to saying affirmatively, that a person might be imprisoned for debt in cases of fraud. Whether the fraud had relation to the time and manner of creating the debt, or to subsequent attempts to defeat the creditor's recovery of it by the ordinary process of the law, was said to make no difference, it being left to the legislature to say what should be deemed such fraud as should make a man liable to imprisonment; and how it should be proved, in order to justify the debtor's arrest, the clause of the Constitution being constructed to protect the honest, but unfortunate, debtor from imprisonment; leaving the legislature at liberty, from time to time, as public policy and experience might dictate, to reach the fraudulent and dishonest shifts and devices of the debtor, and subject him to imprisonment, for the debt he was seeking to avoid the payment of. Therefore it could not be said that you might imprison your debtor for the debt he owed, only when by indiotment, or some other mode yet to be devised, you had first convicted him of fraud in the creation of the debt, or in avoiding the payment of it.

In the above case it was also insisted, on behalf of the prisoner, that so much of the New Jersey act of 1842 as exposed a man to imprisonment for "unlawfully and unjustly" refusing to apply money or choses in action in his own possession, or in the hands of other persons for his use, to the payment of his debt, was incompatible with the clause of the Constitution, and therefore abrogated, upon the ground that there was nothing fraudulent in a man's having money or property in his own possession, or in possession of another for his use and subject to his control, and yet refusing to appropriate it to the payment of his honest debt; but the court stated that one of the most dishonest

hence it is that, while neither the letter of the inhibition, nor the broader policy which is engendered by it and has come to be a part of it, has any application to criminal judgments for fines and costs, yet it is not within legislative competency to declare the mere nonperformance of a contract of indebtedness a misde-

meanor, and punish the commission thereof by imprisonment, directly or indirectly; for, as said in the notes to *State v. Brewer* (S. C.) 87 Am. St. Rep. 753, 758, "as that which is prohibited to be done directly cannot be accomplished by indirection, the legislature cannot declare the mere nonperformance of a contract

things a man could be guilty of was to refuse to pay his honest debts when he had the means to do so, and that whatever was dishonest was fraudulent *in foro conscientie*, and was so treated in a court of equity, fraud and dishonesty being synonymous terms. But mere refusal to apply money to the payment of a debt was held insufficient to constitute a fraud for which a debtor could be imprisoned. See also *Melvin v. Melvin*, 72 N. C. 384, 386; and *Re Concklin's Application*, 5 Ohio C. C. 78, *infra*.

Where the facts shown were such that the commissioner might legally infer fraud and consider them proof of the fraudulent concealment and removal of the debtor's goods, with intent on his part to defraud his creditors, within the meaning of the New Jersey statute, the court affirmed the order of the commissioner under which the debtor was arrested, the weight and credibility of such evidence resting with the commissioner. *Wire v. Browning*, 20 N. J. L. 364. In that case the proceedings were before the adoption of the present Constitution and remained unaffected by any operation which that instrument might have upon the New Jersey act of 1842.

Inasmuch as the Constitution of the state of New Jersey, adopted in the year 1844, art. 1, § 17, declares that "no person shall be imprisoned for debt in any action, or on any judgment founded upon contract, unless in cases of fraud," imprisonment for debt in the state of New Jersey is restricted to cases of fraud, which is not to be presumed but must be proved, and the act of 1842, which abolished imprisonment for debt in all actions founded upon contract, express or implied, except in certain cases and under certain circumstances specified therein, still remains in force, except so far as any of its provisions are repugnant to the Constitution, these provisions still regulating and controlling those cases under which persons may be imprisoned for debt in that state. *Hill v. Hunt*, 20 N. J. L. 476.

The fact that the debtor showed bad faith in procuring time for the payment of the debt by inducing the plaintiff to accept a worthless mortgage was held such a fraud as would authorize his arrest and imprisonment for debt under the New Jersey statutes. *Van Wagenen v. Coe*, 22 N. J. L. 581.

In *McKernan v. McDonald*, 27 N. J. L. 541, it was held that the fraud must be clearly proved by such testimony as would be required in a court of justice, and that the affidavit might be taken by any person competent to take it, and the order might be made by any judge or commissioner to whom the affidavit might be exhibited.

New York.

Although there does not seem to be any express provision in the Constitution of the state of New York prohibiting imprisonment for debt, yet there are statutory provisions in that state which prohibit such imprisonment except in cases of fraud and fraudulent dealings on the part of a debtor, and the same would seem to be in keeping with the provisions contained in the statutes of other states which have been passed for the purpose of carrying out the provision of their respective Constitutions.

Until the passage of the New York act of April 26, 1831, a *capias ad satisfaciendum*, upon which the judgment debtor might be arrested and im-

prisoned, was one of the usual and customary remedies to enforce the judgments of the courts, whether arising *ex contractu* or *ex delicto*; but that act, which was passed to abolish imprisonment for debt, and to punish fraudulent debtors, declares that no person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the nonperformance of any contract. But § 179 of the Code of Procedure provides for the imprisonment of a defendant in actions for the recovery of damages on a cause of action not arising on contract, where such defendant is not a resident of the state or is about to remove therefrom, or where the action is for an injury to person or character, or for injury to or wrongfully taking, detaining, or converting of property. *Merritt v. Carpenter*, 30 Barb. 66, 67.

The New York act abolishing imprisonment for debt was intended to prevent arrests for debt alone, but the legislature continued the power to arrest for certain wrongs committed in contracting the debt, thus clearly indicating an intention to subject the wrongdoer to the prescribed consequences of his unlawful act, and the same provisions are embodied in the New York Code. *National Bank v. Temple*, 30 How. Pr. 432, 436, 2 Sweeny, 344.

The legislature of New York intended to abolish imprisonment for debt in respect to all honest debtors, but still to continue it in respect to dishonest ones, with certain specific qualifications. *Moak v. De Forrest*, 5 Hill, 606.

By subdivision 4 of § 549 of the New York Code, a defendant may be arrested in an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability. *Valentine v. Riehardt*, 17 N. Y. Civ. Proc. Rep. 289.

And under § 179 of the New York Code, subd. 4, which provides that "when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking or detention of which the action is brought," it has been held that where the action is one of debt or of contract strictly speaking, the right of arrest cannot be sustained under the first clause of the above subdivision or clause of the section, as the action is one for fraud or deceit, and strictly the old form of action on the case. *Crandall v. Bryan*, 15 How. Pr. 48, 53.

So the question whether a defendant can, since such subdivision of the New York Code came into operation, be arrested in an action for fraud or deceit in the case of a sale of lands, depends upon the construction to be given to the word "obligation" as used therein. *Ibid*.

In the above case of *Crandall v. Bryan* the court held that the words "incurred an obligation for which the action is brought," as used in the above subdivision of the section of the Code, covered cases of fraud in fact where the remedy was not on the contract in form, where fraud was committed in some matter of contract whereby the plaintiff had been deprived of his property, the word "obligation" being used in a general sense, including all

to be a misdemeanor, for that would amount to an attempt to legalize imprisonment for debt." And so, in Tennessee, there was a statute which made it unlawful for any person, firm, corporation, etc., to refuse to cash any checks or scrip issued by them if presented to them within thirty days of the date of issuance,

and declared that any such person, etc., so refusing to cash in lawful money such checks or scrip would be guilty of a misdemeanor, and, upon conviction, should be fined not less than \$10, nor more than \$25. The constitutional provision in that state is that "the legislature shall pass no law authorizing imprisonment

cases, beyond those embraced in the first clause, when the fraud is committed "in contracting the debt for which the action is brought," the fraud being a violation of a legal duty, and not resting upon the contract.

The general rule is, that no debtor shall be imprisoned; but the exception is affirmatively and explicitly made that to punish fraud, the fraudulent debtor may be taken and committed as other criminals, and the legislature intended to punish the fraudulent debtor, and provided for the punishment by a clear discrimination between him and the honest man. *National Bank v. Temple*, 39 How. Pr. 432, 435, 2 Sweeny, 344; *People, Latorre, v. O'Brien*, 6 Abb. Pr. N. S. 63.

In the above case of *National Bank v. Temple* the court cited with approval the statement made by Kent in volume 2 of his Commentaries, p. 300, an "imprisonment for debt is not usual, unless the debt was contracted, in the first instance, under deceitful assurances, or unless the debtor has applied his property unfairly, or refused to give to his creditor any reasonable or satisfactory explanation. And in all those cases he deserves punishment."

Where the action brought against the defendant merely alleged that he converted the proceeds of certain stock unlawfully and fraudulently, and did not allege that he did the same in a fiduciary relation, nor was there any allegation of a violation of a trust, or wrongdoing, the court held that his arrest under § 549 of the New York Code was illegal, even though the action, since the amendment of such Code, was to be treated as in the nature of an action *ex delicto*. *Wilbur v. Allen*, 5 N. Y. Supp. 746.

In *Wanzer v. De Baum*, 1 E. D. Smith, 261, 264, it was held that the New York statute abrogated the right to hold to bail in certain cases, but not where the debt was fraudulently contracted, and that therefore where a debt was fraudulently contracted the right to hold to bail remained whatever the form of action might be, and through whatever changes the security might pass until the debt was satisfied or discharged, the legislature, in intending to discriminate between the classes of persons who should and should not be held to bail, not intending that a fraudulent debtor should enjoy the same exemption from imprisonment as the honest though unfortunate citizen, and it did not therefore exempt the fraudulent debtor from arrest.

The right to arrest a debtor under the New York Code depends, not upon the character of the action, but upon the question whether the defendant has concealed, removed, or disposed of the property so that it cannot be found or taken by the sheriff, and with the intent that it shall not be so found or taken, or with the intent to defraud plaintiff of the benefit thereof; and in such action the defendant cannot be held to bail as a matter of course. *Janique v. De Luc*, 1 Abb. Pr. N. S. 419, in which case the action was brought to recover lace and for damages for the unlawful detention thereof, an order for arrest having been made against the defendant, which order upon appeal was vacated.

North Carolina.

In order to avoid a violation of the constitutional provisions, and at the same time protect honest creditors against dishonest debtors, the North 84 L. R. A.

Carolina courts have held that it devolves upon the legislature, in cases of fraud, to enact such laws as are necessary in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto, and the Code of that state having so provided, the court must interpret and ascertain its meaning. *Premis v. Cohen*, 117 N. C. 54, 59.

Under art. 1, § 16, of the Constitution of North Carolina, which abolishes imprisonment for debt in that state, except in cases of fraud, there is no constitutional protection against arrest for fraud, whether the person be a resident or nonresident, and therefore a nonresident when within the jurisdiction of the court will not be allowed immunities not accorded to citizens of that state. *Powers v. Davenport*, 101 N. C. 226, 233, in which case the defendant was arrested for a fraud committed after contracting the debt, by concealing the property and resorting to other devices for defeating the creditor.

The sole object of the constitutional provisions is to protect the unfortunate but honest debtors, but not to shelter the knave or assist him in carrying out his purposes, nor to prevent the creditor from the use of all lawful means to procure satisfaction of his debt. *Brown v. Walk*, 8 Ired. L. 517, 520; *State v. Manuel*, 4 Dev. & B. L. 20, 34.

In *Melvin v. Melvin*, 72 N. C. 384, 386, the court stated that the words "except in cases of fraud," as used in such Constitution, were broad, and comprehended, not only fraud in attempting to hinder, delay, and defeat the collection of a debt by concealing property and other fraudulent devices, but embraced also fraud in making the contract, false pretenses and fraud in incurring the liability.

The 20th article of the Constitution of that state protects free negroes and free people of color who have not been guilty of fraud, and such section, under the operation of the act of 1778, prohibits the imprisonment of an insolvent debtor after his insolvency has been ascertained to be bona fide in any manner directed by law, either before or since the adoption of the Constitution. *State v. Manuel*, 4 Dev. & B. L. 20, 23.

So it has been held that such a debtor is protected from arrest at the suit of any creditor, not by virtue of the statutory provision, but by the constitutional provisions. *Burton v. Dickens*, 3 Murph. (N. C.) 108.

Fraud committed by a defendant in contracting a debt is sufficient to justify his arrest under the provisions of the North Carolina Constitution. *Paige v. Price*, 78 N. C. 10.

And it has been held that, even in cases of fraud, a debtor is entitled to be discharged upon giving bail or surrendering his property for the benefit of his creditors according to the terms of the statutes of that state. *Burgwyn v. Hall*, 108 N. C. 489.

In *Melvin v. Melvin*, 72 N. C. 384, 386, the defendant was an administrator fixed with assets to a certain amount, and there being no proof that he had embezzled the amount, or put it into his own pocket, the court held that although fixed with assets which should be forthcoming, he was not thereby found guilty of fraud so as to exclude him from the privilege of being exempted by the Constitution from imprisonment for debt, and was not to be treated as a dishonest debtor.

In *State v. Norman*, 110 N. C. 484, the defendant contended that chapter 444 of the Acts of 1899,

for debt in civil cases,"—terms which would seem to allow greater latitude of legislation in respect of cases of the class we are considering than our own provision,—and, bringing the statute to the test of this inhibition, the court said: "The act of the legislature in question, while not directly authorizing imprisonment

for debt, does attempt to create a crime for the nonpayment of debts evidenced by checks, scrip, or order, and for such crime provides a penalty, which may or may not be followed by imprisonment. In that way and for that reason the act is violative of the spirit if not the letter of the constitutional provision above

amended by chapter 106 of the Acts of 1891, which provides that if any person with intent to cheat or defraud another shall obtain any advances in money, provisions, goods, wares, or merchandise of any description from any other person or corporation, upon and by color of any promise or agreement that the person making the same will commence or begin any work or labor of any description for said person or corporation from whom said advances are obtained, and said person so making said promise or agreement shall unlawfully and wilfully fail to commence and complete said work according to contract, without lawful excuse, the person so offending shall be guilty of a misdemeanor and punished by a fine not exceeding \$50, or imprisonment not exceeding thirty days, was unconstitutional, as being in violation of § 16, art. 1, of the Constitution, which abolished imprisonment for debt, except in cases of fraud; but the court held that the offense denounced by the statute was not a failure to comply with the contract, but the fraud in making it, in obtaining advances with intent to cheat and defraud, and that therefore the act was constitutional.

So, in *McNeely v. Haynes*, 76 N. C. 122, it was held that one of two partners who had not been guilty of fraud, or connived at his partner's actions, in contracting the debt, could not be imprisoned for a debt incurred by his partner through fraud, and was therefore entitled to constitutional exemptions.

And in *Claffin v. Underwood*, 75 N. C. 455, there had been an arrest upon the ground of fraudulent concealment suggested by the affidavit of the plaintiff, and the court stated that the case of fraud not being proved, but on the contrary left open by consent, there was no authority for the writ of *ca. sa.*, and the defendant was entitled to his discharge, there being no case of fraud within the provisions of the Constitution.

Ohio.

It has been held that art. 1, § 15, of the Ohio Constitution of 1851, which provides that "no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud," clearly contemplated legislation before any arrest could be made in civil actions, though fraud might have intervened, and therefore courts, whether of general or limited jurisdiction, had now no common-law power to authorize arrests in such cases, and that the power, if it existed at all, must be conferred by express legislation. *Spice v. Steinruck*, 14 Ohio St. 212, 218.

And in *Re Concklin's Application*, 5 Ohio C. C. 78, it was stated that the legislature having provided for the poor and honest man by the homestead and exemption laws, the balance of his property was subject to his debts, and any act of the judgment debtor that prevented this balance from being so applied, constituted a fraud within the meaning of art. 1, § 15, of the Ohio Bill of Rights.

Oregon.

By art. 1, § 19, of the Constitution of Oregon, it is provided, "there shall be no imprisonment for debt, except in cases of fraud or absconding debtors," and § 106 of the Code provides that a debtor may be arrested in certain cases therein specified, that is to say, when he is a nonresident of the state, or is about to remove therefrom, or when he is guilty

of fraud in contracting the debt, or in concealing or disposing of his property, or when he has removed or disposed of his property, or is about to do so with intent to defraud his creditors.

In *Norman v. Zieber*, 3 Or. 197, 204, it was said that the above constitutional provision was negative in its character, and had only a restrictive effect, which would not, of its own force, and without legislation, authorize an arrest in any case, the legislature having definitely provided in what cases and in what transactions fraud should be a ground for arrest, the authority to arrest for fraud being limited to the kinds or classes of fraud which the legislature had designated, the words "about to remove therefrom," as used in § 106 of the Code being construed with reference to the subject-matter, and without reference to the constitutional restriction; and further, that if the language would admit of a construction consistent with the Constitution, such should be given rather than a construction that would conflict with the Constitution, and thus defeat the intent of the legislature by rendering their acts void; therefore the construction in order to be consistent with the Constitution must include the idea of "absconding" and any "removal" which was neither fraudulent nor an absconding, could not, under the Constitution, be made a cause of arrest.

In that case it was further stated that the act expressly named as causes of arrest removal of property with intent to defraud creditors, and by omitting to mention the removal of the person with such intent it made the conclusion unavoidable that the removal of the person with that intent was not of itself a ground for arrest, and that there must be an absconding, as distinguished from any other kind of fraud, to come within the provisions of both the act and Constitution. *Norman v. Zieber, supra*.

Pennsylvania.

In Pennsylvania the Constitution prohibits such imprisonment in cases wherein there is not a strong presumption of fraud, and after delivery of his estate for the benefit of his creditors in manner prescribed by law.

In *Gosline v. Place*, 33 Pa. 520, 529, it was stated that if the debt was fraudulently contracted, or if it be fraudulently attempted to be evaded, the remedy of imprisonment might be applied whether the fraud was committed in or out of the state in the same manner as actions of tort were allowed, without question as to the place where the wrong was done, the proceedings under the act being in their nature interlocutory.

Where the suit was not brought upon contract, but was for a fraud committed by the defendants for which it was contended the proper remedy was an action of deceit, it was held that it was not included in the Pennsylvania act of July 12, 1842, which merely abolished imprisonment in actions on contracts, leaving torts in the same situation as to remedies as before the passing of the act, and that therefore the defendant could be held to bail. *Sedgbeer v. Moore*, *Brightly* (Pa.) 197, 200.

In *Duff v. McDonough*, 2 Super. Ct. (Pa.) 373, where the defendant was imprisoned for not obeying a decree of the court which required him to deliver up a certain deed and also to pay the costs of the suit, the court held that the case of fraud being shown he was not within the provisions of the Pennsylvania act of 1842 (*Pamph. Laws*, 339)

cited. It is an indirect imposition of imprisonment for the nonpayment of debt, and is therefore clearly within the constitutional inhibition." *State v. Paint Rock Coal & C. Co.* 92 Tenn. 81. And this principle of applying the policy of the organic law on this subject to cases which may not be strictly within its letter

has received recent recognition by this court. *Ex parte Russellville*, 95 Ala. 19.

The statute involved in the case at bar is a much more flagrant attempt to authorize imprisonment for debt, in our opinion, than that denounced by the supreme court of Tennessee. It was not the avowed purpose of that act to

abolishing imprisonment for debt, and therefore his imprisonment was lawful.

But where the action was to recover for a breach of warranty on the sale of a horse, and the declaration was in form for discharge, in case of false warranty, without any averment of fraud or deceit, and the case was treated as one of an alleged breach of warranty on a contract, it was held that it was error in the court below to issue a writ of *ca. sa.*, as the case was not within the exceptions mentioned in the act abolishing imprisonment for debt, but was within the provisions of the section which forbid imprisonment. *Howard v. McKee*, 62 Pa. 409.

All the provisions of the Pennsylvania act of 1836 upon the subject of imprisonment for debt, so far as they relate to arrests upon writs of a *ca. sa.* in actions for the recovery of debts founded upon contracts, were forever swept out of existence by the act of 1842, and in *Blanco v. Bosch*, 8 W. N. C. 171, 172, the court stated, but this was so plainly written on the face of the act that he who runs might read, that the personal liberty of the debtor was no longer at the mercy of the creditor, and no man could be lawfully arrested in Pennsylvania for a debt without the warrant of a judge founded upon an affidavit bringing the debtor within the measures of the 3d section of the act of 1842.

In *Beers v. West Branch Bank*, 7 Watts & S. 365, it was held that when the legislature of Pennsylvania abolished imprisonment for debt in all but a few excepted cases, it virtually abolished special bail in all but those cases, and consequently every recognition with condition to surrender the body, and therefore the courts were not authorized to substitute anything for it, and the great constitutional right of trial by jury was not to be clogged without an explicit declaration of the legislative will, constitutionally expressed, and therefore appeals from awards of arbitrators were to be had without any sort of bail whatever.

South Carolina.

In South Carolina, art. 1, § 20, of the Constitution provides, no person shall be imprisoned for debt except in cases of fraud, and § 200 of the Code of Civil Procedure provides for arrests on warrant in six cases, the first four of which cover cases of fraud *ex nomine*, the fifth provides for the arrest of an absconding debtor, though the debt be not yet due, and the sixth authorizes arrest in an action for the recovery of damages in a cause of action not arising out of contract, when the debtor is about to remove from the state, or when the action is for injury to person or character, or for the wrongful taking, detaining, or wrongful conversion of property; and therefore imprisonment for debt being abolished in all cases but those of fraud, a warrant for arrest will not issue where fraud is not alleged. *The Bremen v. Card*, 38 Fed. Rep. 144, 145.

Vermont.

Under § 38 of the Constitution of Vermont (chap. 2, Vt. Rev. Laws 1880, p. 41), it is provided that the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering and assigning over bona fide all his estate, real and personal, in possession, reversion, or remainder, for the use of his creditors in such manner as shall be hereafter regulated by § 4 L. R. A.

law. And all prisoners, unless in execution or committed for capital offenses, when the proof is evident or presumption great, shall be bailable by sufficient sureties, nor shall excessive bail be exacted for bailable offenses.

Under the Vermont act of January, 1839, which abolished imprisonment for debt except in certain cases therein specified, it is not sufficient for the creditor to state merely that his debtor was about to leave the state, but he must show that he was about to abscond and had secreted his money or other property, before he can have an attachment against his body. *Aiken v. Richardson*, 15 Vt. 500.

In *Bank of Vergennes v. Barker*, 27 Vt. 243, the writ in an action of assumpsit upon bills of exchange, issued as a *ca. sa.* and was served by arresting the defendant, who pleaded that he was a citizen and inhabitant of another state, privileged from arrest, as he was not about to abscond or remove from the state, but the court held his arrest legal, the creditor's affidavit showing, and the words of the statute "abscond or remove" implying, such absconding or removal as such a person was capable of. *Bank of Rutland v. Barker*, 27 Vt. 293, to the same effect.

Washington.

In *Burrichter v. Cline*, 8 Wash. 125, action was brought upon a foreign judgment the defendant being arrested and held to bail on an affidavit charging that he was about to leave the state with intent to defraud his creditors, upon which judgment was given for plaintiff and defendant appealed. The court upheld the defendant's claim that his arrest was illegal and improvident, on the ground that by article 1, § 17, of the Constitution imprisonment for debt, except in the case of absconding debtors, was abolished, and upon the further ground that the affidavit was insufficient under the provisions of the Code, an absconding debtor being one who leaves, or is about to leave, the jurisdiction, or who conceals himself within the jurisdiction for the purpose of avoiding the process of the court.

Wisconsin.

In *Re Mowry*, 12 Wis. 53, the applicant for mandamus sought to be discharged from imprisonment under an execution rendered against his body, upon a judgment in an action for damages for the wrongful and fraudulent misapplication and conversion of school-land certificates deposited as security, his contention being that such execution would not lie, as the judgment was a debt arising out of a contract and therefore within the inhibition imposed by § 16, art. 1, of the state Constitution; but the court held that he was not entitled to the privilege from arrest therein contained.

Where a debtor is about to leave the state, either openly or secretly, with the intention of hindering, delaying, or defrauding his creditors, he is considered as an absconding debtor, and in such a case the state legislature may authorize his arrest and imprisonment,—especially where the state Constitution declares "there shall be no imprisonment for debt, except in cases of fraud and absconding debtors." *Norman v. Manciette*, 1 Sawy. 484, 459.

For further cases showing that the constitutional inhibition does not apply in cases of fraud, see *State v. Benson*, 28 Minn. 424, *infra*, IV. a, *Fines and pen-*

enforce the payment of a debt by means of a prosecution under it. This one cannot be read without conviction that its purpose is to impose imprisonment for debt, and to coerce the payment of a debt by the duress it authorizes. Its requirement that the fine shall be paid only in money, that it shall be double the amount of

the deposit, and that one half of it—that is, a sum equal to the amount deposited—shall go to the person who made the deposit, tends, at least, to show that coercion of payment of the debt which the depositary owed the depositor, —for the transaction created the relation of debtor and creditor between them,—by means

alties as debts; Tryon v. Hassinger, Clark (Pa.) 184, supra, III. a; United States v. Walsh, Deady, 281, 285, 1 Abb. (U. S.) 66, and Com., Colvert, v. Kerr, 25 Pitts. L. J. N. 8, 367, infra, IV., Fines and penalties as debts; Armstrong v. Ayers, 19 Conn. 540, 545, supra, III. a; Bromley v. People, 7 Mich. 472, 487; Parker v. Follensbee, 45 Ill. 473, 478, and Ex parte Prader, 8 Cal. 239, supra, II. a, What are debts in general. See also cases under supra, II. c, Breach of promise to marry.

IV. Fines and penalties as debts.

a. In general.

The cases may be regarded as unanimous in holding that fines and penalties imposed upon defendants for the violation of state laws are not debts within the meaning of the constitutional inhibition, and that therefore a defendant can be imprisoned for nonpayment thereof.

In support of this doctrine the courts have stated that certain duties are cast upon all citizens for the welfare of society, and when a citizen by his own misconduct exposes himself to the punitive powers of the law, the expense incident to his prosecution and conviction may result in subjecting the defaulter to a money liability, but liabilities thus incurred are not debts incurred by contract *inter partes*, but are the result of being members of the social compact, or body politic, and are therefore not within the constitutional prohibition. *Lee v. State, 75 Ala. 29, 30.*

So, a penalty is imposed as a quasi punishment for the violation of law, or the neglect or refusal to perform some duty to the public, or individuals enjoined by law, in furtherance of some public policy, and as a means of procuring obedience to law, and the persons who incurred them are, either in morals or in law, wrongdoers and not simply unfortunate debtors unable to perform their pecuniary obligations, and therefore the constitutional provisions prohibiting imprisonment for debt were not intended to apply to, or include, such cases. *United States v. Walsh, Deady, 281, 285, 1 Abb. (U. S.) 66.*

For this reason, therefore, fines, forfeitures, mulcts, damages for a wrong or tort, are not debts within the clause of the Alabama Constitution, § 21, of the Declaration of Rights, prohibiting imprisonment for debt. *Lee v. State, supra.*

And the Alabama statute of February 23, 1883, passed for the purpose of securing the payment of fines and costs in criminal cases in the courts of that state, is not contrary to the provisions of the Constitution prohibiting imprisonment for debt. *Ibid.*

The same conclusion was reached in *State v. Leach, 75 Ala. 36*, wherein the defendant moved in arrest of judgment, upon the ground that the above act was unconstitutional, the court reversing the judgment of the court below which arrested the judgment of a lower court, and discharging him, the court sustaining the authority of *Lee v. State, supra.*

So, the imprisonment of a defendant for nonpayment of a fine imposed upon his conviction for a violation of § 5480 of the United States Revised Statutes, in using the postoffice establishment of the United States in carrying out a scheme of fraud, has been held not to be imprisonment for debt within the meaning of art. 1, § 15, of the California Constitution, or with § 980 of the Revised 34 L. R. A.

Statutes of the United States, under which no person can be imprisoned for debt in any state on process issuing from a court of the United States, where, by the laws of such states, imprisonment for debt has been or shall be abolished. *Re Sanborn, 59 Fed. Rep. 583.*

The prohibition of the Illinois Constitution against imprisonment for debt does not extend to actions for torts, nor to fines or penalties arising from a violation of the penal laws of the state. *Kennedy v. People, 122 Ill. 649, 653.*

So, it has been held that § 452, div. 14, § 14, chap. 38, Ill. Rev. Stat. 1885, which provides that when a fine is inflicted the court may order, as a part of the judgment, that the offender be committed to jail, until the fine and costs are fully paid, or he is discharged according to law, is not unconstitutional, as it can work no hardship, for the reason that § 455 of the same chapter provides that whenever it is made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fees or costs of prosecution for any criminal offense, hath no estate wherewith to pay such fine or costs, or costs only, it shall be the duty of the court to discharge him. *Ibid.*

Neither does such prohibition include fines or penalties arising from the violation of municipal ordinances or penal laws, and the commitment of a defendant until the fine is paid is necessary in such cases. *Chicago v. Kenney, 35 Ill. App. 57, 66.*

And this is so for the reason that the entire section clearly indicates that reference was had to debts arising *ex contractu*, and embraced debts which exist from the relation of debtor and creditor. *Rioh v. People, 66 Ill. 513, 515.*

And in *McCool v. State, 28 Ind. 127, 131*, the court stated that in prosecutions for crimes fines were assessed against the parties convicted as a punishment for their criminal acts, such fines when assessed becoming a fixed liability to pay the state a definite amount of money; yet such fine was not a debt, and the fact that it was payable to the state was no ground for distinguishing it from the costs in such prosecution, which were payable to individuals, neither being a debt within the meaning of the constitutional provisions.

So, in *Smith v. State, 23 Ind. 132*, the court held there was no error in ordering the defendant to be committed to prison until the fine and costs were paid, in an information for retailing spirituous liquors without license.

Where the judgment directed that the plaintiff should be imprisoned until the fine and costs were paid, and it was conceded that § 484 of the Iowa Code in terms so provided, but it was contended that the costs were no more than a debt and that imprisonment for debt had been abolished by art. 1, § 19, of the Constitution, the court stated that, even conceding such to be the case, the plaintiff was not entitled to be discharged until the fine was paid or satisfied as contemplated by law, and that if the judge below was of opinion that the plaintiff could not be imprisoned for the nonpayment of costs, he should in an appropriate order have so directed. *Jackson v. Boyd, 53 Iowa, 538, 539.*

The 44th section of the third article of the Maryland Constitution declares, no person shall be imprisoned for debt, and in *State v. Mace, 5 Md. 337, 350*, it was held that a fine imposed by a justice of the peace for a violation of the Maryland Act of 1854,

of the restraint which the imposition of the fine itself immediately put upon the defendant, not to speak here of his imprisonment preliminary to the trial, and, that failing to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of

the enactment of the statute. And what doubts on this point might have been left, had the statute stopped here, are removed beyond peradventure by its further provision that payment to the depositor at any time before conviction "shall be a good and lawful defense to any prosecution under this act." There can-

chap. 138, relating to lottery tickets, was not a debt within the constitutional meaning of the term.

In holding that a fine was not a debt within the meaning of the Maryland Constitution prohibiting imprisonment for debt, the court stated that it was not the intention of the Convention which framed the Constitution to destroy the whole police system of the state, or to impose upon the legislature the necessity to expressly provide by new legislature imprisonment in all cases in which fines and penalties had been pronounced against the violators of the public law. They used the term "debt" in its popular sense, and the people evidently so understood it. They regarded it as a protection to the unfortunate, and not an immunity to the criminal. *State v. Mace, supra.*

But in *Day v. State*, 7 Gill, 322, it was held that fines recovered before a justice of the peace in an action for debt for penalties imposed by the Maryland act of 1846, relating to lotteries, were civil actions, and were in the nature of actions in debt in the same way as if they had been for money had and received.

In *State v. Benson*, 28 Minn. 424, the defendant was charged before a justice of the peace under § 23 of chap. 124 of Minn. Gen. Stat. 1873, with procuring food, entertainment, and accommodation without paying therefor, and with intent to cheat and defraud the hotel keeper of the same, and with removing his baggage from the hotel with a like fraudulent intent, and his contention was that the statute was unconstitutional for the reason that it attempted to imprison for debt. The court held the contrary, the statute imposing the penalty, not because, nor for the purpose, of collecting the debt, but because of the fraud, and that therefore a prosecution and punishment under such statute in no way affected the debt.

The Constitution of Missouri, art. 2, § 16, provides that imprisonment for debt shall not be allowed except for the nonpayment of fines and penalties imposed for violations of law, and this by implication is conclusive that the proper legislative authority may direct imprisonment for the nonpayment of fines and penalties without violating the Constitution. *Ex parte Kiburg*, 10 Mo. App. 442, in which case the prisoner was committed for nonpayment of a fine for violating an ordinance prohibiting the sale of lottery tickets.

In *State v. Cannady*, 78 N. C. 539, 544, it was held that neither a fine nor costs inflicted as a punishment was a debt within the meaning of the North Carolina Constitution.

So, a fine imposed for an offense against the criminal law of the country is a punishment, and after it has been judicially imposed the same means may be used to enforce its collection which, by law, the state may employ to collect its debts. It may for this purpose be regarded as a debt due to the state, yet it is not a debt within the meaning of the 39th section of the Constitution of North Carolina. *State v. Manuel*, 4 Dev. & B. L. 20, 26.

And in *Re Beall*, 26 Ohio St. 195, where the applicant, convicted of assault and battery, had been sentenced to imprisonment and the payment of a fine, and after serving his term of imprisonment was arrested on a writ of execution, no property being found, and again imprisoned, and it was contended that the provisions of the Ohio act of April 7, 1863, authorizing such arrest and imprisonment,

did not apply to the case, it being no part of the judgment that he should stand imprisoned till the fines and costs were paid, and further that even if such provision did apply the act was unconstitutional,—the court held that the statute authorized the proceedings, and that no provision of the Constitution had been violated.

The Oregon act of assembly allowing the arrest of a defendant in an action for a penalty is not in conflict with the Oregon Constitution, and is therefore valid and binding. *United States v. Walsh*, Deady, 231, 235, 1 Abb. (U. S.) 66.

In the above case a match manufacturer sold his goods without stamping them pursuant to the law. It was held that he thereby committed a fraud against the United States, and might be arrested and imprisoned in an action brought by the states to recover the penalty incurred by such violation, in the same way as if the debt had been incurred by fraud.

So, a judgment recovered for a penalty prescribed by law as a punishment for the commission of an act forbidden by a clear statutory provision is not within the purview of the Pennsylvania act to abolish imprisonment for debt, as it is not a judgment founded on a contract but a penal infliction intended to discourage the violations of the law, in the same manner as a fine imposed upon an offender after a conviction in a court of sessions. *Com. v. Colbert*, v. Kerr, 25 Pitts. L. J. N. S. 337, in which case the defendant was convicted and fined under the Pennsylvania act of May 21, 1865, relating to oleomargarine, which had for its object the protection of the public health, and the prevention of the adulteration of dairy produce and fraud in the sale thereof.

In *Cagle v. State*, 6 Humph. 391, the plaintiff was convicted of misdemeanors and ordered into custody of the sheriff until he secured the fines and costs. He was held in custody until he gave bond with surety, with the condition that it should be void if he appeared and paid the debt and costs, or made surrender of his property, or took the benefit of the act passed for the benefit of insolvent debtors, the benefit of which act he took, but the court refused to permit him to take the oath and rendered judgment against him for final costs considering the deed executed by him as fraudulent. It was held that the court had power to commit such person, and that the sheriff had a right to take such bond, and that the power of the court to so permit the defendant was not affected by the Tennessee act of 1842, which repealed the writ of *ca. sa.*

So, in *Hill v. State*, 2 Yerg. 247, the defendant, who was indebted for gaming, pleaded guilty, was fined and adjudged to stand committed until the fine and costs were paid, or until he was otherwise discharged by due course of law, and appealed, upon the ground that the court could not make such an order. It was held that the court below had such power, and that no practice was better settled; but that the defendant in such a case stood precisely on the same footing of one imprisoned on a *ca. sa.* and was entitled to the benefits of the insolvent debtor's act.

And the provisions of the Texas Constitution, which prohibit imprisonment for debt, do not apply to the case of fines imposed for the violation of the laws, and for the punishment of crimes and misde-

not be two opinions as to the intent and meaning, or the effect upon the whole enactment, of this last and most remarkable provision. It is a declaration of the baldest and most direct character to one party to a transaction, whereby he has incurred a debt to the other, in the name of the state, that, unless he pays that debt, he

shall be arrested, held to trial, tried, convicted, fined, and imprisoned at hard labor, and this obviously not for any taint of criminality in the transaction out of which the debt arose, but purely and simply for the nonpayment of the debt. For this default, and until it is purged either by simply paying the debt and

means, and such fines are not debts within the meaning of the Constitution. *Dixon v. State*, 2 Tex. 481.

In upholding the constitutionality of the Texas act of 1886, § 47, 1 Stat. 187, passed for the punishment of crimes and misdemeanors, the court stated that it could not have been the intention of the legislature to degrade the subject of misfortune to the level of the criminal, and to confound debt and crime, and that there was nothing to be found in the legislature of the country to warrant such a supposition, but on the contrary they had been made the subject of distinct and quite dissimilar provisions, the constitutional guaranty having been given as a shield to protect the unfortunate debtor, the act of 1886 having been enacted to punish, and thereby restrain, the offender against the laws of society, and that fines and costs imposed for offenses were not so properly the principal as an incident; not the end, but a means of enforcing obedience to the laws, and that the object of the imprisonment authorized by the 47th section of the act in question was not so much to enforce payment as to insure punishment, the great object and design of the penal laws being the prevention of crime. *Dixon v. State*, *supra*.

Again, in *Ex parte Robertson*, 27 Tex. App. 623, the petitioner applied by way of habeas corpus to be released from imprisonment for contempt of court in the nonpayment of a fine imposed for a civil contempt, upon the ground that the fine and imprisonment inflicted were imposed for the purpose of securing and enforcing the payment of a debt due to the plaintiff in a sequestration suit, and therefore in contravention and violation of the 18th section of the Bill of Rights of the Constitution, art. 1, which declares that no person shall ever be imprisoned for debt; but the court held that such fine was not a debt within the meaning of the Constitution.

And in *Graham v. Chicago, M. & St. P. R. Co.* 53 Wis. 473, 478, it was stated that notwithstanding the state Constitution abolishing imprisonment for debt, arising out of or founded upon contract, express or implied, yet the statutes of that state had always provided that the defendant might be arrested and held to bail in an action to recover a forfeiture or a penalty.

In *Re MacDonald (Wyo.)* 83 Pac. 18, 20, the petitioner, convicted and fined for the publication of an unlawful and malicious libel, contended that his imprisonment for nonpayment of the fine was contrary to art. 1, § 5, of the Wyoming Constitution, which provides no person shall be imprisoned for debt except in cases of fraud; but the court held that such imprisonment could not be considered as imprisonment for debt within the meaning of the Constitution.

But in *Glens Falls Paper Co. v. White*, 58 How. Pr. 172, upon a motion for an order to arrest the defendant in an action to recover a debt owing the plaintiff by the association, under a statute making the trustees of such association who failed to file a report liable for the debts of the association, the plaintiff contending that such debt was a penalty inflicted upon the defendant by reason of the non-compliance with the law, the court held that the debt thus incurred was not a fine or penalty within the meaning of subdiv. 1, § 549, of the Code of Civil Procedure, and therefore denied the motion. The court stated that to subject a party to arrest, the

cause of action must be a fine or penalty and not something of a penal character, the court not being disposed to order the arrest of a citizen in a doubtful case, or to strain a statute in that direction,—especially for the sake of calling a debt a penalty in order to procure an arrest while the law had abolished imprisonment for debt.

And it has been held that although the court has power to imprison a party for disobeying its lawful order as to property in a civil case when having power to comply with the order, yet the court has no power, upon making an order committing the party, to impose a fine or imprisonment as punishment for contempt, neither has it power to adjudge the payment and imprisonment until the costs and expenses are paid in favor of the opposite party, for the reason that by so doing it would contravene the provisions of the Missouri Constitution prohibiting imprisonment for debt. *Ex parte Crenshaw*, 80 Mo. 447, 453.

See also *State v. Paint Rock Coal & C. Co.* 22 Tenn. 81, 46 Pa. V.II.

b. Fines imposed by city authority.

With respect to fines and penalties inflicted upon a defendant for the violation of city ordinances, the courts have almost unanimously held that the imprisonment inflicted upon the defendant is no violation of the constitutional provisions.

Where the execution is levied against the body of the offender for the violation of a city ordinance and the charter of the town gives such remedy, the provisions of the Constitution are not thereby violated. *Brown v. Jerome*, 102 Ill. 871.

In *Hardenbrook v. Ligonier*, 95 Ind. 70, it was contended that the penalty imposed by the ordinance of the town regulating the sale of intoxicating liquors which was by way of imprisonment in case of conviction and failure to pay the fine assessed, was contrary to the provisions of the Indiana Constitution prohibiting imprisonment for debt. The court held that a penalty accruing for a breach of an ordinance of a municipal corporation was not a debt within the meaning of the section of the Constitution, the court citing in support of its authority, *McCool v. State*, 23 Ind. 127. To the same effect, *Lower v. Wallick*, 25 Ind. 68; *Turner v. Wilson*, 49 Ind. 581; *McIlvain v. State*, Emery, 87 Ind. 602; *Flora v. Sachs*, 64 Ind. 157; *Lane County v. Oregon*, 74 U. S. 7 Wall. 71, 19 L. ed. 101; *Dunlop v. Keith*, 1 Leigh, 430, 19 Am. Dec. 755; *Caldwell v. State*, 55 Ala. 133; *Hibbard v. Clark*, 56 N. H. 155, 23 Am. Rep. 442; *Camden v. Allen*, 26 N. J. L. 398.

A city charter authorizing the confinement of offenders against the by-laws and ordinances of the city until the fines and costs are paid, or discharged by labor, or otherwise, and making the costs a part of the punishment or penalty, do not conflict either with the provisions of the Kentucky statutes or Code, neither are they in conflict with the state or Federal Constitution. *Berry v. Brian*, 86 Ky. 5, 9, 10.

Where in proceedings for the violation of a city ordinance, it was contended that the petitioner was entitled to be discharged, for the reason that he was not proceeded against in the name of the state but was sued in the name of the city if a civil action, and that the recovery had was for a debt, and therefore as there was no imprisonment for debt in that state (Missouri) he was illegally held in custody, the court stated that while there could

accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and the expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for taking the deposit, if the preliminary imprisonment

shall have the desired effect of extorting the money he owes the depositor out of him; and if, as is the case here, the compulsion of preliminary imprisonment fails of its intended effect, he may, under the guise of punishing an act which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminal-

not be any imprisonment for debt in that state, yet imprisonment for the nonpayment of a fine duly imposed was fully authorized, the constitutional provision interpreting itself; and this was so even though in one sense it might be said that every fine imposed for a violation either of a law of the state or an ordinance of a municipal corporation, either in criminal proceedings by the state or in a civil proceeding quasi criminal, in the name of the corporation, was a debt against the party upon whom it was imposed and who was adjudged to pay it; still it was nevertheless a debt for a fine for the nonpayment of which the party against whom it was adjudged might be imprisoned. *Ex parte Hollwedell*, 74 Mo. 393, 400.

So, in *Deadwood v. Allen* (S. D.) 68 N. W. 338, where the complaint charged the violation of a city ordinance and defendant contended that unless the action was criminal the enforcement of such ordinance by imprisonment for the fine imposed was contrary to § 15, art. 6, of the Bill of Rights, the court held that such contention was not sustainable as the provisions in the Bill of Rights in question related only and expressly "to debts arising out of or founded upon a contract" and therefore such imprisonment was not contrary to the Constitution.

In *Mosley v. Gallatin*, 10 Lea, 494, where the keeping of gaming tables was made a misdemeanor by § 10 of chap. 15 of the by-laws and ordinances of the defendant corporation, the penalty being a fine of not less than \$3 nor more than \$50, and the court in its judgment directed that if the fine and costs be not paid or secured the defendant should be committed to the workhouse until the same were paid, and it was insisted that the act was repugnant to the state Constitution, § 18, art. 1, which prohibited imprisonment for debt, and which provided that the legislature should pass no law authorizing imprisonment for debt in civil cases,—the court held that such provisions in the Constitution had no reference to the enforcement of the collection of fines, penalties, and costs from the defendants, who had been convicted of misdemeanors and the violation of the statute of the state, or the ordinances of a municipal corporation, and that therefore the court had power to make such order against the plaintiff in such action.

In *Markie v. Akron*, 14 Ohio, 596, 591, it was held that an ordinance prohibiting the sale of intoxicating liquors under a penalty was constitutional, and that the proceedings under such ordinance were in the nature of an action for debt, although quasi criminal in their nature.

Where jurisdiction was by the city charter expressly given to the mayor's court for the recovery of fines, forfeitures, penalties, debts, and other demands recognizable in the city court, "it was held that the exercise of such jurisdiction was clear of all objections on constitutional grounds, but where the by-law of a city corporation enacted a penalty for a misdemeanor, and imposed imprisonment in default of payment on conviction by the mayor, it was held void; and even though the city charter did give him a right to imprison on summary conviction, and without appeal to a jury, it was held that such charter would be so far unconstitutional and void. *Barter v. Com.* 3 Penn. & W. 253.

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In *Ex parte Russellville*, 95 Ala. 12, the charter of the municipality gave authority to the city officials to impose hard labor or imprisonment in case of nonpayment of the fine and costs on conviction for violating the liquor law, "until the fine and costs are paid." It was held that the act did not contemplate hard labor or imprisonment as alternative punishment, or as punishment to be imposed in lieu of the fine, but as a means of coercing the payment of the fine, and that while it might be that the defendant could be put to hard labor at a reasonable rate of compensation, for a sufficient length of time for his earnings to equal the fine and costs, yet, in so far as the provision in question undertook to authorize his imprisonment until the fine and costs were paid, it was inoperative and void, otherwise the imprisonment might be for a period as indefinite as the duration of the defendant's life, and have much in common with imprisonment for debt, which was forbidden by the organic law, hence involved the violation of the policy of general jurisprudence.

So, in *Odell Trustees v. Schroeder*, 58 Ill. 353, it was held that a town officer had no power to imprison, or take in custody, one against whom a verbal order of commitment for nonpayment of a fine had been made by a police justice, for breach of a town ordinance, for the reason that the liberty of the citizen cannot be so trifled with, the Constitution prohibiting it, such imprisonment not being a rightful imprisonment through proceedings appointed by the law.

And where the action was brought to recover a penalty for the violation of an ordinance prohibiting the sale of liquors without a license, and judgment was rendered against defendants, and they were committed to jail until fine and costs were paid, it was held upon appeal that the county court erred in adjudging imprisonment against defendant, the action being in debt and the suit a civil one. *Kinmundy v. Mahan*, 72 Ill. 462, 464.

See also, *Ex parte Kiburg*, 10 Mo. App. 442; *Chicago v. Kenney*, 85 Ill. App. 57, 66, *supra*.

V. Taxes as debts.

In cases where it has been sought to enforce the payment of taxes by attachment and imprisonment, the question has been raised whether such proceedings are unconstitutional as being contrary to the provisions of the state Constitutions prohibiting imprisonment for debt. The courts have, however, for the most part, held such proceedings regular, holding that taxes are not debts within the constitutional inhibition.

Taxes are not debts within the meaning of the Constitution of the United States. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes, and is not founded upon contract. It does not establish the relation of debtor and creditor between the taxpayer and the state. It does not draw interest, and it cannot be pretended that an act providing for the collection of debts would include, by force merely of the term "debt," the collection of taxes also. *Perry v. Washburn*, 20 Cal. 318, 350.

So, in *Geren v. Gruber*, 26 La. Ann. 694, 697, it was said that taxes were not debts in the ordinary sense of that word, but were forced contributions for the

ity or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of a debt, be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction.

There can, in our opinion, be no sort of doubt that this enactment is violative of the constitutional provision, and therefore void. The trial court erred in overruling the demurrers which went to this point, and the motion in arrest of judgment based upon them. Its judgment will be reversed, and a judgment will be here entered discharging the defendant.

Reversed and reentered.

support of the body politic, and it was competent for the sovereign to provide how these contributions should be collected, and to say whether the right of preference should exist and for what length of time. In that case, however, the question as to whether a tax was a debt did not arise in proceedings in which it was sought to imprison the delinquent taxpayer for nonpayment, but the proceedings were such as that he sought to enjoin the tax collectors from a sale of the tax premises.

So, in *Camden v. Allen*, 26 N. J. L. 308, 402, where an action of debt was brought for the recovery of taxes assessed by the city authorities, it was held that a tax was not a debt, neither was it in the nature of a debt, but was an impost levied by authority of the government upon its citizens or subjects for the support of the state, and that the remedies for its recovery were more stringent than that which the action of debt would afford, particularly in the coercive power in imprisonment.

Again, in *State, Linn, v. O'Neil*, 55 N. J. L. 58, it was said that taxes were not debts in the ordinary acceptance of the term, and that therefore statutory measures might be resorted to for their collection. The Revised Statutes of this state, p. 1143, § 12, give power to arrest the body of the delinquent taxpayer where no goods, etc., of his are found wherewith to satisfy the demand.

And in *Charleston v. Oliver*, 16 S. C. 47, 52, the question arose whether a license tax was a debt in the sense of the word as used in the clause of the state Constitution which abolished imprisonment for debt, except in cases of fraud. The court held that it was not, stating that there was not any doubt but that the framers of the Constitution, and the people who adopted it, designed to use the word "debt" in the clause under consideration in its ordinary sense, and did not intend that it should be held to embrace taxes levied for the support of the government, or any of its agencies; the manifest object was to deprive the citizen of the power to have his fellow citizen imprisoned for nonpayment of his debt, which power in the hands of private individuals had long been a subject of discussion, and had been previously circumscribed by enactment by the legislature of the insolvent debtors' and prison bound acts, which had no application to taxes, and the object of the clause in question undoubtedly was still further to limit this power by confining it to cases of fraud.

In *Webster v. Seymour*, 8 Vt. 125, 140, the court stated that in the most extensive sense of the term "debt," everything was a debt which was of absolute obligation, but in its more limited sense it imports only a particular kind of duty, and in that sense was substantially synonymous with contract; that in that sense it was more generally used in statutes relating to the executions of process, and especially in those which were intended to mitigate the rigor of the common law; and to create certain privileges and exemptions in behalf of a debtor; that it was a distinctive term and had reference in such cases to a distinction between different classes of debtors while founded in the nature of things, and which had an important bearing upon statutory provisions of that character, and that the common use of the term, in similar statutes, required that it should be taken in its limited sense, and therefore a

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citizen of that state, who was liable to taxation by reason of his property, did not acquire an exemption from taxation or from arrest for nonpayment of the taxes by enlisting in the United States army.

In *Com. v. Byrne*, 20 Gratt. 165, 184, the petitioner sought to be released from imprisonment for the nonpayment of a tax, upon the ground, *inter alia*, that the law authorizing an arrest and imprisonment in such cases was unconstitutional and void by virtue of article 5 of the Amendments to the Constitution of the United States, which declares that no person shall be deprived of life, liberty, or property without due process of law, and also contrary to that part of clause 10 of the Bill of Rights, art. 1 of the Constitution of Virginia, which declares that no man shall be deprived of his liberty except by the law of the land, or the judgment of his peers. The court held that such bill was not contrary to either Constitutions and that the payment of such taxes could be compelled by imprisonment when no personal property was found, the 5th article of the Amendment of the United States Constitution being a limitation of the power of the national government inapplicable to state legislation.

So, in *Appleton v. Hopkins*, 5 Gray, 530, 532, the question was whether the laws authorizing the arrest of a party on a warrant in distress for the nonpayment of a tax assessed pursuant to the laws of the commonwealth, had been repealed by the Statute of 1855, chap. 444, abolishing imprisonment for debt and punishing fraudulent debtors. The court held that such statute had no application to the case of imprisonment for the nonpayment of taxes, even though the language of the statute "imprisonment for debt is hereby forever abolished in Massachusetts" was pointed and emphatic.

In *Appleton v. Hopkins*, *supra*, it is said that in a certain large and general sense taxes may be said to be debts due to the commonwealth, the county, town, and parish respectively, but in the mode of collection and enforcement they have always been regarded as distinct. The special provisions by statute for their allowance implies that they would not in the view of the legislature be included under a general provision of law respecting debts.

But in *Cooper v. Savannah*, 4 Ga. 68, a tax had been imposed by the city ordinance upon free persons of color, and in case of nonpayment the act provided that such persons should be arrested and committed to the common jail, and there confined until the same was paid. It was held that such imprisonment was illegal by the laws of the state, and therefore void.

Again, road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. *Re Dassler*, 35 Kan. 678, 684.

VI. Costs as debts.

With respect to the constitutionality of the imprisonment of a debtor for the nonpayment of the costs in an action, the question would seem largely to depend upon the question whether such action is civil or criminal in its nature, and also upon the question whether the action, if civil, arises from contract, express or implied, or from a tort committed by the defendant. The courts hold cases of

TENNESSEE SUPREME COURT

STATE of Tennessee, *Appt.*,

v.

Sallie YARDLEY.

1 (36 Tenn. 544.)

1. The subject of Laws 1895, chap. 67, providing for the protection of hotel, inn, and

boarding-house keepers, is sufficiently embraced in the title "An Act to Protect Hotel, Inn, and Boarding-House Keepers," although the means or instrumentalities for such protection are not recited therein.

2. Acts 1895, chap. 67, entitled "An Act to Protect Hotel, Inn, and Boarding-House Keepers," is not unconstitutional on

Contract, that such costs form part of, and become incident to, the debt. In other cases they are not so unanimous, the weight of authority being in favor of holding that, in cases of torts or in criminal cases, they are not debts within the meaning of the state Constitutions.

a. *Debts in civil actions.*

There is no law which authorizes the imprisonment of a defendant for the nonpayment of costs, except where the judgment is also for fine or imprisonment. The authority to imprison in such cases must be expressly conferred by statute and will never be inferred. *State v. Jackson*, 46 Ark. 137.

Where the defendant was adjudged to pay the costs occasioned by his removal from the office of constable, and the court refused to order him to be confined in the county jail for nonpayment thereof, and there was also a motion to tax a fee for the prosecuting attorney, upon which the state appealed, it was held that the costs in such proceedings constituted a mere debt to the officers of the court for which the defendant became liable upon his removal, but that he could not be made to work out such costs, the only remedy being by execution, imprisonment for debt being abolished. *Ibid.*

The nonpayment of costs by a guardian *ad litem* does not constitute a tort or a fine within the meaning of § 15 of the Constitution of North Dakota, and hence the omission to pay, not being a contempt of court, will not authorize a court to arrest and incarcerate the guardian on nonpayment of any civil process whatsoever. *Granholm v. Swelgie*, 3 N. D. 478.

And it has been held that although a court may suspend judgment upon the understanding that a defendant will compensate an injured party by payment of money, it adds no force to such a condition to make it a matter of record. The collection of such damages cannot be enforced by imprisonment without coming in conflict with the constitutional inhibition against imprisonment for debt; but when a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs have not been paid, the judgment may be enforced for such failure. *State v. Whitt*, 117 N. C. 804, 808. *State v. Crook*, 115 N. C. 760, 22 L. R. A. 260, to the same effect.

In *Meace v. Crump*, 12 W. N. C. 534, in an action of trespass after judgment and taxation of costs a. ca. sa. was issued to enforce their payment. The court held the judgment for costs was a debt, although it arose out of a tort, and therefore made the rule to set aside the ca. sa. absolute.

In *Lang v. Finch*, 166 Pa. 255, a *capias ad satisfaciendum* for the costs was issued and executed in an amicable action of ejectment, and thereupon the court quashed the writ and discharged the defendant from custody, and the plaintiff then entered a rule for leave to issue an alias ca. sa. for costs. The sole question was whether the defendant was liable to arrest and imprisonment for the costs in question, and the court stated that the plaintiff's right of action, as well as the remedy of which he availed himself, sprang, not from a tort, but solely from a breach of contract, and hence the defend-

ant was within the protection of the act of July 12, 1842, abolishing imprisonment for debt, the judgment containing no element of damages in the nature of mere profits; and that, so far as the costs of suit might be regarded as a species of damages, they were in that case merely a debt, arising, not from tort, but from a breach of contract. The court therefore affirmed the rule discharging the writ.

In *Selden v. Conard*, 2 Pa. Dist. R. 664, the defendant imprisoned for costs in an action of ejectment claimed his discharge under § 1 of the Pennsylvania act of July 12, 1842 (Pamph. Laws, 339, Purd. 741, pl. 21), which provides that no person shall be arrested or imprisoned on any civil process issued out of any court in this commonwealth, in any suit or proceeding issued for the recovery of money due upon any contract or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damage for the nonperformance of any contract, excepting, etc., and the question turned upon the point whether the defendant's obligation to pay the costs for which the judgment was recovered against him arose from contract or otherwise. The court stated that if it did arise from contract it was within the purview of the act, otherwise it was not, and held that the defendant was not entitled to his discharge under such act, his obligation to pay costs not arising from a contract, no promise, express or implied being imputed to him with respect to the land, the damages, or the plaintiff's costs in such an action, the court pointing out the difference between a plaintiff and a defendant in such cases, the plaintiff being the actor and consenting to do what the law makes it his duty to do even in the event of defeat, the judgment against such a plaintiff for costs being founded on contract.

See also *Pieroe's Appeal*, 103 Pa. 27, *infra*, VIII. a. So, in *Thompson v. Berry*, 5 R. I. 25, 103, it was held that costs adjudged against a plaintiff in an action of trespass and ejectment were included in the term "debt," and that the Rhode Island statute ought to receive a liberal interpretation to carry out its purposes, the court stating that there was no ground for distinction between a judgment for costs and for a pre-existing debt or damages, the judgment being one equally for money which it required the same means to pay.

The same was said in *Thayer's Petition*, 11 R. I. 160, where the petitioner sought to be discharged from imprisonment on an execution for costs awarded against her in an action for trover.

See also *Jackson v. Boyd*, 53 Iowa, 536, 539; *Ex parte Crenshaw*, 80 Mo. 447, 456, *supra*, IV. a.

b. *Not debts in civil actions.*

In cases where the action, though civil in its nature, is for a tort or other wrong committed by the defendant, the imprisonment of the defendant for nonpayment of the costs has been held not to be imprisonment for debt, the action being for such tort, *ex delicto* in its character and not *ex contractu*, such costs not arising from or out of any contract.

Where the action was for unlawful detainer, and such action was made tortious by express statutes, it was held that the plaintiff was not imprisoned for

the ground that the title embraces more than one subject.

3. **More than one subject is not embraced**, in violation of the Constitution, in Acts 1895, chap. 67, providing that specified fraudulent acts to the prejudice of hotel, inn, and boarding-house keepers shall be misdemeanors which shall constitute prima facie evidence in a prosecution for such acts, and authorizing the sale of baggage left by defaulting patrons.

4. **A statute which does not expressly**

repeal, revive, or amend any former law, but states that "all laws and parts of laws in conflict" therewith are repealed, is not within the provisions of Const. art. 2, § 17, requiring all acts which repeal, revive, or amend former laws to recite the title or substance of the law repealed, revived, or amended.

5. **The prohibition against any law authorizing imprisonment for debt**, in Const. art. 1, § 13, is not violated by Laws 1895, chap. 67, providing that any person who fraud-

breach arising out of or founded on contract, express or implied, within the meaning of § 16, art. 1, of the Constitution of Wisconsin, where the execution was issued against him for nonpayment of costs. *Total v. Clapp*, 64 Wis. 223, 227.

By Mass. Gen. Stat. chap. 124, § 5, it is provided that no person shall be arrested on execution issued for debt or damages in a civil action, except in actions of tort, unless the judgment creditor, or some person in his behalf, after execution is issued amounting to \$20, exclusive of all costs, shall make an affidavit as therein provided. In *Hildreth v. Brigham*, 12 Allen, 71, it was held that under this section of the act, where judgment in foreclosure had been rendered against defendant for recovery of the property and costs upon which an execution had issued, the defendant was liable to be arrested for the costs, and that no affidavit was necessary under the statute, the action being really brought to recover for an injury to property by reason of its wrongful detention, and therefore strongly analogous to an action in tort.

Where the action was originally brought to recover damages for malpractice as a physician, and the defendant was charged with fraud in disposing of his property in order to avoid payment of the judgment, the costs were said to be merely incident to the debt, and fraud being proved the imprisonment was held legal. Nev. Const. art. 1, § 14, not prohibiting imprisonment in cases of a disposition of property with intent to defraud creditors, especially where the action is in tort. *Ex parte Bergman*, 18 Nev. 381.

In the above case the court stated that in cases of that nature costs were but an incident of the debt and were necessarily incurred in order to procure the enforcement of the judgment, and the imprisonment of the petitioner was for the fraud practised in attempting to evade the payment of any judgment obtained against him, and this imprisonment, while in the nature of a punishment, was a coercive means, given by the statute and sanctioned by the Constitution, to enforce the collection of the judgment, and, in all cases of such a character, was considered an element of remedial justice, and it must therefore necessarily follow that imprisonment was authorized for the costs which were incurred in using such coercive means to enforce the collection of the judgment, as well as for the amount of the principal debt or demand.

In *Parker v. Spear*, 62 How. Pr. 364, 366, the court, under § 66 of the New York Code, allowed the arrest of the unsuccessful party in a suit for the costs incurred by the defendant's attorney, but the court severely criticized the section of the Code which permitted an arrest in such cases.

A breach of trust is within the exceptions mentioned in the Pennsylvania act abolishing imprisonment for debt, and therefore an attachment for costs may be issued in such a case even though the nature of the suit be *ex contractu*. *Church's Appeal*, 103 Pa. 263.

So, where the decree of a court found that the appellant had been unfaithful in the discharge of his duties under a letter of attorney, and that he had mismanaged and wasted the estate committed to his trust and applied the moneys to his own use, a

breach of trust being thereby committed, it was held that the case was exempt from the operation of the Pennsylvania act abolishing imprisonment for debt, and that therefore an attachment might issue for the costs. *Wilson v. Wilson*, 142 Pa. 247.

See also *Berry v. Brislan*, 86 Ky. 5, 9, 10, *supra*, IV. b.

c. Debts in criminal actions.

In some cases the courts have looked upon the costs, even in criminal causes, as debts for the nonpayment of which the defendant could not be imprisoned.

Where a defendant had been convicted of larceny, and was sentenced to work on the streets and to pay costs, and in default of the payment of such costs was condemned to an additional period, the court held that such costs were merely a debt, whether in criminal or civil cases, a result from the operation of the law condemning the party cast to pay the costs of the proceedings, and that therefore such part of the sentence as imposed the additional penalty was unconstitutional. *State v. Braannon*, 54 La. Ann. 942, 946.

In *Re Mitchell*, 39 Fed. Rep. 396, the petitioner was convicted of a misdemeanor, and was ordered to pay a fine, or to stand committed to jail until the fine and costs were paid; and with respect to the costs, the court held that the costs were part of the punishment for disobeying the laws of the state, imposed by statute, and the officers of the court claimed them, not in their individual capacity or name, but as officers of the state and in the state name, and that if such costs were due to the officers personally, they could sue petitioner for them in their own name, but after recovery he could not be imprisoned for nonpayment of the judgment, as the Virginia laws forbid all imprisonment of debt except under peculiar circumstances; the court therefore held that the petitioner who had discharged the fines was entitled to be liberated from arrest in respect to costs.

The costs which the defendant in a criminal case is adjudged to pay, belong to individuals, and they are matter of private right. The costs in a criminal case are a matter of mere indebtedness, for which, in the absence of fraud, a defendant cannot, in view of his constitutional immunity, be ordered to be imprisoned. *Thompson v. State*, 16 Ind. 516. *State v. Farley*, 8 Blackf. 239, to the same effect.

Where the plaintiff had been sentenced to imprisonment in the county jail for the term of a year, and was also to stand committed until the costs of the prosecution were paid or replevied, the court stated there was error in ordering the defendant to stand committed until the costs were paid, although the order was made pursuant to § 123 of the Indiana Revised Statutes of 1892, such provision being in conflict with the Constitution of that state, which provides, art. 1, § 22, that there shall be no imprisonment for debt, except in cases of fraud. *Thompson v. State*, *supra*.

Yet in a later case in that state the court stated that in criminal prosecutions fines were assessed against the parties convicted as a punishment for their criminal acts, and they were also taxed with the costs of prosecution,—the costs were but an in-

ulently obtains accommodations at an inn, hotel, or boarding house, or fraudulently removes his baggage or other property, shall be adjudged guilty of a misdemeanor and punished accordingly.

6. The provision that proof of certain things enumerated shall be prima facie evidence of fraudulent intent in procuring accommodations at a hotel, inn, or board-

ing house, which is made a misdemeanor by Laws 1886, chap. 67, does not violate Const. art. I, §§ 6, 8, 9, guaranteeing the right of trial by an impartial jury.

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cident of the fine assessed resulting from the same act, and, although they were due to the officers of the court and witnesses for services rendered, they were adjudged against the defendant because of his criminal act, and might be fairly regarded as part of the punishment. The fine when assessed became a fixed liability to pay the state a definite amount of money. The costs were taxed and were due to the officers and witnesses, and were not a debt within the meaning of the section of the Indiana Constitution, neither was the fine a debt, and the fact that the one was payable to the state and the other to individuals furnished no ground for distinction, neither being a debt within the meaning of the constitutional provisions. *McCool v. State*, 23 Ind. 127, 131.

This case expressly overruled the prior case of *Thompson v. State*, *supra*, and also by inference the still earlier case of *State v. Farley*, *supra*, as that case was relied upon in the case of *Thompson v. State*.

In *State v. Kenny*, 1 Bail. L. 375, although the question did not turn upon the right or the constitutionality of imprisonment for debt, yet the court stated that the costs of a criminal prosecution constituted a mere debt to the court officers for which the defendant became liable on conviction, and although made no part of the sentence that he should be committed until they were paid, yet he was entitled to the benefit of the insolvent debtor's act and prison bound act if unable to pay them.

d. Not debts in criminal actions.

The Revised Code of Alabama, § 3759, directs that "where a fine is assessed the court may allow the defendant to confess judgment with good and sufficient sureties for the fine and costs," but under § 3760, "if the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county."

In a case involving the construction of these sections where the fine was paid and the costs were not paid, and no judgment was confessed and security given for the same, and the defendant was condemned to hard labor for the county until the costs were paid, it was held that the judgment was not equivalent to a sentence of imprisonment until the costs were paid, and it did not therefore violate the section of the state Constitution declaring that no person shall be imprisoned for debt. The court stated that the question how the payment of the costs should be enforced in criminal cases, was for the general assembly to determine, and for the courts to carry into effect, its opinion being that a party could not be imprisoned to enforce the payment of costs in such a case, for the reason that costs were not strictly a part of the punishment, but only a debt the collection of which might be enforced by execution as any other debt, but if the costs were not paid or secured as allowed by law, it knew of no restraint on the legislature which forbade the state to impose a certain amount of work for the county on the defendant as a mode of securing the payment of the costs in a criminal case. *Nelson v. State*, 46 Ala. 186, 189, 190.

And the same conclusion was arrived at by the 34 L. R. A.

court in a later case directed under the same section of the statute, the court holding that in such a case, which was criminal in its nature, the costs were not a debt any more than a fine, and that therefore the section in question was not violated. *Morgan v. State*, 47 Ala. 34, 36.

It is competent for the legislature to declare that the payment of costs that may accrue to the officers in the prosecution and conviction of an offender shall constitute a part of the punishment, and no provisions of the Alabama Constitution forbid this. And the fact that the costs when collected go to the officers of the court, and not to the state or county, exerts no decisive influence on the question. And on conviction for malicious mischief under §§ 3738-3739, of the Revised Code, the fine goes to the party injured when private property is the subject of the mischief; yet it cannot be contended that such fines are not punishments for the public offense, and the fact that the nonpayment of costs in such a case goes to increase the punishments, does not conflict with any constitutional provision, therefore the provisions of the Constitution which prohibit imprisonment for debt do not apply to such costs. *Caldwell v. State*, 55 Ala. 133.

The imprisonment of one convicted of crime for the satisfaction of costs incurred by the state in his prosecution, or to which the state, if it were liable for costs, should be subjected, is not an infringement of that provision of the Constitution which provides that "no person shall be imprisoned for debt." *Bailey v. State*, 87 Ala. 44, 45.

In *Bailey v. State*, *supra*, the defendant had been convicted of larceny, and was sentenced to perform hard labor for the county, for a certain period of time, to satisfy certain costs incurred in the prosecution, and taxed as fees in favor of the solicitor, clerk of the court, sheriff, and certain state witnesses, the sentence being in accordance with the rules prescribed by § 4504 of the Code of that state, which provides for the sentence of convicts to additional hard labor imposed for costs, if not presently paid, or if judgment is not confessed therefor, as provided by law. And while the defendant did not deny the authority of the decisions which made the imprisonment in such a case no infringement of the constitutional provision against imprisonment for debt, it was contended that, inasmuch as he was sentenced to hard labor under the provisions of the Alabama act of February 18, 1887, relating to the working of male convicts sentenced to hard labor for the county, upon the public roads thereof, the fees were no longer due to the officers and witnesses, and there was no authority for the enforcement of their collection by hard labor, and the court held that the act of 1887 authorized the imposition of additional hard labor to pay the fine and costs, in conformity with the provisions of the general law as contained in §§ 4503, 4504, of the Code, and that the objections taken to its constitutionality were without any force.

Under the Illinois statute, which provides that when a fine is inflicted, the court may order as a part of the judgment that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law, the court held that the liability of the party convicted to pay the costs in a criminal proceeding did not arise out of an implied contract, the costs being

quashing an indictment against defendant for violation of the statute against procuring accommodations as a boarder and then removing baggage from the boarding house without the consent of the proprietor or payment of the board bill. *Reversed.*

The facts are stated in the opinion.

Messrs. G. W. Pickle, Attorney General,

E. F. Mynatt, and Grafton Green, for appellant:

Making out a prima facie case does not change the burden of proof.

Com. v. Williams, 6 Gray, 1.

On a charge of murder, malice is presumed from the fact of the killing, unaccompanied with circumstances of extenuation; and the

fixed by the statute, and were creatures of the law incident to the prosecution of the proceeding, and growing out of it, therefore following the judgment and a part of it, and such costs were not therefore a debt within the meaning of the prohibition of the Constitution. *Kennedy v. People, 123 Ill. 649, 652.*

Section 4509 of the Iowa Code provides, in case of fine, for imprisonment until the fine shall be satisfied, and § 4611 provides when any person convicted of a criminal offense is sentenced to pay the fine and costs only, and stand committed until sentence be pronounced, if the sentence be not complied with by payment of the sum due within thirty days next following, the sheriff may liberate him from imprisonment if committed for no other cause, and also if he is unable to pay such fine and costs.

Where defendant was fined and committed to hard labor until the fine and costs were paid, and it was contended that the court erred in ordering him to be imprisoned until the costs were paid, the court stated that the above sections seemed to assume that a person might be sentenced to stand committed for nonpayment of costs, and not arise from mere assumption that it had been conferred; and not having been expressly conferred by the statute in that case it did not exist, the costs not being a part of the fine. *State v. Erwin, 44 Iowa, 637.*

In a case where the defendant had been convicted of violating the statute relating to a sale of intoxicating liquors, and sought to be released upon habeas corpus, it was held that the costs which, under the Iowa statute, were to be taxed to the defendant were such as accrued in the proceeding for the enforcement of the penalty against the defendant, and were merely incidental to the proceeding, and were collected for the compensation of public officers who rendered service in the cause, and witnesses; but they were, in no proper sense, a part of the penalty which might be imposed upon the defendant by the judgment of the court, by way of punishment for his violation of the statute, the sum exacted from him as punishment for his criminal misconduct being that definite and certain sum called a fine, which the court was empowered by statute to impose upon him; which was the sum which he was compelled to pay to the state as a penalty for its violated law, the costs being exacted as a mere incident of the proceeding, to enforce that penalty against him, and for the purpose of compensating those who rendered service in the proceeding, the only effect of the statute on the power of the court with reference to the taxation of costs, being to empower it to commit the defendant in case of his refusal to pay such costs as might be taxed, the provision with respect to the imprisonment being that he should stand committed until such fine and costs were paid, which did not empower the court to imprison him in punishment for his offense. *Albertson v. Kriebbaum, 65 Iowa, 11, 17.*

Where a judgment provided that the defendants should each pay a fine of a specified amount, and a further sum for costs of the action, and that in default of the payment of the same they should each stand committed to jail for a certain number of days, unless the same was sooner paid, and it was contended that such judgment was illegal inasmuch

as it provided for imprisonment in case of default of payment of the costs,—the court stated that as the imprisonment did not exceed the statutory limit, it must be held to apply only to the fines imposed, and was therefore not illegal as a judgment for imprisonment for costs. *State v. Boynton, 75 Iowa, 753, 757.*

In *Boyer v. Kinnick, 90 Iowa, 74*, the plaintiff was convicted of violating the law against the sale of intoxicating liquors. A fine was imposed and a judgment rendered against him for costs with an order for imprisonment until both were paid. He paid the fine and was imprisoned for nonpayment of the costs, and the proceedings were instituted to test the validity of such imprisonment. The court stated that the imprisonment was authorized by the statute, and the only question was the constitutionality of such law. Section 19 of art. 1 of the Iowa Constitution providing no person shall be imprisoned for debt in a civil action, on mesne or final process, unless in case of fraud, and no person shall be imprisoned for a military fine in time of peace, it was claimed that the judgment for costs was a debt and therefore the legislature could not authorize the imprisonment. The court stated that if it was a debt the act authorizing the imprisonment for it was not vulnerable to the section of the Constitution quoted, for the reason that the costs were adjudged in a criminal and not in a civil action, the section applying only to the latter; and further, that a judgment for costs in a criminal action was not within the constitutional meaning a debt, and that although the costs were due to individuals and only incident to the fine.

In *Re Boyd, 84 Kan. 570*, the facts showed that the petitioner for writ of habeas corpus was convicted for violating the liquor law, fined and adjudged to pay the costs of the prosecution; to find bond for good behavior, and to stand committed until the judgment should be complied with. He gave the bond but failed to pay the fine and costs, and was arrested, but upon petition he was discharged from custody upon condition that he pay the costs adjudged against him for which the county was liable. It was held that such costs were not debts within the meaning of the constitutional provisions prohibiting imprisonment for debt.

In *Re Ebenback, 17 Kan. 618, 622*, the question was as to the constitutionality of § 18, p. 681, of the General Statutes of that state, that provides, in effect, that when upon a trial before a justice of the peace for misdemeanor it shall be found that the prosecution was instituted maliciously, or without probable cause, the prosecuting witness shall be adjudged to pay the costs, and, unless a bond is given therefor, shall be committed to the county jail until they are paid. It was contended that the proceedings were in conflict with § 16 of the Kansas Bill of Rights, which provides that no person shall be imprisoned for debt except in cases of fraud, and the court stated that such exception was not well taken, as the costs were imposed upon him as a penalty, and they did not constitute strictly and simply a debt, in a technical sense of the word, any more than the fine imposed upon a party convicted for assault and battery was a debt, the legislature in effect declaring that an unwarranted appeal in that class of cases to the criminal law was itself a

burden of disproving the malice is thrown upon the accused.

1 Greenl. Ev. § 84.

Possession of the fruits of the crime recently after its commission is prima facie evidence of guilty possession; and if unexplained it is taken as conclusive.

Ibid.; *Com. v. Wallace*, 7 Gray, 222; *Com. v.*

Rowe, 14 Gray, 47; *Jones v. McLeod*, 103 Mass. 58; *State v. Hurley*, 54 Me. 562; *State v. Day*, 87 Me. 244.

The prisoner in rebutting this prima facie case need only introduce evidence enough to raise a reasonable doubt of his guilt.

Sahlinger v. People, 102 Ill. 241; *State v. Richart*, 57 Iowa, 245.

violation of law, subjecting the offender to punishment; the penalty imposed being the costs of the unwarranted proceedings.

The costs of a conviction are not a debt within the meaning of the Constitution of North Carolina. *State v. Manuel*, 4 Dev. & B. L. 20, 25.

Neither are costs imposed as a punishment with a fine debts within the meaning of such Constitution. *State v. Cannady*, 78 N. C. 599, 544.

The costs of a prosecution imposed against a prosecutor when the prosecution terminates in a *nolle prosequi* acquittal or arrest of judgment, or imposed upon the accused upon a verdict of guilty, and for which either party may be put in the sheriff's custody until they are paid or discharged according to law, do not constitute a debt within the meaning of the clause of the North Carolina Constitution by which imprisonment is forbidden, but are in the nature of a penal infliction, punitive in character and purpose, as a fine imposed by one guilty of crime. *State v. Wallin*, 89 N. C. 578, 580.

In *State v. Dunn*, 95 N. C. 697, the judge found that the prosecution was frivolous, and adjudged the prosecutor to pay the costs, and to stand committed until they were paid. The court held, affirming the decision in *State v. Cannady*, *supra*, that the costs put upon a prosecutor did not constitute a debt in the sense of the Constitution, but were essentially punitive for a false and unfounded clamor, and were such that the prosecutor ought to bear, and which the general assembly had a right to enact that he should bear.

And it has been held that § 737 of the Code of North Carolina, which empowers the court trying a cause to determine at any stage of a criminal proceeding who the prosecutor is and tax him with the costs, if such court shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest, and § 738 of the same, which empowers the court to imprison the prosecutor for nonpayment of costs, if it shall be adjudged the prosecution was frivolous and malicious, are constitutional. *State v. Hamilton*, 106 N. C. 660, 661; *State v. Cannady*, 78 N. C. 539.

VII. Statutory, criminal, or quasi criminal cases.

A person who violates the Alabama act of February 21, 1898 (Acts 1892, 1893, p. 1089) for the protection of landlords, proprietors, or keepers of hotels and boarding houses, is imprisoned, not for the debt which he owes the proprietor, or for the purpose of making him pay it, but to punish him for the wrong he has perpetrated, which is made a crime by such act. *Ex parte King*, 102 Ala. 182.

In that case it was held that the act was not a violation of the Constitution, which forbids imprisonment for debt, or the making of laws giving any special privileges or immunities, the act being in line with other statutes against false pretenses, frauds, cheats, acts to injure and the like.

In *Robertson v. People*, 20 Colo. 279, 291, the defendant contended that the Colorado act "to provide for the punishment of a person receiving deposits in, or creating indebtedness by, any bank or banking institution with knowledge of the insolvency of such bank or banking institution" was unconstitutional, as being in violation of § 8 of the Bill of Rights of the Constitution of the state of Colorado, which provides that "all persons have certain 34 L. R. A.

natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness;" and also as a violation of § 12 of the said Bill of Rights, which reads: "No person shall be imprisoned for debt unless . . . where there is a strong presumption of fraud," and further that such statute violated § 25 of the Bill of Rights, which reads "that no person shall be deprived of life, liberty, or property, without due process of law;" and also that such statute was in violation of article 14 of the Amendments to the Constitution of the United States. The court held, however, that the imprisonment under such act was not an imprisonment for debt, but for a crime in the nature of a misdemeanor, and therefore that the constitutional provisions regarding imprisonment for debt did not apply; and further stated that to make receiving money on deposit under such circumstances prima facie evidence of knowledge on the part of the owner of the bank that it was then in failing circumstances or insolvent, violated no constitutional guaranty.

The constitutionality of a similar act was involved in *Meadowcroft v. People*, 163 Ill. 55, the Illinois act of June 4, 1879, making it a crime of embezzlement for a bank to receive moneys on deposit, knowing himself to be insolvent, and it was contended that the same was unconstitutional upon the ground, *inter alia*, that it deprived the defendant of life, liberty, or property without due process of law, and further that the relation of a banker to his depositor was an ordinary contract relation of debtor and creditor, the moneys deposited becoming the property of the banker and not trust funds, and that every person in the state other than a private banker engaged in the ordinary and common callings of life, was allowed to enter into contracts the result of which was to establish himself debtor to every other person in the community dealing with him, and that to deny to the private banker the right to prosecute his business and, as incident thereto, to contract in regard to the same on the like terms as other ordinary and common callings, business, or pursuits, was to deprive him of both liberty and property to the extent that he was thus denied the right to contract without due process of law; but the court held that such act was constitutional.

And the same conclusion was arrived at with regard to the Wisconsin statute which makes it a misdemeanor for a banker to receive a deposit of money as a banker, knowing himself or his bank to be insolvent, the imprisonment thereunder not being for debt, much less for a debt arising out of or founded on any contract within the meaning of Wis. Const. art. 1, § 16, such act not expressly or impliedly violating either the state or national Constitution. *Baker v. State*, 54 Wis. 363.

But § 73 of the California Practice Act, which provides that "defendant may be arrested when the action is for wilful injury to person or character," has been held to be directly in conflict with § 15 of art. 1 of the state Constitution, which provides that no person shall be imprisoned for debt in any civil case on mesne or final process, unless in case of fraud. *Ex parte Prader*, 6 Cal. 239.

So, in *State v. Paint Rock Coal & C. Co.* 92 Tenn. 181, where the defendants were indicted for refusing

This statute does not provide for imprisonment for debt.

Ex parte King, 102 Ala. 182; *State v. Norman*, 110 N. C. 484.

Mr. S. G. Heiskell also for appellant.

Messrs. E. E. Houk, Charles Nelson, and R. A. Mynatt for appellee.

to cash a certain check of their own which was presented within thirty days of its date, and for unlawfully refusing to redeem in lawful currency a certain check which they had issued, and moved to quash such indictment upon the ground that no criminal offense was alleged, and that the Tennessee act of 1887, under which the indictment was drawn, was unconstitutional in that it impaired the obligation of the contract, and attempted to imprison the defendant for refusing to pay a debt, within art. 1, § 12, of the state Constitution, which provided, "the legislature shall pass no law authorizing imprisonment for debt in civil causes," the court held that the act in question, while not directly authorizing imprisonment for debt, did attempt to create a crime for the nonpayment of debts evidenced by check, scrip, or order, and for such a crime provided a penalty which might or might not be followed by imprisonment, and in that way violated the spirit, if not the letter, of the constitutional provisions, the act being an indirect imposition of imprisonment for the nonpayment of a debt, and therefore unconstitutional.

In declaring the above act unconstitutional, the court stated that in other words the act said that when any person who owed a debt which was evidenced by check or scrip issued by him did not cash the same within thirty days of its issuance, he should be guilty of a misdemeanor and fined accordingly, which judgment under the general law would be liable to be enforced by confinement in the workhouse. *State v. Paint Rock Coal & C. Co. supra*.

The act in question enacted that it should be unlawful for any person or persons, etc., to refuse to cash any check or scrip of their own, which might be presented within thirty days of the date of issuance, and that such person refusing to redeem in lawful currency shall be guilty of a misdemeanor and be subject to a fine for such offense. *Ibid*.

See also *State v. Norman*, 110 N. C. 484, *supra*, III. d; *Meyer v. Herlandt*, 39 Minn. 438, 1 L. R. A. 777, *supra*, II. b; *Mosley v. Gallatin*, 10 Lea, 484, *supra*, IV. b; *Barber v. Com.* 3 Penn. & W. 253, *supra*, IV. b.

VIII. Enforcing orders and decrees of court.

a. In general.

The question whether the imprisonment of a party to a cause for disobeying the order of a court is an infringement of the constitutional provisions respecting imprisonment for debt has often been raised, but the courts have held that where such imprisonment is not merely for the enforcement of a money decree, but for enforcing the court's order and as a punishment for wilful disobedience, such imprisonment does not conflict with the constitutional provisions prohibiting imprisonment for debt. Yet where the imprisonment is merely to force the payment of money under a money decree the contrary would seem to be the law, the courts holding such decrees merely judgments for the payment of money.

In *Geery v. Geery*, 68 N. Y. 252, 255, it is said to be doubtful, since the passing of the Revised Statutes and the Code of that state, and the act abolishing imprisonment for debt, whether decrees for the payment of money could be enforced by attachment or sequestration.

And in that state it has been held that when an order is in effect a final judgment for the payment 34 L. R. A.

Caldwell, J., delivered the opinion of the court:

Sallie Yardley was indicted for obtaining accommodations as a boarder in the boarding house of Amanda Smith, in Knoxville, and thereafter unlawfully and surreptitiously removing her baggage and property from said

of money, whether the proceeding in which it is made is of equitable or legal cognizance, it cannot be enforced by imprisonment, upon the theory of a contempt, such a proceeding violating the state law which permits no imprisonment for debt. *Re Atlantic Mut. L. Ins. Co.* 17 Nat. Bankr. Reg. 368.

In *Ex parte Hardy*, 68 Ala. 303, the petitioner was imprisoned under an order of the court in proceedings by way of discovery, and contended that §§ 3887-3889 of the Alabama Code, which embraced the act of March 8, 1871, extending the chancery jurisdiction, were unconstitutional and void for the reason that they violated the Bill of Rights, § 2, art. 1, of the State Constitution, so far as they authorized imprisonment for debt, the question for the determination of the court being whether the sentence to imprisonment for the alleged contempt was in its essential nature and purposes "an imprisonment for debt." The court held that although the act of 1871 had enlarged the jurisdiction of the chancery court, and had given that court power to coerce payment of a debt by contempt proceedings and imprisonment thereunder, yet the legislature having no power to do indirectly that which was directly prohibited by the law, the section of the act in question authorizing such imprisonment was unconstitutional and void.

The provision of the Constitution of Georgia, that there shall be no imprisonment for debt, was not intended to interfere with the traditional power of chancery courts to punish for contempt all refusals to obey their lawful decrees and orders. *Clements v. Tillman*, 79 Ga. 451, 454.

Under the Georgia statutes, when a party is decreed to perform a duty, or to do any act other than the mere payment of money, which the court has jurisdiction to adjudge he shall do, if he disobeys, the authority of the court is defied, he is guilty of contempt, and the arrest and imprisonment of his person is not imprisonment for debt in any appropriate sense of the term. But if a court of equity should render a simple decree for money on the simple money verdict, a decree which it may now enforce by the ordinary common-law process against property, the failure to pay the decree would not be a contempt, nor could compulsory process against the person of the party in default be resorted to in order to enforce payment. *Ibid*.

So, in *Goodwillie v. Millmann*, 56 Ill. 523, 525, it was stated that the remedy of enforcing decrees in equity by imprisonment should be limited to cases of necessity only, in accordance with the spirit that dictates the constitutional restriction, and courts of equity should act as justly in regard to the liberty of parties as to their rights of property, and there was no reason for declaring a party in contempt for failing to pay a money decree, than there would be for refusing to pay a judgment at law, and that it would seem that equity was not authorized to imprison in the first instance for the failure to pay a money decree.

For this reason, therefore, unless a defendant wilfully refuses to obey a money decree made in chancery proceedings, he cannot be imprisoned for the failure to make such payment. *Dinet v. People*, 73 Ill. 183, 186; *O'Callaghan v. O'Callaghan*, 69 Ill. 552.

Where the United States marshal moved for an order requiring an officer of the insurance company upon whose petition the company was adjudicated a

boarding house, without the consent of the proprietor thereof or the payment of her bill. On motion of the defendant, the indictment was quashed, and the state appealed in error.

The substance of the motion to quash is as follows: That the act upon which the indictment is based is unconstitutional (1) because its subject is not stated in the title; (2) because

the title embraces more than one subject; (3) because the act seeks to repeal, amend, and revive former laws, and does not recite, in its caption or otherwise, the title or substance of the laws repealed, amended, or revived; and (4) because the act was intended to make the creation of certain debts a criminal offense, punishable by imprisonment. The court ad-

bankrupt, to pay the fees of the marshal in executing the warrant, the proceedings in bankruptcy having been vacated, the court held that unless the authority to issue an attachment in that case rested upon the power of the court to punish for contempt, a commitment would contravene the statute abolishing imprisonment for debt, the power of the court of the United States to punish for contempt and to imprison for debt being substantially coextensive with that vested in the courts of the state [New York], or the power to punish for contempt was possibly somewhat more circumscribed than that conferred by the laws of the state, the power conferred to imprison for debt being precisely that given by the laws of the state. *Re Atlantic Mut. L. Ins. Co. 17 Nat. Bankr. Reg. 368.*

As above stated, the courts make a distinction between an order in the shape of a direct decree for the payment of money and an order directing certain things to be done, and while in the former cases they will not enforce such orders, decrees, or judgments by imprisonment, yet in the latter they will enforce them by such a method, as the punishment is not to compel the payment of money, strictly speaking, but to compel obedience to the court's decree and to punish the offender for contempt.

In *Hogue v. Hayes, 53 Iowa, 377*, where a judgment had been recovered against defendant for moneys owing by him to plaintiff, under which judgment he had been examined under supplementary proceedings, and had been ordered to pay over moneys found to be in his hands, it was held that his wilful disobedience of such order was a contempt of court for which he might be imprisoned, the same not being contrary to the provisions of the Constitution, although in that case the defendant was released, upon the ground that it was not shown that he had wilfully disobeyed the court's order.

See also *Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; Eikenberry v. Edwards, 67 Iowa, 619, 56 Am. Rep. 860, supra, III. d.*

An order made in a suit for the taking of partnership accounts, upon the person occupying the position of manager and treasurer of the partnership concern to pay over to the receiver moneys in his possession belonging to the concern, was held not to be an order to imprison for debt, within the Louisiana Constitution, but to compel obedience to the order of the court in relation to a fund which the court was entitled to as custodian, and which it was within the power of the relator to hand over to the receiver as the officer of the court, and the habeas corpus was therefore denied. *State, Audibert, v. Maubertret, 47 La. Ann. 384, 385.*

So, proceedings to enforce an order of the court, taken under chap. 66, § 307, and chap. 87, Minn. Gen. Stat., which order a defendant had wholly neglected to comply with, although able to do so, were held not to be contrary to, *inter alia*, § 12 of the Bill of Rights of that state, which declares that no person shall be imprisoned for debt, the imprisonment in that case being for contempt of court, even though the order related to a debt evidenced by the judgment, the imprisonment being for contempt and not for debt, such contempt not consisting in the neglect or refusal to pay the debt, but in the dis-

obedience of the order of the court, the commitment not being in a proper sense an imprisonment for debt. *State, Warfield, v. Becht, 23 Minn. 411.*

And the imprisonment of an insolvent debtor upon his refusal to obey the order of the court ordering him to turn over his property to his creditor's assignee, was held not to be contrary to the provisions of the Minnesota Constitution, as he was not imprisoned for debt, neither was he imprisoned for the reason that he could not or would not pay a debt which he owed, but for the reason that the court had found a specific sum of money which belonged to his creditors which should have been turned over by him to his assignee for their benefit, pursuant to the court's order, which order he refused to obey, and it was therefore for such refusal that he was punished by imprisonment. *Re Burt, 56 Minn. 397.*

A trustee wilfully retaining funds contrary to the order of the court may be imprisoned without infringement of the law, and so may an executor or administrator, who wilfully disobeys an order to pay over moneys shown to be in his hands. *People v. Marshall, 7 Abb. N. C. 386.*

For a wilful disobedience of an order of a court, a defendant may be committed to prison without infringing the law prohibiting imprisonment for debt. *Dusenberry v. Woodward, 1 Abb. Pr. 452.*

In *Ferguson v. Cummings, 1 Dem. 435*, the court stated that the extraordinary power given to the surrogate's court to enforce obedience to their decrees for the payment of money by punishment of the delinquent for contempt should be exercised in conformity to the liberal spirit of the legislature on the subject of imprisonment for debt. The following cases are the same in effect. *Doran v. Dempsey, 1 Bradf. 490; Re Latson, 1 Duer, 603; Hosack v. Rogers, 11 Paige, 608; Re Callahan, Tucker, 62; People v. Marshall, supra.*

A commitment for not obeying the order of the court to apply certain properties in defendant's possession to the satisfaction of a judgment is not contrary to the constitutional provision prohibiting imprisonment for debt, the order not being for payment of a debt but a direction to apply certain property to the satisfaction of the judgment. *State v. Burrows, 38 Kan. 17.*

So, the imprisonment of a judgment debtor for contempt in not delivering property or money to a receiver appointed in proceedings supplementary to execution is not in violation of § 15, art. 1, of the Constitution of Ohio inhibiting imprisonment for debt in any civil action, on mesne or final process, unless in cases of fraud. *Re Conkling's Application, 5 Ohio C. C. 78.*

The Pennsylvania act of 1842 expressly prohibits imprisonment to enforce decrees for the payment of money due on contracts, and the rule of the supreme court must not be construed as a repeal of that statute, as it was not intended as a construction of it, and therefore a decree in equity cannot in that state be enforced by the attachment of the defendant, the act of 1842 having abolished imprisonment for debt. *Scott v. The Jailor, 1 Grant, Cal. 237, 239.*

So, in the case of a final decree founded on contract the defendant cannot be punished for con-

judged all the grounds of the motion well taken, and therefore held the indictment bad.

The act in question is in the following words and figures:

An Act to Protect Hotel, Inn, and Boarding-House Keepers.

Sec. 1. Be it enacted by the general assem-

bly of the state of Tennessee, that persons who shall, at any hotel, inn, or boarding house, order and receive or cause to be furnished any food or accommodation, with intent to defraud the owner or proprietor of such hotel, inn, or boarding house out of the value or price of such food or accommodation; and any person who shall obtain credit at any hotel, inn, or

tempt upon his omission to pay either the debt or costs, especially where no breach of trust is involved. *Pierce's Appeal*, 103 Pa. 27.

In *Re Hugg's Estate*, 1 Clark (Pa.) 237, it was sought to set aside an attachment issued to compel the payment of money due to the estate by defendant as assignee, upon the ground that he was exempt from imprisonment by reason of the Pennsylvania act abolishing imprisonment for debt but the court stated that when a decree was for the payment of money founded upon a contract, the defendant could not be taken in execution either by process in equity or at common law, yet where the proceedings were those of which a court of equity operated upon the conscience of the party and compelled the performance of the specific act, the defendant might be imprisoned as for contempt of court.

But the Pennsylvania act of 1842 does not exempt a trustee from liability to attachment for contempt of court in disobeying a positive order of the court to pay over money. *Chew's Appeal*, 44 Pa. 247, 251.

So, where the decree of a court found that the appellant had been unfaithful in the discharge of his duties under a letter of attorney, and that he had mismanaged and wasted the estate committed to his trust and applied the moneys to his own use, a breach of trust being thereby committed, it was held that the case was exempt from the operation of the Pennsylvania act abolishing imprisonment for debt, and that therefore an attachment might issue to the costs. *Wilson v. Wilson*, 142 Pa. 247.

And a master's fees in a divorce suit are not a debt within the meaning of the Pennsylvania act abolishing imprisonment for debt, and therefore an attachment may be issued against a husband who refuses to comply with the order of a court for payment thereof. *Calhoun v. Calhoun*, 6 Pa. Co. Ct. 177.

The imprisonment of an assignor in insolvency proceedings after a hearing and examination and a full disclosure of his property for a neglect and refusal to turn over the property in his possession to his assignee as ordered by the court for which he is adjudged in contempt, is not imprisonment for debt, and does not contravene § 12, art. 1, of the Minnesota Constitution, and the court has therefore the power to punish him by imprisonment for such contempt. *Re Burt*, 56 Minn. 387.

The provisions of the Wisconsin Constitution were not designed to cripple, or take away the ordinary and well-defined powers of the court or judge when exercising equitable jurisdiction, and therefore decrees and orders in equitable suits and proceedings not coming clearly within the prohibition may still be enforced by coercion. *Re Milburn*, 59 Wis. 24, 31.

The imprisonment of a defendant for refusing to obey the order of a court, commanding him to hand over moneys in his hands to a receiver, is not an imprisonment for debt, but is a punishment for the disobedience of the order of the court and for contempt thereof, and therefore § 3037 of the Wisconsin Revised Statutes, which authorizes such imprisonment, is not contrary to the Constitution, and this is so although the judgment may be for a debt founded on a contract. *Ibid*.

So, the imprisonment of a defendant for the disobedience of the order of a court, which com-

manded him not to transfer or dispose of his property, was held not to be an imprisonment for debt, even though the judgment was for a debt founded on a contract, such imprisonment being for contempt of the court's order. *Re Perry*, 30 Wis. 268.

It has been held that it was not the design of § 3029 of the Revised Statutes of that state, relating to proceedings in aid of execution, to revive the power and practice of imprisonment for debt, and that under such section a commitment for failure to pay over money ordered to be paid would not be made unless the evidence showed clearly and satisfactorily that the party had the money within his power, and so had the present ability to comply with the order, and it was only in such manner that the liberty of the citizen could be adequately conserved. *Warren v. Rosenberg* (Wis.) 69 N. W. 539, 341.

b. In decedents' estates.

The same doctrine is applied by the courts in cases of orders or decrees made in matters relating to decedents' estates. The difference being between an order directing acts to be done and an order which merely amounts to a money decree.

Therefore by virtue of § 20 of the Declaration of Rights of the Constitution of South Carolina, inhibiting imprisonment for debt, except in cases of fraud, an administrator who has failed to comply with an order of the court of probate, which was in the nature of a money decree, was held exempt from arrest and imprisonment, the court having no power to issue a warrant for the imprisonment of a defendant in such a case. *Gilliam v. McJunkin*, 2 S. C. N. S. 442, 450.

In that case the court stated that if the mere non-payment of a sum of money was to be construed as a fraud within the language of the above section of the Constitution, the humane and liberal provisions which it made against imprisonment for debt would have been not only senseless in meaning, but delusive, and if the section of the Code under which it was sought to hold the defendant had directly authorized the probate court to imprison a party for failure to comply with its orders directing the payment of money, it would also have been nugatory because in violation of the Constitution.

So, in *Re Leach*, 51 Vt. 630, the court held that the proceedings by way of contempt upon an order of the probate court, ordering him as executor to pay a widow a certain monthly stipend, were invalid by reason of their noncompliance with the requirements of the statutes; and further, that the order of the court being for the payment of money, it was a judgment for debt, and as such was abolished by the statute, a judgment or decree for the payment of money being a mere contract within the purview of the statute, and that the probate court had no power to make a commitment which was denied to a court of common law, and also to the court of chancery, discretion in the latter courts so far as pretense to imprisonment of the body of the debtor is concerned being like judgments at common law.

Again, in *Re Blingham*, 32 Vt. 329, where the order which it was sought to enforce was a mere money decree calling upon the administrator to pay over a specific sum of money, it was held that such order could not be enforced by imprisonment.

boarding house, by the use of any false pretense or device, or by fraudulently depositing at such hotel, inn, or boarding house, any baggage or property of less value than the amount of such credit, or of the bill by such person incurred, unless credit be given by express agreement; and any person who, after obtaining credit or accommodation at any hotel, inn, or

boarding house, and shall surreptitiously remove his or her baggage or property therefrom, shall, upon conviction, be adjudged guilty of a misdemeanor, and be punished accordingly.

Sec. 2. Be it further enacted, that proof that lodging, food, or other accommodation was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the

as the money was a mere debt the imprisonment for which was forbidden under the state statute.

The provision in art. 1, § 5, W. Va. Const., in effect renders void any order or judgment of any court or officer in that state, which directs the imprisonment of a person in any case where the debt for or on account of which he is imprisoned arises out of or is founded on a contract.

Where the decree in equity ordered the relator, an executor and trustee, to pay the complainant moneys in his hands for his use and benefit, and also gave execution against the relator for the sum, together with interest, it was held that, although it was his duty to pay such sum, and the decree was right in awarding an execution against him in case it was not paid, yet the decree did not authorize the imprisonment of the relator, for the reason that it only showed that he owed the money which came to his hands as a trustee, and therefore the debt arose out of and was founded on a contract. *Re Blair*, 4 Wis. 522, 534, 535.

Where a decree against an executor ordered him to pay money over to a legatee, it was held that he was entitled to an execution to enforce the performance of such decree, but that he was not entitled to an alternative decree, to the effect that upon failure of such payment the executor should be deemed to be in contempt, the facts not authorizing such alternative order imprisoning the defendant on failure to pay, the court stating that the power to order imprisonment was never exercised by chancery courts, except in those cases where a trust in the property or fund arose between the parties litigant, or some specific interest in it was claimed, or the chattel had such peculiar value and importance, that a recovery of damages at law for its detention or conversion was inadequate. Such interference was in the nature of a bill *quia timet*, and was asserted only on a proper showing that the fund or property was in danger of loss or destruction. No jurisdiction to compel the payment of an ordinary money demand unconnected with such peculiar equities ever existed in chancery courts, nor had they the power to compel such payment by punishing the refusal to pay under the guise of contempt. *Clements v. Tillman*, 79 Ga. 451, 454.

When, however, the order which it is sought to enforce is not a mere decree for the payment of money amounting to a mere judgment against the defendant or debtor, the power of the court to enforce such order by imprisonment would seem to be denied under the state Constitutions and laws abolishing imprisonment for debt.

It has been held that proceedings for the settlement of the estate of a decedent are not a civil action within the meaning of § 15, art. 1, of the Constitution of California, nor is the amount of money which by the order of distribution the executors are required to pay over to the distributees, a debt due from the executors to the distributees, and therefore the case does not fall within the clause of the section of the Constitution forbidding imprisonment for debt in a civil action. *Ex parte Smith*, 53 Cal. 204, 207. To the same effect, *Ex parte Cohn*, 55 Cal. 193, 196.

The provisions of the New York act to abolish imprisonment for debt do not extend to proceedings as for contempt to enforce civil remedies. They relate only to civil process for executions is-
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suing out of courts of law or equity, and they are not therefore applicable to proceedings in the surrogate's court. *Doran v. Dempsey*, 1 Bradf. 490, 492, in which case an attachment was issued against an executor to compel his obedience to the order of the court directing the payment of a legacy.

In *Tome's Appeal*, 50 Pa. 235, 237, the court applied the construction placed upon the nonimprisonment law of 1842 in the case of *Chew's Appeal*, 44 Pa. 247, to the case when an executor was ordered to pay and deliver over to a successor the estate of a decedent in his hands.

In *Leach v. Peabody*, 58 Vt. 435, the court held that an executor wilfully refusing to obey the order of the court of probate under which he was to pay a certain amount to the widow and children of a decedent for their maintenance, pending the settlement of the estate, was lawfully imprisoned, and distinguished the case from that of *Re Bingham*, 32 Vt. 330, in which the order made by the judge of probate created a debt, the imprisonment for non-compliance and the court's order in that case being unlawful, § 15, chap. 48, of Vt. Gen. Stat., which empowered probate courts to issue warrants for the imprisonment of a person refusing to perform its orders, applying in the case then before the court but not in the latter.

The same principles would seem to be applied by the court, in the case of *Re Leachy*, 58 Vt. 724, where the petitioner had been committed for neglect in obeying the order of the court to pay over money in his hands as administrator, which sum had been recovered in a judgment obtained in an action brought by his successor against him; the court stating that the debt was not one of simple contract which he was liable to pay to a creditor, but the funds in his hands were not his, but were held by him as a strict trust to pay them away only as ordered by the court. See also *Wood v. Wood*, 84 Ga. 102; *Hosack v. Rogers*, 11 Paige, 603, *supra*, II. b; *Melvin v. Melvin*, 72 N. C. 384, 386, *supra*, III. d.

c. In admiralty.

By rule 46 in admiralty, made in December, 1860, by the supreme court, it is provided imprisonment for debt on process issuing out of the admiralty court is abolished in all cases where by the laws of the state in which the court is held imprisonment has been or shall be hereafter abolished upon similar or analogous process issuing from a state court, and by § 920 of the Revised Statutes of the United States it is provided: "No person shall be imprisoned for debt in any state on process issuing from a court of the United States where by the laws of such state imprisonment for debt has been or shall be abolished, and all modifications, conditions, and restrictions upon imprisonment for debt provided by the laws of any state shall be applicable to the process issuing from the courts of the United States to be executed therein, and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state." *The Bremena v. Card*, 38 Fed. Rep. 144.

Section 990, U. S. Rev. Stat., rule 47, of the Amended Admiralty Rules, and § 17, art. 1, of the Washington Constitution, refer only to imprisonment for debt, and do not affect the power of the court to issue a warrant of arrest as process for compelling the defendant to respond to the claim for unliquidated damages, which is not a debt, any

party refused to pay for such food, lodging, or accommodation on demand, or that he absconded without paying or offering to pay for such food, lodging, or other accommodations, or that he surreptitiously removed or attempted to remove his or her baggage, shall be prima facie proof of the fraudulent intent mentioned in § 1 of this act.

Sec. 8. Be it further enacted, that at any time after thirty (30) days after the person incurring the debt or obligation has left the hotel, inn, or boarding house, and the debt or obligation being still due and unpaid, the owner or proprietor of said hotel, inn, or boarding house, may sell, at public auction, for cash, at hotel or boarding-house office, any or all baggage or

more than it restricts the power of the court to imprison defendants for nonpayment of fines, or by way of punishment for contempt, the word "debt" when used in a statute, without some plain or explicit declaration making it applicable thereto, not including taxes or claims for unliquidated damages, its legal definition being opposed to unliquidated damages or a liability in the sense of an inchoate or contingent debt or an obligation not enforceable by ordinary process. *Bolden v. Jensen*, 69 Fed. Rep. 745, where the action was in libel to recover damages for personal injury and cruelty inflicted on the libellant while serving on board a vessel as a seaman.

As the right to a warrant of arrest of the person is unauthorized and illegal under the Constitution of Alabama, so is an attachment issued under rule 2 of the rules of practice in admiralty, which is dependent on such warrant of arrest, the right to the writ being dependent on the right to imprison for debt, which right is abolished by the Constitution of that state. *Chiesa v. Conover*, 36 Fed. Rep. 334.

So, in *Hanson v. Fowle*, 1 Sawyer, 497, 505, where the plaintiff sought damages for a trespass and consequent injuries to his person, committed by defendant, who was arrested pursuant to the admiralty rules, it was contended that such imprisonment was illegal by reason of the Oregon statute of March 2, 1867, which modified the law respecting imprisonment for debt. It was held that such statute did not apply to the case in question, as the action was not one to recover a debt, neither was the claim for damages a claim for a debt within the meaning of such act, or within the meaning of Or. Const. art. 1, subd. 19, not, however, until such claim had ripened into a decree for a sum of money certain.

In *The Blanche Page*, 15 Blatchf. 1, 8, it was held that the stipulations and bonds of sureties in suits *in rem* in admiralty amounted to contracts and contracts to pay money, and that the decrees were judgments requiring the payment of money due upon contracts, and the statutes of New York having abolished imprisonment for debt as a remedy in execution of a judgment requiring the payment of money due on a contract, the circuit court of the United States had no power to enforce such judgment by imprisonment.

d. Alimony.

The question has often been raised as to whether the imprisonment of the defendant in divorce proceedings for nonpayment of alimony is imprisonment for debt within the meaning of the provisions of the various state Constitutions inhibiting imprisonment for debt.

The majority of the cases are in favor of the theory that alimony is not a debt within the meaning of such Constitutions, and therefore the defendants' imprisonment is not contrary to the constitutional provisions, the question being regarded as an imprisonment for the wilful contempt of the court's order and in the nature of a punishment therefor, rather than as a means of enforcing payment of a debt.

The only state which seems to hold an opinion in direct conflict with the above doctrine is Missouri, wherein the courts hold that alimony is a debt within the prohibitory provisions of the state Constitution.

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In a case where the wife's bill against the husband prayed for alimony, but did not seek a divorce, the court, in passing upon the duty of the husband to maintain his wife, and in enforcing an order for the payment of such alimony, stated that the court of chancery might and did enforce the obeying of such orders by attachment of the person of the husband, and that such a proceeding was not imprisonment for debt within the prohibition of the Alabama Constitution. *Murray v. Murray*, 84 Ala. 363.

In *Ex parte Murray*, 35 Fed. Rep. 490, it was contended on behalf of the petitioner that he was imprisoned without due process of law, and that § 3801 of the Alabama Code of 1893, which provided that such decree might be enforced by process of attachment against the defendant therein, and by sequestration of his property, as well as by execution, was unconstitutional. The court held that the prisoner was not imprisoned without due process of law, and that the section in question was not a violation of the Constitution of the United States, relating to the liberty of the subject, and that as the courts had held that a decree for alimony was not a money decree, but was a decree to enforce the performance of a duty, the nonperformance of it was a wrong, quasi criminal, and that therefore the writ of attachment was an appropriate mode for enforcing such decree, and for this reason there was no law or constitutional provision of the United States which was violated by such arrest and imprisonment.

So, in *Ex parte Perkins*, 18 Cal. 60, the main question had relation to the power of the district court to order the applicant to pay a sum of money for expenses incurred by the defendant wife in an action for divorce, the question turning upon the legality of the husband's imprisonment for non-compliance with an order of the court respecting the alimony, the husband's contention being that such sum was a debt within the meaning of the words of the California Constitution prohibiting imprisonment for debt. The court held that such was not the case, and that the sum so ordered to be paid was not within the provisions of the Constitution.

But in *Re Wilson*, 75 Cal. 590, 584, where the petitioner applied to be discharged from custody, and alleged his inability to pay, the court held that an opportunity should be given him to prove his inability to comply with the order of the court, as to hold that he should, when utterly penniless, suffer a life imprisonment for debt, because of the particular form in which the imprisonment was imposed, would be a gross violation of the provisions of the Code.

Where, in contempt proceedings for nonpayment of alimony, the defendant insisted that the decree stood on the same ground as a judgment at law, or an ordinary decree in equity, for the payment of a mere debt or sum of money, enforceable as in those cases, by an accustomed writ of execution, and if necessary by an appropriate resort to a court of equity; and that an enforcement of the decree by process of contempt for noncompliance with it would deprive the defendant of the exemption from imprisonment, or in case of imprisonment the privilege of the oath, provided by law for poor debtors; to which he would be entitled in an ordinary writ of execution, the court stated that such

property, left at said hotel, inn, or boarding house, to satisfy said debt or obligation without any process at law or equity, provided that said sale shall be advertised by written or printed posters for at least ten days before said sale.

Sec. 4. Be it further enacted, that all laws, and parts of laws, in conflict with this act, be and the same are hereby repealed.

Acts 1895, chap. 67.

was not a decree for the payment of a debt as the court did not decree alimony as a debt due to the wife, but as a part of her husband's estate to which she became legally entitled. *Lyon v. Lyon*, 21 Conn. 185, 197.

So, in *Carlton v. Carlton*, 44 Ga. 216, 220, it was held that § 18, art. 1, Ga. Const. 1868, abolishing imprisonment for debt, did not take away the power of the judge to commit to jail for contempt of court in refusing to obey an order for the payment of temporary alimony in divorce proceedings, although § 17 of the same article of the Constitution would seem to imply that such power exists, since it makes it the duty of the general assembly to limit the power of the courts to punish for contempts in such cases. The imprisonment must, however, be clearly for the contempt of the process of the court, and be of one who is able and unwilling to obey the order of the court.

And in *Lester v. Lester*, 68 Ga. 356, where the defendant was imprisoned for contempt for the nonpayment of alimony, the court stated that while the imprisonment which impends over the respondent is not for debt, it can be prevented by the same means as if it were, that is, by payment, and that, harsh as was the only remedy of imprisonment for debt, yet it had its wholesome effect in many cases, and was so far a beneficial instrumentality.

And this is so for the reason that the means used to compel his obedience to such decree by attachment do not amount to an imprisonment for debt within the meaning of the Constitution, the court having stated that "when a bird can sing, and will not sing, he must be made to sing." *Lewis v. Lewis*, 89 Ga. 706.

In Illinois the courts have held that a commitment to jail for the nonpayment of alimony is not an imprisonment for debt, under the provisions of the Illinois Constitution and the laws enacted on that subject. *Wightman v. Wightman*, 45 Ill. 187, 173.

The amount found and ordered to be paid under a decree of alimony is not originally founded upon contract, and therefore if the means adopted for enforcing such payment are in accordance with the Illinois Chancery Code, they are not contrary to the provisions of the 15th section of the 8th article of the Illinois Constitution, prohibiting imprisonment for debt. *Ibid*.

So, in *Becker v. Becker*, 15 Ill. App. 247, the court stated that decrees for alimony might be enforced by execution as other decrees in chancery, or in any other mode consistent with the practice of the court of chancery. No doubt the court may enforce decrees for the payment of alimony, as sequestration of real or personal estate by attachment against the person, by fine or imprisonment, or both, in the discretion of the court, but while such extraordinary power is conceded to rest in the courts, it is subject to those limitations imposed by the Constitution that a party may not be imprisoned except in cases where it shall appear he has the pecuniary ability to enable him to comply with the decree, and his disobedience is wilful.

The court may punish wilful disobedience by imprisonment, but the spirit of the Illinois Constitution forbids the pecuniary inability of the party in

proceedings to enforce the payment of alimony not resulting from his fraudulent conduct to produce such condition from being made a ground for punishment as for a contempt by imprisonment. *O'Callaghan v. O'Callaghan*, 69 Ill. 552, 554, 555; *Blake v. People*, 80 Ill. 11, 14.

And the Indiana courts have held that alimony is not a debt growing out of law founded upon a contract, express or implied, within the meaning of the Constitution. *Menzie v. Anderson*, 65 Ind. 220.

So, the restrictions imposed by the Massachusetts general statutes apply to executions issued to pay debts or damages in a civil action, except in actions of tort, and the allowance of alimony or the award to the wife of her own or a part of her husband's estate, upon granting a divorce, is not a debt or damages in the sense of the statute. *Chase v. Ingalls*, 97 Mass. 524, 530.

And in *Foster v. Foster*, 130 Mass. 189, it was held that a defendant lawfully arrested on execution for alimony had no right to be discharged from imprisonment, except in the same manner and subject to the same provisions of law as a person arrested on execution for debt or damages in a civil action, and by applying to take the poor debtor's oath he assumed the risk of meeting charges of fraud filed by a creditor.

In *Hurd v. Hurd* (Minn.) 65 N. W. 723, it was contended that the statute authorizing imprisonment for contempt in refusing to pay alimony violated the Minnesota Constitution forbidding imprisonment for debt, but the court held that if the statute was to be construed as authorizing the imprisonment of a party neglecting or refusing to pay alimony which the court had ordered him to pay, until he did pay, without reference to his power to comply with the order, it was unconstitutional, but the statute in question was to be construed as applying only to cases where the husband had the ability to comply with the order of the court and would not do so, and so construed it was constitutional, and therefore if it was in his power to comply with the order of the court his refusal was a contempt of the court, and he might be imprisoned until he purged himself of the contempt by complying with the order, and such imprisonment was for contempt and not for debt, and therefore did not contravene the constitutional provision.

Executions for alimony have in New Hampshire been made to run against both the property and the body, as the court may have seen fit to direct, and the provisions of the statute exempting the body from arrest do not apply to decrees and orders of this nature. *Sheafe v. Sheafe*, 36 N. H. 155, 156; *Sheafe v. Loughton*, Id. 240.

So, in North Carolina the courts have held that the allowance of alimony is not a debt within the meaning of the state Constitution, for which imprisonment is not permitted. *Pain v. Pain*, 80 N. C. 322.

And N. C. Act 1896, chap. 63, abolishing imprisonment for debt, does not embrace cases relating to the payment of alimony *pendente lite*, and therefore in case the defendant neglects to obey the or-

voke the 2d clause of § 17 of art. 2 of the state Constitution, which clause declares that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." That requirement of the organic law is mandatory, and, unless obeyed in every instance, the legislation attempted is invalid and of no effect whatever. *Cannon v. Mathes*, 8 Helsk. 518; *Cole Mfg. Co. v. Falls*, 90 Tenn. 482.

1. The subject of the present act is "protec-

tion" to hotel, inn, and boarding-house keepers; and that subject is plainly and unmistakably expressed in the title, which is as follows: "An Act to Protect Hotel, Inn, and Boarding-House Keepers." It is a vain impeachment of the law to say that it is bad because the means or instrumentalities by which that protection is to be afforded are not recited in the title. Recitation of details in the title of an act is not necessary to its validity. It is sufficient to state

der of the court in such cases he may be arrested and imprisoned until he complies with the order of the court. *Wood v. Wood*, 61 N. C. 538. To the same effect, *Clerk's Office v. Allen*, 7 Jones, L. 158.

In *Effinger v. State*, 11 Ohio C. C. 389, 391, it was held that upon sufficient evidence the court had power to imprison for contempt on failure to pay alimony, as such alimony was not a debt, and imprisonment for failure to perform was not against the provisions of the Constitution of that state, or within the state statutes.

The punishment of a defendant in a divorce suit for noncompliance with an order for the payment of alimony under § 5540 of the Revised Statutes of Ohio, which provides that a person guilty of any of the following acts may be punished as for a contempt, that is, disobedience or resistance to a lawful writ, process, order, rule, judgment, or command of a court or of an officer, is not imprisonment for a debt within the meaning of the state Constitution, as the order for temporary alimony does not create a debt. *Stewart v. Stewart*, 28 Ohio L. J. 38.

Again, in *Tolman v. Leonard*, 28 Wash. L. Rep. 343, 345, it was held that an allowance of alimony was not in the nature of an absolute debt, inasmuch as it was not unconditional and unchangeable, as it might be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction, and therefore an order committing the defendant to prison for the nonobservance of the court's order respecting the payment of such alimony was not within the constitutional prohibition against imprisonment for debt.

But in *Aspinwall v. Aspinwall*, 58 N. J. Eq. 684, upon proceedings to compel the specific performance by a husband of a contract made by him upon articles of separation, wherein the wife sought by attachment for contempt to compel him to pay the stipulated weekly allowances, the court refused the writ, and upon appeal it was held that such refusal was right, the court stating that under N. J. Rev. Stat. § 55, p. 112, and § 64, p. 115, the court of chancery had power to enforce its decrees by sequestration of the real and personal estate of the defendant, and by issuing writs of *f. fa.* and of a *capias ad satisfaciendum*, and the effect of such legislation was to do away with the process of contempt as a method of enforcing decrees for the payment of moneys due upon contracts between the parties, in cases where no special equities exist, and to substitute therefor sequestration of the defendant's estate, the writ of *fieri facias* against his real and personal property, and, in cases of fraud, the writ of *capias* against his person, the court's conclusion being that decrees of that kind in cases where there was no pretense of fraud, which were ordinarily enforced in that state by process of attachment, could only be reached by ignoring that provision of the New Jersey Constitution which forbids the imprisonment of any person for debt in any action, or on any judgment founded on contract, except in cases of fraud; for the ultimate result of proceedings for contempt, where they were used as a method of relief *inter partes*, was the imprisonment of the party proceeded against.

So, in *Steller v. Steller*, 25 Mich. 159, the defendant insisted that the constitutional provisions inhibit-

ing imprisonment for debt exempted him from being committed to jail for nonpayment of temporary alimony and expenses. The court stated that whatever might be the proper construction to be placed upon the Michigan statutes, it was clear that with imprisonment for debt forbidden, a party could not be imprisoned on noncompliance with such an order, except on the ground of contempt of the authority of the court.

And in Missouri the courts have held that an order for the payment of alimony is simply an order for the payment of money, and, imprisonment for debt being abolished in that state, and imprisonment for nonpayment of alimony being the imprisonment for debt only, the commitment of the defendant in such a case is without authority of law and contrary to the provisions of the Constitution. Neither can such a party be imprisoned for contempt of court in refusing to obey such an order, as there is no means of putting a party in contempt for disobeying orders or decrees for the mere payment of money. *Coughlin v. Ehler*, 30 Mo. 235.

Again, in *Elmer v. Elmer*, 150 Pa. 205, where, upon petition and affidavit of a wife that no alimony had been paid to her, and praying process to compel the payment of the same, the court issued a *f. fa.* and a *ca. sa.* for the collection of the same, and subsequently refused to set the same aside, it was held that a *f. fa.* or attachment was the proper process under the Pennsylvania act of 1854, § 1, but that *ca. sa.* was not the proper remedy as it was not authorized. In this case, however, the constitutionality of the imprisonment was not directly raised, neither was the point that imprisonment for debt was abolished in that state by statute passed upon, the court merely holding the arrest unauthorized.

And where upon a motion for an attachment for the nonpayment of alimony, the libellant suggested that the proper remedy was a *ca. sa.* under which he could be discharged upon complying with the provisions of the insolvency laws, the court stated that if it were to award such a writ it would only raise the question whether the court had power to enforce a decree for alimony by attachment, and, the Pennsylvania act of 1842, which abolished imprisonment for debt, excepting proceedings for contempt, to enforce civil remedies, the proceedings by way of attachment for contempt were legal. *Wallen v. Wallen*, 1 Pa. Dist. R. 664.

Upon the question of contempt proceedings to compel the payment of alimony, see *note* to *Staples v. Staples* (Wis.) 24 L. R. A. 433.

e. In bastardy.

The question whether the relation of debtor and creditor exists between the reputed father of an illegitimate child and those who prosecute him, so as to create a debt within the meaning of the constitutional provisions abolishing imprisonment for debt so as to exempt such father from attachment and imprisonment for nonpayment of the amount ordered to be paid by him, has often been raised when it has been sought to punish such father by imprisonment.

In most cases, however, the courts have held that such a relation is not created thereby, and that the liability of the father is not a debt within the mean-

the object in the title, and the manner of its accomplishment in the body of the act. *Luehrman v. Shelby County Tazing Dist.* 2 Lea, 425; *Ex parte Griffin*, 88 Tenn. 547; *Illinois C. R. Co. v. Orider*, 91 Tenn. 494. A late author says: "In regard to the particularity required in the title of a statute, it is the accepted doctrine that it is sufficient if the title described with adequate clearness the general purpose

and scope of the act. It need not amount to an index or epitome of the statute, nor is it necessary that the title should set forth the modes, means, or instrumentalities provided in the law for its administration and enforcement." Black, Const. Law, § 107. It cannot be truly said, therefore, that the title under consideration does not express the subject of legislation because it fails to indicate the par-

ing of the state Constitutions, so as to exempt him from imprisonment.

In Iowa, however, the courts have reached a contrary conclusion, holding the amount to be paid by such father to be in the nature of a debt within the provisions of the state Constitution.

The constitutional inhibition of imprisonment for debt is not infringed by the imprisonment of the reputed father of a child, if he fails to execute the bond for the support of the child required of him upon conviction. He is not imprisoned for the failure to pay a debt, but for his failure to perform a duty enforced in the name of the state for the protection of the state. *Paulk v. State*, 52 Ala. 427, 429.

And the relation of debtor and creditor cannot be said to exist between the reputed father of an illegitimate child and the people who prosecute him, to support such child, and therefore the amount ordered to be paid by him for such support cannot be said to be a debt within the provisions of the constitutional prohibition. *Rich v. People*, 66 Ill. 513, 515.

In Indiana there would seem to have been a conflict of opinion upon the question, but the later cases have overruled the earlier ones, which held such imprisonment to be for a mere debt.

Where a bond was executed in a bastardy case to save the defendant from imprisonment, it was stated that if the prosecution for bastardy was not founded on a criminal or appeal statute, it was simply for the enforcement of a civil obligation, and the bond was executed to escape imprisonment for debt, which was a proceeding to enforce a mere civil obligation for the nonperformance of which a defendant could not be imprisoned. *Byers v. State*, *Hutchison*, 20 Ind. 47, 48; *State*, *McArthur*, *v. Evans*, 19 Ind. 92.

But it has been held that the provisions of the Indiana statutes relating to bastardy proceedings are not in conflict with the provisions of the Indiana Bill of Rights, § 22, which prohibits imprisonment for debt, and therefore such act is constitutional, and the statute relating to the discharge of insolvent debtors has no application to a party imprisoned under such acts. *Lower v. Wallick*, 25 Ind. 68.

So, in *Ex parte Teague*, 41 Ind. 278, the court held that the opinion expressed with regard to the constitutionality of imprisonment of a defendant under the bastardy acts in the case of *Lower v. Wallick*, *supra*, was correct, and that such imprisonment was legal, and that the fact that the defendant was unable to replevy the demand did not entitle him to a discharge, the court stating that the question should no longer be regarded as open and unsettled in that state. To the same effect *State*, *Billman*, *v. Hamilton*, 33 Ind. 602; *Ex parte Voltz*, 37 Ind. 237.

In the above case the court looked upon the case of *Byers v. State*, *Hutchison*, *supra*, which held so much of the bastardy act as provided for the imprisonment of the defendant unconstitutional and void, was to be taken as overruled by the court in the case of *Lower v. Wallick*, *supra*, and subsequent cases.

And the same construction was placed upon the statute and the proceedings thereunder in *McIlvain v. State*, *Emery*, 37 Ind. 602, the court stating 34 L. R. A.

that it did not consider the question an open one, and cited the earlier cases of *Lower v. Wallick*, and *Ex parte Teague*, *supra*; *Reynolds v. Lamont*, 55 Ind. 308; and *Turner v. Wilson*, 49 Ind. 581,—in support of its theory.

A judgment rendered against the father of an illegitimate child for the payment of money for its support and maintenance is not a debt within the meaning of the constitutional provision abolishing imprisonment for debt. *Turner v. Wilson*, *supra*.

In *Turner v. Wilson*, *supra*, which followed the holding of the court in the previous cases of *Lower v. Wallick*, *State*, *Billman*, *v. Hamilton*, *Ex parte Voltz*, *Ex parte Teague*, and *Reynolds v. Lamont*, *supra*, there was, however, a dissenting opinion by Chief Justice Pettit, who held that the provisions of the bastardy act, which provide that after judgment for money due had been rendered the defendant should be imprisoned until he paid or replevied the judgment, was a palpable violation of both the letter and spirit of the 22d section of article 1 of the Constitution, the ingredient of fraud not being in the judgment for bastardy, and upon the further ground that a judgment for money was a debt no matter what the cause of action was, whether tort or contract, the judgment being a debt of record, and therefore the debtor could not be imprisoned to enforce or coerce the payment of it in cases of fraud.

So, it has been held that a proceeding by way of imprisonment of a defendant in cases arising under the Indiana statute relating to bastardy, is a means of enforcing the court's order and a part of the remedy, and not merely a contempt of court. *Reynolds v. Lamont*, *supra*.

So, in Kansas the courts have held that the order calling upon the father to support the child do not make the money ordered to be paid for the support of such child a debt in the ordinary acceptation of the terms, and that therefore the constitutional provisions do not apply. *Re Wheeler*, 24 Kan. 90.

Again, in Nebraska the sum charged against a petitioner for a writ of habeas corpus for the support of an illegitimate child has been held not to be a debt in the sense in which that word is used in the Nebraska Constitution, and therefore the imprisonment of the father to enforce such judgment is not contrary to the provisions of the Constitution. *Ex parte Cottrell*, 13 Neb. 193, 195.

In the above case, the question was whether proceedings in bastardy for the maintenance of an illegitimate child were in the nature of a civil action, and so within § 20 of art. 1 of the Constitution of that state, which provides that no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud. The court held that such proceedings were not within the provisions of the Constitution, and that therefore the father might be committed to prison for nonpayment of the amount ordered to be paid by him for the maintenance of the child.

So, in *Ex parte Donahoe*, 24 Neb. 69, the court upheld the constitutionality of the Nebraska statute relating to the maintenance and support of illegitimate children, and of the imprisonment of the father for noncomplying with the order of the court, upon the ground that such imprisonment

ticular provisions to be made. Nor can it be successfully contended that it fails to express the subject because of the general terms used for that purpose. Generality of title is not objectionable, so long as it is not made to cover legislation incongruous in itself, or which, by fair intendment, may not be considered as having a necessary or proper connection with the subject expressed. *Cooley*, Const. Lim. 5th

ed. p. 174; *Cannon v. Mathes*, 8 Helsk. 519; *Fraser v. East Tennessee, V. & G. R. Co.* 88 Tenn. 140; *State v. Wilson*, 12 Lea, 247; *Greene v. State*, 15 Lea, 711.

2. The title does not embrace more than one subject. That it names its proposed beneficiaries in three classes, as hotel keepers, inn keepers, and boarding-house keepers, does not make it double; and yet there is no other

was not an imprisonment for debt, but to enforce the statutory penalty under a conviction of bastardy involving a private injury and a public wrong to be compounded only by the assent of the complaining witness, or satisfied by compliance with the terms of the statute, such imprisonment not being in aid of an execution for debt, such as could be discharged under § 557 of the Code of Civil Procedure of that state.

And the Ohio courts have held that the proceedings under the Ohio statute, whereby the father of an illegitimate child may be imprisoned to enforce the sentence and order of the court, with respect to the child's maintenance, are not in conflict with § 15, art. 1, of the Constitution of that state, for the reason that the liability sought to be enforced is not founded upon a contract, express or implied, but originates in the wrongful act of the defendant, and therefore the imprisonment of the defendant in such a case is not contrary to the Constitution. *Musser v. Stewart*, 21 Ohio St. 353, 356.

In *State v. Brewer*, 38 S. C. 233, 19 L. R. A. 362, the question raised was whether a person who has been convicted of bastardy, who fails or refuses to enter into the recognizance as required by the law of that state for the support of the child, can, after execution against his property has been returned wholly or partially unsatisfied, be arrested under a writ of *capias ad satisfaciendum*, and committed to jail, subject, however, to the privileges accorded to insolvent debtors arrested under a similar writ. The court held that he might be so proceeded against, and was entitled to the same privileges, and that the provisions of the South Carolina statute relating to such proceedings did not violate the provisions of the Constitution which prohibited imprisonment for debt.

But in *Holmes v. State*, 2 G. Greene, 501, 503, where the question was whether, since the article of the Iowa Constitution abolishes imprisonment for debt in all civil actions, except in cases of fraud, a prosecution under the bastardy act was a civil or a criminal proceeding, the court stated that such proceedings were not in the nature of a criminal action, and that therefore the provisions of the Constitution applied, and for that reason the defendant was not liable to be imprisoned for debt. The provisions of the Constitution adopted since the bastardy act was passed repealing such act so far as it related to imprisonment.

In the case of *State v. Brewer*, *supra*, the court in its opinion cites the case of *Ex parte Robertson*, 27 Tex. App. 623, as an authority in favor of the theory that such orders are not debts within the terms of the constitutional inhibition, but this case is not a direct authority upon the point as it deals with the question of the imprisonment for nonpayment of a fine imposed upon a constable for refusing to execute and return a writ of sequestration issued in a civil cause, which case will be found under head IV. a, of this note.

As to prosecutions for bastardy, see brief in *Moore v. State*, *Vernon* (Kan.), 17 L. R. A. 714.

1. Against officers of the court.

The objection has, in many cases, been raised that it is contrary to the Constitution to imprison an officer of the court for neglect in obeying an order of the court, especially where such order

directs the payment of money; but the courts have generally supported the validity of such proceedings.

Imprisonment under an attachment for contempt to compel obedience by an officer of the court to a lawful order to pay over money which he has collected in the course of his official or professional duty is not imprisonment for debt, but is sound disciplinary dealing with an unruly member of the forensic household, and the imprisonment of such a person is not contrary to a Constitution. *Smith v. McLendon*, 59 Ga. 523, 527.

In *Bogart v. Electrical Supply Co.*, 23 Blatchf. 552, it was held that the statutes prohibiting imprisonment for debt had no application to the case of an attorney required by the order of the court to pay costs to which his client had been unjustly subjected, upon his application for relief to substitute a new attorney which resulted in a reference to a master, and a decision that the attorney was not entitled to further compensation than he had already received.

Imprisonment under an attachment for contempt to compel obedience by an officer of the court, such as an attorney to a lawful order to pay over money which he has collected in the course of his official or professional duty, is not imprisonment for debt within the meaning of the Georgia Constitution, and in such case the court treats him, not as a mere debtor who will not pay, but as a domestic of the law who refuses to obey his master. *Smith v. McLendon*, *supra*.

The neglect of an attorney to pay over money collected for his client is a case of "neglect" in "professional employment" within the meaning of the exception contained in the Pennsylvania act of July 12, 1842, abolishing imprisonment for debt, and therefore such an attorney may be arrested and imprisoned under a ca. sa. even in an action in assumpsit. *Wills v. Kane*, 2 Grant, Cas. 60.

In the above case, however, there was a dissenting opinion by Justice Woodward, wherein he held that such an attorney could not be so arrested, as the act of 1842, as properly understood, exempted from imprisonment defendants in actions of assumpsit.

And in *Cotton v. Sharpstein*, 14 Wis. 223, 230, 80 Am. Dec. 774, it was held that the fact that the applicant for the writ of mandamus was an attorney created no exception to the doctrine laid down by the court in the prior case of *Re Mowry*, 13 Wis. 53, *supra*, III. a. In this case the attorney had unlawfully converted a certificate of sale to his own use, and a body execution had been issued against him under a judgment in an action for such wrongful conversion, the liability in such an action resting in tort and not upon contract.

In *Chaffe v. Handy*, 36 La. Ann. 32, 33, where the defendant had been proceeded against under the Louisiana act of February 10, 1841 (art. 730 of the Code of Practice), which provides that whenever a judgment is rendered against a sheriff or other public officer for money by him or them received in his or their official capacity, and converted to his or their own use, or not accounted for, and a writ of *fi. fa.* is returned, "no property found," a *capias ad satisfaciendum* may be taken out and executed against such defendant or defendants, it was held that the remedy so granted by the statute,

ground, even so plausible as that, upon which to rest the insistence that it embraces more than one subject. The number of persons or classes of persons or kinds of business to be affected by a particular act has no bearing upon the question as to whether the title embraces one subject or more. The subject expressed in the title may be single, and still authorize legislation for every individual in the state; as in case of general assessment acts, etc.

3. Does the body of the act embrace more than one subject? Though not raised in the motion to quash, this is a question to be considered in determining the validity or invalidity of the act. If it should be answered in the affirmative, then the act is void, without reference to the questions raised in that motion. The 1st section declares that certain fraudulent acts, to the prejudice of hotel, inn, and boarding-house keepers, shall be misdemeanors; the 2d section declares what shall constitute prima facie evidence of fraudulent intent in prosecution for those acts; and the 3d section authorizes the sale of baggage or other property left by defaulting patrons of hotels, inns, and boarding houses. The 1st and 2d sections combined, are intended to prevent and suppress, by criminal punishment, the fraudulent acts therein enumerated; and the 3d sec-

tion is intended to reduce the injury resulting from such acts as much as possible by providing a speedy civil remedy. They all tend to the same end, and facilitate the same purpose. They are consistent parts of one general scheme, promotive of the object and germane to the subject expressed in the title, namely, protection to hotel, inn, and boarding-house keepers. This being true, the act, though consisting of different parts, embraces but one subject in legal contemplation. Sutherland, in the 98d section of his work on Statutory Construction, says: "Where the title of a legislative act expressed a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated, are properly included in the act, and are germane to its title." Chief Justice Nicholson, speaking for this court in the case of *Cannon v. Mathes*, said: "It is obvious, therefore, that the true rule of the construction, as fully established by the authorities, is, that any provision of the act, directly or indirectly relating to the subject expressed in the title, and having a natural connection thereto, and not foreign thereto, should be held to be embraced in it." 9 Heisk. 523. That rule, though expressed in somewhat different phraseology, has

Although created immediately after the abolition of imprisonment for debt, was explicitly provided for, not only in article 730 of the Code of Practice, but was also to be found *sparsim* in two sections of the Revised Statutes of 1870, namely §§ 3444, 3616, which clearly indicates an intention on the part of the legislature to retain that mode of coercion of payment against delinquent officials as a conspicuous feature of the Louisiana legislation.

In *State v. Nicholson*, 37 Md. 1, the defendant, a tax collector, was indicted under Md. act 1872, chap. 329, relating to the duty of tax collectors and making a defaulter upon conviction subject to imprisonment in the penitentiary, unless the amount be paid, and it was contended upon demurrer that such act was unconstitutional, for reason that it was in conflict with the Constitution of the state which abolishes imprisonment for debt. The court held that there was a broad distinction between imprisonment for debt within the meaning of the Constitution and imprisonment for a breach of duty on the part of a public officer, although such breach of duty might be the neglect or refusal on his part to pay money received by him for the use of the state, the court stating that public officers were by the common law indictable for malfeasance or misfeasance in office, and although the Constitution abolishes imprisonment for debt, that in no manner interfered with the power of the legislature to punish such offenses by imprisonment or otherwise as the public interest might require.

IX. Due process of law.

The question has been raised whether the imprisonment of a debtor is not an infringement of the 14th Amendment to the Constitution of the United States, § 1 of which provides, *inter alia*: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In *Gates v. M'Daniel*, 3 Port. (Ala.) 356, 359, where the defendant was arrested in the first instance without any order or rule to show cause why he

should not be committed to prison, the court in holding such imprisonment contrary to the constitutional provisions relating to due process of law, stated that there would seem to be a distinction between an execution directed in the first instance against the body of the defendant under which he is imprisoned and deprived of his liberty, and a case in which the practice is not to direct a seizure of the body in the first instance, but to give notice of a motion against the party charged as with the contempt, that he shall stand committed, wherein, if he is not prepared to defend, the court usually gives a day to show cause, and then, after hearing both sides, decides as to the guilt of the party, and makes its order thereon.

The Iowa act, chap. 126, Rev. Stat. 1880, providing for imprisonment for contempt of an order in proceedings to aid execution requiring a debtor to pay over money when made by a county judge not sitting as the court, was declared unconstitutional by reason of its violating §§ 9 and 10 of art. 1 of the Constitution, which provides that the right to trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty, or property without due process of law. *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529.

So, in *Re Roberts*, 4 Kan. App. 292, it was held that the General Statutes of that state of 1889, §§ 4572, 4573, relating to the arrest and imprisonment of a judgment debtor upon the affidavit of the plaintiff, his attorney, or agent alone, were unconstitutional and void, as they violated art. 14, § 1, of the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, the debtor being imprisoned merely upon the affidavit of the plaintiff filed after judgment, without any provision for a hearing or determination of the question of fraud.

In upholding the imprisonment of the debtor in the case, *Re Burt*, 56 Minn. 397, the court stated that when an insolvent debtor had taken the initiative under the insolvent law, and sought its benefit by making an assignment in the expectation that he might be released from his debts, and he swore that he had assigned all of his property and turned it

been applied in several subsequent cases some of which we cite: *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 158; *Cole Mfg. Co. v. Falls*, 90 Tenn. 488; *Illinois O. R. Co. v. Orider*, 91 Tenn. 498. The act construed and adjudged to embrace but one subject in the last-named cause provides (1) that any person, corporation, company, lessee, or agent owning or operating any railroad in this state shall be liable for any injury done to live stock upon an unfenced track; (2) that three householders may be appointed to assess the damage resulting from such injury; (3) that the appraisalment by such appraisers shall be prima facie evidence of the amount of damage in any action for such injury; (4) that the defendant in such action shall be liable also for a reasonable attorney's fee for plaintiff's counsel; (5) that the master of the section of road on which the injury was done shall give notice thereof to the owner, his agent, or the nearest magistrate; and (6) that any section master who knowingly fails to give such notice shall be guilty of a misdemeanor. Acts 1891, chap. 101. That act, like this one, it will be observed, treats of both criminal and civil remedies, and declares what facts, when established, shall constitute prima facie evidence (of amount of civil liability under the one act, and of the intent to commit the offense prohibited by the other);

and, in addition, that act contains three provisions in excess of those contained in this one, in consequence of which it is to that extent more comprehensive in its scope and purpose. Yet that act was, in the case cited, held to embrace but one subject; and it has been applied and enforced as a valid law in subsequent cases. *Cincinnati, N. O. & T. P. R. Co. v. Russell*, 92 Tenn. 108; *Nashville, C. & St. L. R. Co. v. Hughes*, 94 Tenn. 450; *Cincinnati, N. O. & T. P. R. Co. v. Stonecipher*, 95 Tenn. 811. The subject of legislation is single in each of the two acts, though the liabilities declared therein are both criminal and civil, and the remedies prescribed are more than one.

4. Passing next to the third ground of the motion to quash, the inquiry is whether or not the act is in violation of the 8d clause of § 17, art. 2, of the Constitution, which requires that "all acts which repeal, revive, or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived, or amended." The word "caption," as here used, is synonymous with "title;" and the word "otherwise" refers to the "body" of the repealing, reviving, or amending act. *Shelton v. State*, 96 Tenn. 521; *State v. Runnels*, 93 Tenn. 322; *Ransome v. State*, 91 Tenn. 718. Neither in its caption nor otherwise (title nor body) does the act before us recite either "the

over to the assignee, when in fact he had not done so, it was not depriving him of his property or liberty without due process of law to compel him to disclose what other property, if any, he had concealed, and in default of his doing so punish him for contempt of court. If the assignor could in such cases defy the law and the courts, he could retain large sums of money after making the fraudulent assignment, and the insolvency law would become an instrument for the perpetration of fraud and swindling instead of one intended for the equal protection of all.

See also *Meadowcroft v. People*, 163 Ill. 53, *supra*, VII.; *Ez parte Murray*, 35 Fed. Rep. 496, *supra*, VIII. d.

X. Ne exeat.

In *West v. Walker*, 6 Blackf. 420, a defendant in chancery, who was a prisoner on a writ of ne exeat to secure the performance of a pecuniary demand, was discharged from custody on motion under the Indiana act of 1842, abolishing imprisonment for debt, no fraud being shown.

But the constitutional inhibition against imprisonment for debt as found in art. 1, § 16, Wis. Const., which provides, no person shall be imprisoned for debt arising out of law founded on a contract, express or implied, was held not to apply to an arrest by virtue of a writ of ne exeat, which is in the nature of equitable bail and issued only by the special order of the court when the party against whom it is asked is about to leave the jurisdiction of the court, so that the decree of the court will be ineffectual and thus prevent the person going from the state until he gives surety for his appearance, and it is not therefore imprisonment for debt within the proper meaning and sense of the words. *Dean v. Smith*, 23 Wis. 483, 498, 90 Am. Dec. 198.

See also *Malcolm v. Andrews*, 68 Ill. 100, 104, *supra*, III. d.

XI. Debts owing to the United States.

The state legislature has full constitutional authority to pass laws whereby insolvent debtors shall be released or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them. *Beers v. Houghton*, 34 U. S. 9 Pet. 323, 360, 9 L. ed. 145, 157.

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The act of Congress of the 28th of February, 1890, adopts the state law with reference to the imprisonment of debtors for the nonpayment of debt. *Gray v. Munroe*, 1 McLean, 523, 523.

The imprisonment of private debtors sued in courts of the United States is to be governed by the laws and policy of each state wherein the execution issues, but with respect to those who are debtors to the United States it is to be governed by the united and fixed laws of Congress. *Moan v. Wilmarth*, 3 Woodb. & M. 369.

Where a debtor after being sued in the circuit court took the benefit of the Massachusetts insolvent laws, it was held that he was, under the acts of Congress, entitled to have execution issued against his property alone, and could not be imprisoned for debt, the surrender by the debtor of his property being one of the abolitions under certain "conditions and restrictions" provided for in the Massachusetts statutes. *Ibid*.

In *United States v. Hewes, Crabbe*, 307, the defendant sought to be discharged from imprisonment by virtue of an act of Congress the 28th day of February, 1890, entitled, "An Act to Abolish Imprisonment for Debt in Certain Cases," which enacted "that no person shall be imprisoned for debt in any state on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt has been abolished; and where, by the laws of a state, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the court of the United States; and the same proceedings shall be had therein, as are adopted in the courts of such state," it was held that persons indebted to the United States were not to be considered as included in the provisions of the statute, for the reason that the United States could not be bound by such general words, and that in order to bind the sovereignty it must be expressly included or there must be a necessary implication to so include such power.

See also *State v. Manuel*, 4 Dev. & B. L. 20, 28 *supra*, II. a.

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title or substance" of any former law. No former law is mentioned or designated in any way in any part of that act; hence the act is necessarily void if that constitutional requirement is applicable to any part of it. That requirement does not apply, however, to all legislation. It relates alone to those acts which expressly repeal, revive, or amend former laws; and does not embrace implied amendments (*Shelton v. State*, 96 Tenn. 521), nor implied repeals (*Home Ins. Co. v. Shelby County Taxing Dist.* 4 Lea, 644; *Maney v. State*, 6 Lea, 221; *Knoxville v. Lewis*, 12 Lea, 181; *Ballentine v. Pulaski*, 15 Lea, 638; *Poe v. State*, 85 Tenn. 495; *Illinois C. R. Co. v. Orider*, 91 Tenn. 507; *Hunter v. Memphis*, 93 Tenn. 571), nor implied revivora. If any former law is amended or revived by this act, that result is accomplished by implication alone; there is no express amendment or revivor. No word indicating a purpose to amend or revive any former law is used in any part of the act. With equal propriety and certainty, it may be said that no express repeal was intended, and that any repeal actually effected was by implication simply. The words of the 4th section "that all laws and parts of laws in conflict with this act be and the same are hereby repealed," do not make it an expressly repealing act. Really, that section adds nothing of virtue or meaning to the act, and takes nothing from it. All prior conflicting laws and parts of laws were impliedly repealed by the former section of the act; and, as a consequence, no such laws or parts of laws were left for the 4th section to operate upon. That section was therefore useless, and of no force or effect whatever. It had no office to perform, and performed none. Its presence in the bill did not make the act a repealing law or a non-repealing law; and it will not be regarded for the purpose of vitiating the law, nor will it be permitted to have that effect. Such provision is of frequent occurrence in the concluding sections of legislative acts. It has generally appeared, and as often been disregarded, in those cases in which the court has held that the constitutional requirement last mentioned did not apply, and that repeals were wrought by implication. See Acts 1879, chap. 84, § 13, and *Home Ins. Co. v. Shelby County Taxing Dist.* 4 Lea, 644; Acts 1879, chap. 186, § 4, and *Poe v. State*, 85 Tenn. 495; Acts 1891, chap. 101, § 8, and *Illinois C. R. Co. v. Orider*, 91 Tenn. 507; Acts 1893, chap. 89, § 12, and *Hunter v. Memphis*, 93 Tenn. 571; Acts 1881, chap. 171, § 88, and *Knoxville v. Lewis*, 12 Lea, 181. It may be repeated that this act does not expressly repeal, revive, or amend any former law; therefore, it is not obnoxious to the 8d clause of § 17 of art. 2 of the Constitution. If invalid at all, it must be so for some reason or reasons yet to be considered.

5. Is it invalid for the fourth and last reason assigned in the motion to quash? That is to say, does it violate § 18 of article 1 of the Constitution, which declares that "the legislature shall pass no law authorizing imprisonment for debt?" It does not in terms provide imprisonment or any other specific punishment; it only declares that certain things shall be misdemeanors and receive punishment as such. That is sufficient, however, to author-

ize imprisonment; for misdemeanors whose punishment is not specifically prescribed by the law creating them are punishable by fine and imprisonment,—one or both, in the discretion of the court. 1 Bishop, Crim. L. § 719; *Atchison v. State*, 13 Lea, 275. But that does not decide the whole question. The act authorizes imprisonment. That much is certain. But is that imprisonment for debt or for something else? To determine that, the act must be construed; and, in ascertaining its true construction, all intendments will be made and all doubts resolved in favor of that interpretation which will support the act, and avoid conflict with the Constitution. Sutherland, Stat. Constr. § 832; Cooley, Const. Lim. 5th ed. 218; Black, Const. Law, § 28; 3 Am. & Eng. Enc. Law, 673, 674; *Cole Mfg. Co. v. Falls*, 90 Tenn. 469; *Illinois C. R. Co. v. Orider*, 91 Tenn. 507; *Ellis v. State*, 93 Tenn. 93. Applying that rule, the act assailed in this case will not be held to impose or authorize imprisonment for debt if any other reasonable construction can be placed upon the language used therein. The threefold provision is that any person (1) who shall procure the accommodations mentioned "with intent to defraud" the person furnishing them "out of the value or price" thereof, or (2) who shall obtain credit for such accommodations "by the use of any false pretense or device, or by fraudulently depositing" baggage or other property, or (3) who, having obtained credit, "shall surreptitiously remove his or her baggage or property," shall be "guilty of a misdemeanor, and be punished accordingly." § 1. Or, stating it more briefly still, the act provides that any person who fraudulently obtains such accommodations, or who fraudulently removes his baggage or other property, shall be guilty of a misdemeanor. The offense consists, not in the creation of a debt, nor in its nonpayment, but rather in the fraud through which credit may be procured or payment evaded. The latter, and not the former, is the thing for which punishment is to be inflicted. As well said by one of the attorneys for the state, the legislative intent was "to punish the debtor for his fraud, and not for his debt." Honest debtors are not within the act. It relates to those alone who shall intentionally pursue a certain course of fraudulent conduct; and that course of fraudulent conduct intentionally pursued constitutes the offense for which punishment is prescribed, and without which punishment will not be inflicted. Without intentional fraud no offense is committed, no penalty incurred. The intention of the legislature, as we get it from the words and the tenor of the act, was to authorize punishment, including imprisonment, not for debt, but alone for particular intentional frauds, whereby the offender may obtain the property of his victim—for temporary use in case of lodging, and for absolute consumption in case of food—without compensation, or whereby, after obtaining such accommodation, he would defeat the landlord's lien upon his baggage. To our minds, this is not only a fair and reasonable construction of the act, but the most easy and natural one that can be given the language employed. The manifest object was to protect the property and the lien of the landlord against those persons

who would, by intentional fraud, wrongfully use or consume the one or defeat the other; and, to make that protection effectual, the offender is subjected to punishment for his fraud, whether practised in the wrongful use or consumption of the landlord's property, or in the removal of his own property upon which the landlord has a lien. In either case the landlord has an interest in property, which the state, as a matter of public policy or of individual right, may well protect by the passage and enforcement of a penal statute, such as that before us. Of like nature are all our laws against false pretenses (Mill & V. Code, §§ 5468-5472, inclusive), and against the removal of mortgaged property (Id. § 5626, sub-sec. 8). Statutes similar to that impeached in this case seem to have been passed in many of the states, including Alabama, Illinois, Iowa, Michigan, Minnesota, Missouri, Nebraska, New York, and Ohio; but, so far as we are aware, the question as to whether or not such legislation violates the usual constitutional prohibition of imprisonment for debt has been considered by only one court of last resort. Hearing a case on appeal from a judgment refusing to discharge the petitioner on a writ of habeas corpus, the supreme court of Alabama said: "There is nothing in the point raised in the application that the act 'for the protection of landlords, proprietors, or keepers of hotels and boarding houses' is violative of §§ 21 and 28 of art. 1 of the Constitution, which forbids imprisonment for debt, or the making of laws giving any special privileges or immunities. The act is in line with our other statutes against false pretenses, frauds, cheats, acts to injure, and the like. One who violates the act is imprisoned, not for the debt he owes the proprietor, and not to make him pay it, but to punish him for a wrong he has perpetrated, which is made a crime. And this is no more of a special privilege to the hotel keeper than the statute against burglary from a store or a dwelling is to the merchant who owns the store, or to the owner of the dwelling. Habeas corpus denied." *Ex parte King*, 103 Ala. 182.

6. The 2d section of the act does not impair the right of trial by an impartial jury, as guaranteed by §§ 6, 8, 9, art. 1, of the Constitution. It simply provides that proof of certain things therein enumerated shall be "prima facie" evidence of fraudulent intent. The language used indicates no purpose to abridge the right of trial by jury; nor can it be held, by any proper construction, to have that effect. A person arraigned under the 1st section of the act is left to his trial by an impartial jury, and is allowed the presumption of innocence as fully as in any other case. That right and that presumption are in no degree affected by the 2d section. Neither can be impaired by a mere provision that proof of certain facts shall be taken as prima facie evidence of a fraudulent intent; and yet that is the sum total of the 2d section. It cannot be true that a declaration by the legislature or a holding by the courts that proof of certain facts is prima facie or presumptive evidence of one ingredient of an offense, as of guilty intent, is an invasion of the peculiar province of the jury, or an impairment of the defendant's sacred right of

jury trial. In every case the defendant is entitled to trial by an impartial jury and to the benefit of a presumption of innocence; but that right and that presumption can no more preclude a presumption of guilty intent from sufficient proof adduced than they can preclude the introduction of proof altogether. The courts have long held that juries may and should be instructed that proof of recent possession of stolen property, unexplained, affords prima facie or presumptive evidence of guilt (1 Greenl. Ev. § 84; *McGuire v. State*, 6 Baxt. 621; *Wilcox v. State*, 3 Heisk. 118; *Hughes v. State*, 8 Humph. 75; *Fields v. State*, 6 Coldw. 526; *Boyer v. State*, 93 Tenn. 220); and that, upon a charge of murder, proof of the killing, without more, raises a presumption of malice (1 Greenl. Ev. § 84; *Coffee v. State*, 3 Yerg. 283, 24 Am. Dec. 570; *Draper v. State*, 4 Baxt. 246; *Gray v. State*, Id. 331; *Witt v. State*, 6 Coldw. 5; *Epperson v. State*, 5 Lea, 291). The power of the legislature to, prescribe rules of evidence, and to declare what shall be evidence, is practically unrestrained, and legislation, to those ends, will be upheld so long as it is impartial and uniform, and does not "preclude a party from exhibiting his rights." Cooley, Const. Lim. 5th ed. pp. 452-454. In the case of *Illinois C. R. Co. v. Orider*, 91 Tenn. 498, 499, this court so held, and sustained as constitutional a provision (Acts 1891, chap. 101, § 4) that the report of appraisers as to value of live stock killed, and as to amount of damages to live stock injured, by moving train upon unfenced track, "shall be prima facie evidence" of such value or damage in the event of suit therefor. That was a civil case, dealing with a provision as to evidence of civil liability. It is true; but that fact does not avoid the force of the decision as a precedent in this case. A man can no more be deprived of his property than of his life or liberty by unconstitutional legislation. Const. art. 1, § 8. It is not an unusual or prohibited thing for the legislature to declare in penal statutes what particular wrongful acts, when proved, shall constitute certain criminal offenses, or the ingredients thereof. One striking instance of the rightful exercise of that power is found in Mill. & V. Code, § 5849, which is as follows: "Every murder perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious, and premeditated killing, or committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary, or larceny, is murder in the first degree." When the fact that murder, as defined in the preceding section (5348), has been committed, is established by proof, and it is further shown that the offense was "perpetrated by the means of poison," or by "lying in wait," or in any other one of the several ways mentioned, then the offender is guilty of "murder in the first degree,"—so declared by the legislature. Thus, the facts that shall constitute one of the highest crimes known to our law are set forth in a legislative act, whose validity is unquestioned and unquestionable, and under which scores of unfortunate men have been executed or consigned to imprisonment for life. Would that act have been any more subject to adverse criticism on constitutional grounds had it merely declared that proof of

the killing, by the means or in the manner mentioned, should be prima facie or presumptive evidence of an intent to commit murder in the first degree? We apprehend not.

7. It should be added, by way of construction, that the clause "or that the party refused to pay for such food, lodging, or accommodation, on demand," used in the 2d section to describe one of the acts which, when proved, shall be taken as prima facie evidence of fraudulent intent, does not refer to or include an honest refusal—a mere failure or declination—to pay on demand. Standing alone, the words used would naturally embrace every

refusal; but when they are considered in connection with other parts of the act, and in their true relation thereto, it is manifest that only a fraudulent refusal or evasion was in the legislative mind when that clause was introduced. Every other clause of that section, and every clause of the 1st section, by express terms, relates to fraudulent conduct, and to that alone as the matter for investigation and punishment in the courts. Only fraudulent acts are contemplated and embraced in the first and second sections.

Reverse and remand.

KANSAS SUPREME COURT.

Charles D. RATHBONE

James C. HOPPER *et al.*

(.....Kan.....)

1. The term "municipal corporations," employed in the title of chapter 50 of the Laws of 1879, includes townships; and the provisions of that act authorizing the refunding of township indebtedness are not in conflict with § 16 of art. 2 of the Constitution.

2. That act authorizes the issue of negotiable bonds.

(Allen, J., dissents from proposition 2.)

(July 11, 1890.)

APPPLICATION for a writ of mandamus to compel the levy of a tax for the payment of interest upon certain bonds which had been issued by Forrester township. *Granted.*

The facts are stated in the opinion.

Messrs. Gleed, Ware, & Gleed, for plaintiff:

The title of a law need not be a duplicate of the law itself; all that is necessary is, that such a title should be given to a bill that the localities or persons affected thereby may be apprised by the title and have an opportunity to investigate, and if necessary, or deemed proper, to oppose the bill.

The mere generality of the title to an act does not render it objectionable, so long as the act has but one general object, and the title is such that neither the members of the legislature nor the people to be affected can be misled.

Re Pinkney, 47 Kan. 89.

The township may build bridges, vote bonds to railroads, may establish and maintain a free library and reading rooms, public parks and cemeteries, and they may levy a tax for the purpose of paying their indebtedness, expenses, and bonds. It is in Kansas a municipal corporation.

Pleasant View Twp. v. Shawgo, 54 Kan. 742;

*Headnotes by JOHNSTON, J.

Ralston v. Dodge City, M. & T. R. Co. 53 Kan. 337; *Center Twp. v. Hunt*, 16 Kan. 430; *Alma Twp. v. Kast*, 37 Kan. 433; *Salt Creek Twp. v. King Iron Bridge & Mfg. Co.* 51 Kan. 526; *Riley v. Finney County Twp.* 54 Kan. 463.

A municipal corporation is a subordinate branch of the domestic government of a state.

Nashville v. Ray, 86 U. S. 19 Wall. 475, 22 L. ed. 168, *East Tennessee University v. Knoxville*, 6 Baxt. 171; *Pirley v. Western P. R. Co.* 33 Cal. 186, 91 Am. Dec. 623; *Horton v. Mobile School Comrs.* 43 Ala. 607; *Winspear v. Holman Dist. Twp.* 37 Iowa, 542; *Williams v. Nottawa Twp.* 104 U. S. 209, 26 L. ed. 719; *Doon Dist. Twp. v. Cummins*, 142 U. S. 373, 35 L. ed. 1047; *Indiana, Stanton, v. Glover*, 153 U. S. 513, 39 L. ed. 243; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301.

A municipal corporation, in its broader sense, is a body politic, such as a state, and each of the governmental subdivisions of the state, such as counties, parishes, townships, hundreds, New England "towns," and school districts, as well as cities and incorporated towns, villages, and boroughs. Every one of these is properly susceptible of the general appellation.

15 Am. & Eng. Enc. Law, *Municipal Corporations*, p. 958.

The distinction between municipal corporations proper and municipal corporations quasi is one of great convenience, and furnishes a key to many wise decisions, but public corporations quasi are nevertheless in the fullest and strictest sense municipal corporations.

West Plains Twp. v. Sage, 69 Fed. Rep. 943.

The refunding bonds were valid.

Ashley v. Presque Isle County Supers. 60 Fed. Rep. 55, 16 U. S. App. 656; *Cadillac v. Woonsocket Inst. for Sav.* 58 Fed. Rep. 935, 16 U. S. App. 545; *Cummins v. Doon Dist. Twp.* 42 Fed. Rep. 644; *National Bank of Commerce v. Grenada*, 41 Fed. Rep. 87, *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389; *Sinton v. Carter County*, 23 Fed. Rep. 535; *Chandler v. Attica*, 18 Fed. Rep. 299; *Ballou v. Jasper County*, 8 Fed. Rep. 630.

NOTE.—As to town bonds, see also *Brownell v. Greenwich (N.Y.)* 4 L. R. A. 635; and *State, Charles v. L. R. A.*

ton, C. & C. R. Co., v. Whitesides (S. C.) 3 L. R. A. 777.

Messrs. Buchan, Freeman, & Porter, for defendants:

A township is not a municipal corporation. 1 Dill. Mun. Corp. §§ 12, 20; Beach, Pub. Corp. §§ 2-6; 15 Am. & Eng. Enc. Law, p. 952; *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109; *Finch v. Toledo Bd. of Edu.* 80 Ohio St. 87, 27 Am. Rep. 414; *Askeo v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730; *Harris v. School Dist. No. 10*, 28 N. H. 61; *Fourth School Dist. v. Wood*, 18 Mass. 192; *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 85; *Beach v. Leahy*, 11 Kan. 23; *Eikenberry v. Bazaar Twp.* 22 Kan. 561, 31 Am. Rep. 198; *Marion County Comrs. v. Riggs*, 24 Kan. 255; *Cooley, Torts*, 622; *Waltham v. Kemper*, 55 Ill. 846, 8 Am. Rep. 652; *Russell v. Decon County*, 2 T. R. 671; *Atchison v. Bartholow*, 4 Kan. 124; *Freeland v. Stillman*, 49 Kan. 197.

A statute or a title to a statute is to be so construed as to give sense and meaning to every part.

Cooley, Const. Lim. 70, 71.

In the construction of a statute the words "municipal corporation" are not, as a definition, broad enough to include counties, townships, and school districts.

Freeman v. Stillman, supra.

The Constitution has said that the title must be an index to the law, and the court may not sanction, as a valid enactment, any part of the statute to which the finger of the title does not point.

State v. Brown, 38 Kan. 390; *Re Wood*, 84 Kan. 645; *State v. Bankers & M. Mut. Ben. Assn.* 23 Kan. 499; *Swygas v. Britton*, 17 Kan. 627; *Shepherd v. Helmers*, 23 Kan. 505; *Sedgwick County Comrs. v. Bailey*, 18 Kan. 600.

The original bonds voted in aid of the Ness County Sugar Mill Company were absolutely void.

Bonds issued in aid of a private enterprise are invalid.

Central Branch U. P. R. Co. v. Smith, 23 Kan. 745; *Commercial Nat. Bank v. Iola*, 2 Dill. 353; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Citizens' Sav. Assn. v. Topeka*, 3 Dill. 376, 87 U. S. 20 Wall. 655, 32 L. ed. 455.

Chapter 60, Laws 1879, even if it applies to townships, does not authorize the issue of negotiable bonds, or bonds such as those set out in the alternative writ.

The powers of such governmental agencies as counties, townships, and school districts are more strictly construed than in the case of incorporated municipalities. It is settled that this class of corporations have not the implied power to borrow money and issue negotiable bonds. Direct legislative authority is necessary.

Clatsop County v. Brooks, 111 U. S. 400-407, 28 L. ed. 470-472; *Hill v. Memphis*, 184 U. S. 199, 38 L. ed. 887; *Young v. Clarendon Twp.* 183 U. S. 840, 38 L. ed. 356; *Kelley v. Milan*, 127 U. S. 139, 32 L. ed. 77; *Nashville v. Bay*, 86 U. S. 19 Wall. 468, 22 L. ed. 164; *Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390; *Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 652; *Merrill v. Monticello*, 188 U. S. 673, 34 L. ed. 1069; *Anthony v. Jasper County*, 101 U. S. 698, 25 L. ed. 1005. 34 L. R. A.

Johnston, J., delivered the opinion of the court:

This is an original proceeding in mandamus to compel the levy of a tax upon the property in Forrester township, Ness county, for the payment of interest which has accrued upon refunding bonds issued by the township. It appears that in April, 1889, the township voted \$20,000 in bonds, payable in twenty years, and bearing interest at 7 per cent per annum, to aid the Ness County Sugar-Mill Company; and, on October of the same year, they were refunded in bonds running thirty years, and bearing interest at 6 per cent per annum, in accordance with the provisions of chapter 50 of the Laws of 1879. The petition alleges that the refunding bonds were negotiable, payable to bearer, and had been duly registered by the auditor of the state of Kansas, who certified that they had been regularly and legally issued, in conformity with the laws of the state. Default has been made in the payment of the interest, and the local authorities decline to levy a tax, claiming that the original bonds were invalid, because they were issued in aid of a private enterprise, and also that the act under which they were issued does not authorize the issue of refunding bonds by townships, nor the issue of negotiable bonds, such as were issued by the township, in any case.

The questions submitted for decision are raised on a motion to quash the alternative writ, and the first is that the title of the act under which the bonds were issued is not broad enough to cover the provisions authorizing the refunding of township indebtedness. The title is as follows: "An Act to Enable Counties, Municipal Corporations, the Boards of Education of Any City and School Districts to Refund Their Indebtedness." Express authority is given in the body of the act for refunding township indebtedness. Townships are mentioned in connection with counties, cities, and school districts in almost every section; and the provisions of the act apply substantially alike to each municipality, except that townships and school districts cannot refund their debts without the assent of the voters, expressed at an election held for that purpose. It was the manifest purpose of the legislature to confer authority upon townships to refund their indebtedness, and the question for decision is whether the general term "municipal corporations," employed in the title, is sufficiently broad to cover those provisions. In this state, each organized township is a body politic and corporate, with power to make all contracts that may be necessary and convenient for the exercise of its corporate powers, and, in its proper name, may sue and be sued. A township is generally spoken of as a municipality or municipal corporation, but, strictly speaking, every political subdivision of the state organized for the administration of civil government is a quasi corporation. In this respect they are placed on the same plane as counties and school districts; and in this court in determining the liability of this class of corporations for failure to perform some corporate duty, or for the neglect or misfeasance of its officers and agents, it has been held that counties, townships, and school

districts are not municipal corporations proper, and that their liabilities in this respect are not the same as incorporated cities, towns, and villages. *Beach v. Leahy*, 11 Kan. 23; *Eikenberry v. Bazaar Twp.* 22 Kan. 561, 31 Am. Rep. 198; *Marion County Comrs. v. Riggs*, 24 Kan. 255; *Freedland v. Stillman*, 49 Kan. 197. In all these cases and for the purpose of determining their liabilities and powers, the distinction between municipal corporations proper and other public corporations has been made. In the broader sense and in common usage, the term "municipal corporations" includes counties and townships. All public corporations, including counties, cities, and townships are frequently referred to as "municipalities" and "municipal corporations," to distinguish them from private corporations, and it is not uncommon to find them so designated in the state and Federal courts, and in the published reports of their decisions. In a very recent case, Chief Justice Horton referred to a township as "a public municipal corporation;" and the same language is employed both in the syllabus and in the opinion. *Riley v. Garfield Twp.* 54 Kan. 463. In 15 Am. & Eng. Enc. Law, p. 953, the following definition is given: "A municipal corporation, in its broader sense, is a body politic, such as a state, and each of the governmental subdivisions of the state, such as counties, parishes, townships, hundreds, New England 'towns,' and school districts, as well as cities and incorporated towns, villages, and boroughs. Every one of these is properly susceptible of the general appellation." Here, then, we have in the title a term which, if taken in the broader sense and popular signification, would include townships, and render the act valid, while, if taken in the more restricted and technical sense, it would render it invalid. What sense shall be imputed to the legislature, and which interpretation should be given to the term? No one can doubt that the legislature intended to make a title broad enough to cover the provisions of the act with reference to townships, and this is the more apparent from the amendments made to the act long after the passage of the original act, and after large amounts of township indebtedness had been refunded under its provisions. Laws 1891, chap. 163; Laws 1893, chap. 118. The obvious intention of the legislature is entitled to great weight in determining the sufficiency of the title. In *Woodruff v. Baldwin*, 23 Kan. 494, it was held in a similar case to be more just and fair to say that the legislature used the title in its broadest sense,—a sense broad enough to include the subject-matter of the act,—rather than to apply the restricted meaning, which would to some extent defeat the legislative purpose. The same view was taken in *Re Pinkney*, 47 Kan. 89. There a term was employed in the title to an act which, if given the broader meaning, would uphold the act, while, giving it the narrower and perhaps more common meaning would render it invalid; and it was held that, the legislature having employed the word in its broadest sense, and one which fairly covered the provision assailed, the court was not warranted in adopting the narrower meaning, and thus holding the act invalid. It was said that the fact that general

terms are employed in the title does not render it objectionable so long as the title to the act is such that neither the members of the legislature nor the people to be affected are misled. The defendants place some reliance upon the language used in *Freedland v. Stillman*, *supra*; but an attentive reading of the decision shows that it is not controlling. In that case the court was not considering the title to an act, but was endeavoring to ascertain the intention of the legislature, and from the connection in which "municipal corporations" was used it could be readily seen that school districts were not within the purpose of the legislature in framing the act. Here the provisions of the body of the act in question show beyond cavil that the legislature intended to authorize townships to refund their indebtedness; and the question we have to decide is whether that intention shall be thwarted by a technical interpretation of the title to the act. In making the distinction between the different kinds of public corporations, it is common to refer to cities as municipal corporations proper. This is a discriminating expression frequently used by the courts of this state, and, if that term had been employed in the title, there would be some reason for the strict interpretation for which the defendants contend. A technical interpretation, however, has never been applied in this state to the titles of legislative acts. On the other hand, it has been consistently held that the constitutional limitation should not be enforced in any narrow or technical spirit, but should be liberally interpreted, with a view of upholding the acts of the legislature. It has been regarded to be the duty of the court to view the acts of the legislature with great respect, and, so far as possible, endeavor to reconcile and sustain them. Illustrations of liberal interpretations placed upon the title of the acts may be found in almost every volume of our decisions, but we need only to refer to a few of them. *Woodruff v. Baldwin*, *supra*; *Philpin v. McCarty*, 24 Kan. 393; *Marion County Comrs. v. Harvey County Comrs.* 26 Kan. 181; *Cherokee County Comrs. v. State*, 36 Kan. 387; *Missouri P. R. Co. v. Harrelson*, 44 Kan. 258; *State v. Bush*, 45 Kan. 140; *Re Pinkney*, 47 Kan. 89; *State v. Lewelling*, 51 Kan. 562; *Re Sanders*, 53 Kan. 191, 23 L. R. A. 603; *Lynch v. Chase*, 55 Kan. 867; *Rogers v. Morrill*, Id. 737. The act has been in force for more than seventeen years, and, upon the theory that the title was good and the act valid, a vast number of the townships of the state have issued bonds, which have been negotiated in the money markets of the country, and accepted as valid securities. The official reports show that the state holds a considerable amount of such bonds, purchased as an investment of the permanent school and other funds. The validity of the act is assailed here for the first time, but we think the scope and effect of the series of decisions heretofore cited compel us to hold that the term "municipal corporations," as used in the title of the act, should be interpreted so as to include townships.

We are unable to agree with the contention that the refunding bonds are non-negotiable, and that in the hands of bona-fide holders they are

subject to the same defenses as would have been available against the immediate payee. They are specifically alleged to be negotiable in the alternative writ, are negotiable in form, and we think the act under which they are issued contains no restrictions which take away the attribute of negotiability, or except them from the rules commonly applied to such municipal securities. Prior to the enactment of the refunding law of 1879, a great number of special acts had been passed to refund the accrued and accruing indebtedness of counties, cities, townships, and school districts. It was the obvious purpose of the legislature of 1879 to frame a general refunding law, which would be available to all municipalities. The act provides for the issuance of interest-bearing bonds, with coupons attached, to run for a period of thirty years or less; the bonds and coupons to be signed by the officer and in the ordinary manner in which municipal bonds are executed. They are required to be issued in denominations from \$100 to \$1,000, payable at a place to be designated upon the face thereof, and to contain a recital of the act under which they are issued. Where authority is given to a municipality to issue bonds of this character, without restriction as to negotiability, there is a fair implication that negotiable bonds are to be issued. The provisions of this act in respect to the character of the bonds to be issued are substantially the same as those of the numerous refunding acts of Kansas, and the bonds that have been issued under them have been regarded as negotiable by the people of the state, and have been so accepted in the commercial world. This question was recently before the United States circuit court of appeals, and it was held that the objection that the act did not authorize the issue of negotiable bonds was untenable. Sanborn, J., in pronouncing the judgment of the court, said that "the act under consideration in this case authorized this township to 'issue new bonds,' without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual—nay, it may almost be said the universal—form of such securities is that of a negotiable bond payable to bearer; and, in our opinion, it was bonds in this form, and in no other, that the legislature of Kansas had in mind and intended to give this township power to issue by this act. *Cadillac v. Woonsocket Inst. for Sav.* 7 C. C. A. 574, 58 Fed. Rep. 985, 16 U. S. App. 545; *Ashley v. Presque Isle County Supers.* 8 C. C. A. 455, 60 Fed. Rep. 53, 16 U. S. App. 656." *West Plains Twp. v. Sage*, 16 C. C. A. 553, 69 Fed. Rep. 943. In the same connection, that court held, and we think correctly, that the provision that new bonds should be issued to the holder of the old indebtedness does not require that he shall be named as payee in the bonds, and is not to be interpreted as a restriction upon the negotiable character of the bonds issued. The issue and delivery of the bonds payable to bearer, which is the usual method employed, would seem to be a full compliance with that provision of the statute. Its main purpose was to require the officers to deal di-

rectly with the holder of the indebtedness, so that no refunding bonds should be issued until the old indebtedness was delivered up for cancellation. It is significant, too, that the amendatory act of 1891, passed twelve years after the original act, distinctly provides for the sale of the refunding bonds, and restricts the municipal authorities from negotiating such bonds at less than par, or at a higher rate of interest than 6 per cent per annum. This provision goes upon the theory that the bonds are negotiable, and, in a certain sense, is a legislative interpretation of that part of the act. Neither can we see that the provision requiring the county clerk to keep a record of the refunding proceedings, showing the character of the refunding bonds, and the persons who surrendered the old and received the new form of indebtedness, indicates a legislative purpose to restrict the negotiable character of the securities to be issued. It is no more than the ordinary record which officers are required to keep of important business concerns, and is but a repetition of what already appears in the records of the township.

The peremptory writ will be allowed.

Martin, Ch. J., concurring specially:

I entertain much doubt of the correctness of the decision of the majority as expressed in the first point of the syllabus. Heretofore the distinction between municipal corporations and quasi corporations has always been maintained by this court. *Bench v. Leahy*, 11 Kan. 23, 28, 29; *Eikenberry v. Bazaar Twp.* 22 Kan. 556, 561, 31 Am. Rep. 198; *Marion County Comrs. v. Riggs*, 24 Kan. 255, 258; *Freland v. Stillman*, 49 Kan. 197, 207. The title of this act is restrictive; and following the plain course of reasoning pursued by Justice Johnston in *Freland v. Stillman*, *supra*, it would seem that the inclusion in the title of certain quasi corporations is inconsistent with the contention that another class of the same kind not mentioned is included in the phrase "municipal corporations." An act of the legislature should not, however, be held unconstitutional upon a mere doubt, but only when it cannot be supported upon any fair and legitimate line of argument; and this consideration is strengthened by the long time that this act has remained unchallenged on our statute books, and the important rights supposed to have accrued under it, and which should not be disturbed except for weighty reasons. I am therefore constrained to yield my assent, although other statutes have been, upon slighter grounds, condemned by this court as enacted in violation of § 16 of article 2 of the Constitution.

On the second point of the syllabus I fully concur:

Allen, J., dissenting:

I concur in holding the title of the act sufficient to include municipal townships, but dissent from the proposition that the act of 1879 authorizes the issuance of negotiable bonds. Neither the word "negotiable" nor any of its synonyms are to be found in the act. The right of the plaintiff to recover in this case depends entirely on the negotiability of the bonds, there being no contention that the origi-

mal bonds issued in aid of the sugar-mill company were valid. The rule of law rendering the private maker of negotiable paper liable for the full face of it in the hands of a bona fide purchaser for value, even though he in fact received no consideration for its execution, is often exceedingly harsh, and is frequently invoked to perpetrate a fraud. It is still more harsh to impose a burden on the taxpayers, who have taken no part in the execution of written instruments, to pay for that for which they have received no benefit in return; and the courts have generally held that to authorize public officers to execute negotiable instruments in the name of a township or other political subdivision of the state, and thereby impose on the public a burden of debt wrongfully and illegally, and without benefit to the public, there must be explicit legislative authority. In the case of *Merrill v. Monticello*, 188 U. S. 673, 84 L. ed. 1069, Mr. Justice Lamar, in delivering the opinion of the court, quotes with approval the language of Chancellor Kent, as follows: "The modern doctrine is, to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine, and it has been repeated in the decisions of the state courts. . . . As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode, and manner, and subject-matter prescribed." In *Hill v. Memphis*, 184 U. S. 198, 83 L. ed. 887, Mr. Justice Field said: "The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court." And in *Brenham v. German-American Bank*, 144 U. S. 178, 86 L. ed. 390, it was held: "Power in a municipal corporation to borrow money not being nugatory, although unaccompanied by the power to issue negotiable bonds therefor, it is easy for the legislature to confer upon the municipality the power to issue such bonds; and, under the well-settled rule that any doubt as to the exist-

ence of such power ought to be determined against its existence, it ought not to be held to exist in the present case." See also the dissenting opinion of Judge Caldwell in the case of *West Plains Twp. v. Sage*, 16 C. C. A. 553, 69 Fed. Rep. 952, cited in support of the opinion of the court in this case.

The act does not expressly authorize negotiable bonds to be issued. What necessity, then, requires the court, by construction and implication, to confer such power? Are not purchasers fairly dealt with if they are allowed to collect bonds rightfully and lawfully issued? What necessity is there for going further, and saying that the law implies power, as was attempted in this case, to create a debt without lawful consideration? There is much in the act indicating that the legislature did not intend that negotiable bonds should be issued and placed on the market, imposing an absolute liability, whether with or without a valid consideration. The bonds are to be issued only to the holder of the prior indebtedness, in pursuance of a compromise agreed on, and on the delivery and cancelation of the evidences of the prior debt. He, of course, has full knowledge of everything affecting the validity of the bonds. It is with him, and him alone, that the township deals in making the exchange. A purchaser from him, of course, might not have full knowledge concerning the original transaction, but § 4 of the act requires the county clerk to keep a record of all bonds issued in the county under the act, showing the date, number, and amount thereof, to whom, and on what account issued, and requires also a register of the number, amount, and date of issue of the canceled obligations. From these records and the inquiries they suggest, a purchaser might readily ascertain whether the refunding bonds were issued for a valid indebtedness or not. He who invests his money in such securities ought to have a motive for inquiring into the reason for the issuance of them. The attention of the taxpayers is not challenged to the transaction, and no good reason exists for holding them to the exercise of diligence in protecting their rights. They are not parties in any sense to the transaction between the original payee of the bonds and the purchaser from him. A debt of the taxpayers ought not to be created by a transaction between strangers merely because one of them advances his money in reliance on his own ignorance concerning the consideration of the securities he purchases.

NEW YORK COURT OF APPEALS.

George S. TILLINGHAST, Madison County Treasurer, *Resp't.*,

J. Herman MERRILL *et al.*, *Appts.*

(151 N. Y. 135.)

A supervisor is liable on grounds of public policy for public money lost by the failure

NOTE.—As to liability on official bonds for loss of money by bank failure, see *note* to *Wilson v. People, Pueblo & A. V. R. Co.*, (Colo.) 22 L. R. A. 449; also *State, Overton County, v. Copeland* (Tenn.) 31 84 L. R. A.

of a firm of private bankers with whom he had deposited it, although he acted in good faith and without negligence.

(Gray, J., *dissenta.*)

(December 1, 1905.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court,

L. R. A. 844; *Fairchild v. Hedges* (Wash.) 81 L. R. A. 851; *Bush v. Johnson County* (Neb.) 82 L. R. A. 228; and *Allibone v. Ames* (S. D.) 83 L. R. A. 585.

Fourth Department, affirming a judgment of the Madison County Circuit in favor of plaintiff in an action upon a supervisor's bond to recover public money lost by him through a bank failure. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry B. Coman, for appellants:

The defendant, Merrill, was liable only as a bailee for ordinary care and prudence, and the plaintiff was not entitled to a recovery without establishing negligence or bad faith.

Lane v. Cotton, 1 Ld. Raym. 646; *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; *Albany County Supers. v. Dorr*, 25 Wend. 440; *People, Nash, v. Faulkner*, 107 N. Y. 477; 19 Am. & Eng. Enc. Law, p. 481; 24 Am. & Eng. Enc. Law, pp. 885, 888; *Story, Bailm.* §§ 180, 620; 2 Kent, Com. Holmes' ed. 827; *United States v. Thomas*, 82 U. S. 15 Wall. 837, 21 L. ed. 89; *Peck v. James*, 3 Hend. 75; *Cumberland County v. Pennell*, 69 Me. 857, 31 Am. Rep. 284; *United States v. Adams*, 24 Fed. Rep. 848; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59, 83 Ala. 361; *Houghton v. Freeland*, 26 Grant. Ch. (U. C.) 500; *York County v. Watson*, 15 S. C. 1. 40 Am. Rep. 675; *Trotty v. Houser*, 7 S. C. N. S. 153; *Wilson v. People, Pueblo & A. V. R. Co.*, 19 Colo. 199, 22 L. R. A. 449.

It is no longer the law of the United States courts that a public officer is an insurer of the public moneys which come to his official custody.

United States v. Thomas, supra.

There is nothing in the language of the statutes which indicates an intention on the part of the legislature to impose a more stringent liability than that of the common law.

Rev. Stat. 8th ed. p. 1288.

The cases in the United States Supreme Court which hold receivers and collectors of public moneys to a more stringent liability than that imposed by the common law are largely based upon the ground that the United States statutes have imposed the larger liability and responsibility.

United States v. Thomas, supra.

There are a few cases in this state in which it has been held that a certain class of public officers are liable as debtors or insurers for the public moneys coming to their hands.

Muzzy v. Shattuck, 1 Denio, 233; *Looney v. Hughes*, 26 N. Y. 514; *Fake v. Whipple*, 89 N. Y. 894; *Bradley v. Ward*, 58 N. Y. 401.

These are all cases of town collectors, and the decisions were put upon the ground that the terms of the statute make the collector an absolute debtor for the money, even before he has received a dollar of it.

People, Nash, v. Faulkner, 107 N. Y. 487.

An official bond neither adds to nor diminishes the liability of the officer. It is simply a security that he will faithfully perform the duties of his office, and not a contract imposing additional duties or liabilities.

People, Nash, v. Faulkner, 107 N. Y. 489; *Wilson v. People, Pueblo & A. V. R. Co.*, 19 Colo. 199, 22 L. R. A. 449; *United States v. Thomas*, 82 U. S. 15 Wall. 837, 21 L. ed. 89.

Public policy, in this state, at this time, does not require that public officers be held to a more stringent rule of responsibility than that of the common law.

People, Nash, v. Faulkner, 107 N. Y. 477.

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No prudent business man, in the latter part of the nineteenth century, carries \$2,000 around with him in his pocket by day, or sleeps with it under his pillow at night. He places it in some bank in which he has confidence, and, as he has occasion to use it, checks it out.

In case of a special depositor without compensation, the bank is merely the bailee of the depositor, and is bound only for slight care, and responsible only for gross negligence.

Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

Even had he compensated the bank for its care of the property, it would still have been only a bailee and liable only for ordinary care and prudence—a much less stringent liability than it assumed when he made a general deposit.

Story, Bailm. 9th ed. § 898; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 862.

The bank being in good standing and credit he had a right to assume that the money would be forthcoming when demanded, but he had no right to assume that it might not be robbed or destroyed by fire, or his special deposit otherwise lost without gross negligence on the part of the bank; in either of which events, he could not have recovered from the bank.

Commercial Bank v. Hughes, 17 Wend. 94; *Curtis v. Leavitt*, 15 N. Y. 9; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 114.

Mr. Joseph Mason, with **Mr. John E. Smith**, for respondent:

Upon the receipt of the school moneys by the defendant he became the debtor of the town in the sum so received by him.

Muzzy v. Shattuck, 1 Denio, 233; *Fake v. Whipple*, 89 N. Y. 894.

The supervisor of the town as it respects these school moneys, being the debtor of the town, such indebtedness can only be discharged by the payment of the money upon the orders of trustees for teachers' wages and library purposes, and the payment of the balance in his hands, if any, to his successor.

Albany County Supers. v. Dorr, 25 Wend. 440, is not the law of this state to-day.

United States v. Prescott, 44 U. S. 3 How. 578, 11 L. ed. 784; *Boyd v. United States*, 80 U. S. 18 Wall. 21, 20 L. ed. 529; *Pine Island Bd. of Edu. v. Jereil*, 44 Minn. 437; *Taylor Dist. Twp. v. Morton*, 87 Iowa, 550; *Thompson v. Township Sixteen*, 80 Ill. 99; *Halbert v. State, Martin County Comrs.*, 23 Ind. 125; *Hennepin County Comrs. v. Jones*, 18 Minn. 199; *Jefferson County Comrs. v. Lineberger*, 3 Mont. 281, 85 Am. Rep. 462; *Morbeck v. State, Jackson Twp.*, 28 Ind. 86; *Rock v. Stinger*, 86 Ind. 346; *Union Dist. Twp. v. Smith*, 89 Iowa, 9, 18 Am. Rep. 39; *Hancock v. Hazard*, 12 Cush. 112; *Redwood County Comrs. v. Tower*, 28 Minn. 45; *State v. Nevin*, 19 Nev. 162; *State, Wyandot County, v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 383; *New Providence v. McEachron*, 38 N. J. L. 339; *State, Bladen County Comrs. v. Clarke*, 73 N. C. 255; *Com. v. Comly*, 3 Pa. 372.

His liability rests upon the conditions of his bond; and if by them he is required to do an act which without his fault becomes impossible on account of anything occurring subsequent to the contract, he will not be released.

Pine Island Bd. of Edu. v. Jewell, Taylor Dist. Twp. v. Morton, Thompson v. Township Staten, Hennepin County Comrs. v. Jones, Jefferson County Comrs. v. Linberger, Morbeck v. State, Jackson Twp., Rock v. Stinger, Union Dist. Twp. v. Smith, Hancock v. Hazzard, State v. Nevin, State, Wyandot County, v. Harper, New Providence v. McEachron, and State, Bladen County Comrs., v. Clarke, supra.

The loss of the money in question by reason of the insolvency of E. C. Stark & Co., private bankers, with whom the defendant, Merrill, deposited the same as a general deposit, thereby making himself their creditor, is no defense to this action.

State, The Township, v. Powell, 67 Mo. 395, 29 Am. Rep. 512; *Ward v. Colfax County School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477; *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114; *Wilson v. Wichita County*, 67 Tex. 647; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Nason v. Directors of Poor*, 126 Pa. 445; *Hart v. Pittsburgh Guardians of Poor*, 81* Pa. 466; *Omro Supra. v. Kaime*, 39 Wis. 468; *State, Mississippi County, v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *United States v. Morgan*, 52 U. S. 11 How. 154, 13 L. ed. 648; *United States v. Dashiell*, 71 U. S. 4 Wall. 182, 13 L. ed. 819; *United States v. Keebler*, 76 U. S. 9 Wall. 83, 19 L. ed. 574; *Boyden v. United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 581; *Bevans v. United States*, 80 U. S. 13 Wall. 56, 20 L. ed. 581; *United States v. Thomas*, 82 U. S. 15 Wall. 837, 21 L. ed. 89; *Parndine v. Jans, Aleyn, 26; Ford v. Cotesworth*, L. R. 4 Q. B. 184.

The courts of many of the states have followed the rule herein contended for, with respect to the liability of the sureties of an officer for money lost or stolen, or of which he was robbed while it was in his hands.

Holbert v. State, Martin County Comrs., 22 Ind. 125; *Morbeck v. State, Jackson Twp.*, 28 Ind. 86; *Rock v. Stinger*, 36 Ind. 346; *Taylor Dist. Twp. v. Morton*, 37 Iowa, 550; *Hancock v. Hazzard*, 12 Cush. 112; *Redwood County Comrs. v. Tower*, 28 Minn. 45; *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427; *State, Mississippi County, v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Jefferson County Comrs. v. Linberger*, 8 Mont. 231, 35 Am. Rep. 462; *State v. Nevin*, 19 Nev. 162; *New Providence v. McEachron*, 33 N. J. L. 339; *State, Wyandot County, v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Com. v. Comly*, 8 Pa. 372.

The state of North Carolina even refuses to acknowledge an exception from the act of God or a public enemy.

State, Bladen County Comrs., v. Clarke, 73 N. C. 255.

And a territorial ruling holds that the sureties are liable although the officer was murdered as well as robbed.

United States v. Watts, 1 N. M. 553.

Where a statute exempted an officer and his sureties from any loss arising from "irresistible superhuman cause" it was held that an accidental fire not caused by lightning, whereby the money was destroyed, was not within the statutory exemption.

Clay County v. Simonsen, 1 Dak. 403; *Union Dist. Twp. v. Smith*, 39 Iowa, 9, 18 Am. Rep. 89.

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Where public money has been deposited by an officer in a bank, and is lost by the failure of the bank, the officer and his sureties are liable for the money although the bank was then in good credit, and the officer was not chargeable with want of care.

Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *State, The Township, v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *Harens v. Lathene*, 75 N. C. 505; *Hart v. Pittsburgh Guardians of Poor*, 81* Pa. 466; *Nason v. Directors of Poor*, 126 Pa. 445; *Wilson v. Wichita County*, 67 Tex. 647; *Omro Supra. v. Kaime*, 39 Wis. 468; *Ward v. Colfax County School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477.

The obligation assumed by the officer is in most instances fixed by the terms of the statute providing for the office, or by the terms of his official bond, under which he is not regarded as a bailee, and his obligation to keep it safely is deemed absolute and without condition to be discharged only by payment.

19 Am. & Eng. Enc. Law, 481; *State v. Peck*, 58 Me. 123; *Scio Bd. of Edu. v. Melandborough*, 36 Ohio St. 227, 33 Am. Rep. 582; *Mount v. State, Richey*, 30 Ind. 29, 46 Am. Rep. 192.

The supervisor should be held to a strict accountability. He should exercise the highest degree of vigilance.

United States v. Prescott, 44 U. S. 3 How. 578, 11 L. ed. 734; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *United States v. Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *Peck v. James*, 3 Head, 75.

Bartlett, J., delivered the opinion of the court:

The defendant Merrill, while supervisor of the town of Stockbridge in the county of Madison, deposited with a firm of private bankers, to his credit as supervisor, certain of the public moneys in his hands. The banking firm afterwards failed and the money was totally lost. This action was brought by the county treasurer to recover the money of Merrill and his bondsmen, upon the theory that Merrill, on receiving the money, became the debtor of the county, and that the deposit of the same was at his own risk. The trial judge found that Merrill acted in good faith and without negligence in all that he did in the premises. Under these circumstances the learned counsel for the defendants has urged, with much earnestness and ability, that a supervisor rests under the common-law liability, whereby he was bound to exercise good faith and reasonable diligence in the discharge of his duties, and is not responsible for any loss of money which came to his official custody, occurring without fault on his part; that proof of the failure of the banking firm, where he had deposited the money in good faith and without negligence, is a complete defense to this action. The trial judge and general term have found against the defendants, and it remains for this court to determine which measure of liability is to be applied to a supervisor under the circumstances stated.

The question is an open one in this state, and, as the case at bar presents a claim against a supervisor who acted in good faith and with-

out negligence, we are permitted to consider and decide this appeal upon general principles, and in the light of public policy. It is rather remarkable that, in a great business state like New York, this question should not have been decided long since by the court of last resort. In 1841 the case of *Albany County Supers. v. Dorr*, 25 Wend. 440, came before the supreme court, composed of Chief Justice Nelson and Justices Bronson and Cowen. Dorr was county treasurer, and had given a bond to faithfully execute the duties of his office, and pay according to law all moneys. The declaration was on the bond, alleging breaches in not paying over, and in not accounting. Dorr pleaded that the identical money received by him was stolen from his office without negligence on his part. To this plea the plaintiff demurred. Chief Justice Nelson, delivering the opinion of the court, stated that the question was "whether an officer concerned in the receipt and disbursement of the public funds is an insurer of the same, *ex virtute officii*, whilst they necessarily remain in his custody." He then stated that "the principle was decided in favor of the defendant, in *Lane v. Cotton*, 1 Ld. Raym. 646, and subsequently confirmed in *Whitfield v. Lord Le Despencer*, 2 Cowp. 754, and is in conformity with the general rule of daily application, that in order to subject the officer it is necessary to prove misconduct or neglect in the execution of his duties." Justices Bronson and Cowen concurred. An appeal was taken to the court of errors, and that court equally divided upon the question, the effect of which was to affirm the judgment below, and the case stands with no more force as a precedent than a unanimous opinion of the supreme court. Chancellor Walworth, in the court of errors, wrote for affirmance, thus adding his name to those of the distinguished justices of the supreme court who had decided to limit the liability of a public officer, by the rule of the common law.

It has been a mooted question whether this case was overruled by *Muzzy v. Shattuck*, 1 Denio, 233, decided in 1845. Mr. Hill, in his note to *Albany Supers. v. Dorr*, in court of errors (7 Hill, 584), says that in *Muzzy v. Shattuck* the law seems to have been settled, and properly, directly the other way. On the other hand, Judge Earl, in *People, Nash, v. Faulkner*, 107 N. Y. 486, in referring to *Albany Supers. v. Dorr*, says: "The doctrine of that case has been erroneously supposed to have been overruled by the decision in *Muzzy v. Shattuck*, 1 Denio, 233. In the latter case the action was upon the official bond of a town collector, and the defense was that the money was stolen from him. It was held that the defense was not good, the supreme court then being composed of Bronson, Ch. J., and Justices Beardsley and Jewett; and Bronson, who concurred in the prior decision, also concurred in this, without any indication that he had changed his views. The prior decision was referred to in the opinion of the court, but not criticised or disapproved. This decision was based, not upon the common law, and not upon the force and effect of the official bond given by the collector, but upon the statutes defining the duties and liabilities of the collector; and the court held that by those statutes he was made an ab-

solute debtor for the money collected by him, and that the fact that the money was stolen, therefore, constituted no defense." The learned judge, after a further elaboration of his views as to *Albany Supers. v. Dorr*, reaches the conclusion that, in view of the decisions of the Federal and state courts, the case should probably not be regarded as binding authority in this state, and that the question therein decided is an open one. He also held that it was not necessary to decide the question in the case in which he was writing, as the money received by the defendant surrogate was not public money, but belonged to a private estate, or to individuals. It therefore comes to this, that for forty-five years the case of *Albany County Supers. v. Dorr*, 25 Wend. 440, has stood without being directly overruled by any case in this state, and the rule of the limited liability of the common law approved therein by four of our most distinguished judges. It must be admitted, however, that the weight of authority in the Federal and state courts is in favor of holding officials having the custody of public moneys liable for its loss, although accruing without their fault or negligence. In many of these cases the decision turned upon the construction of the local statute or the official bond, but others squarely decide the question on principles of public policy.

In the case at bar, the defendant Merrill is sought to be held liable for school moneys paid to him by the county treasurer, to disburse in payment of the salaries of school teachers upon the orders of the trustees. The statute imposing this duty reads as follows, *viz.*: "It is the duty of every supervisor (1) to disburse the school moneys in his hands, applicable to the payment of teachers' wages, upon and only upon the written orders of a sole trustee, or a majority of the trustees, in favor of qualified teachers. . . ." 2 Rev. Stat. 8th ed. p. 1293, § 6. By ¶ 8 of the same section a supervisor is required to pay to his successor all school moneys remaining in his hands. In this statute it will be observed that there are no explicit declarations of the legislative intent, as in the case of town collectors, to create a supervisor the debtor of the county for public moneys in his hands, and the condition of the bond to safely keep, faithfully disburse, and justly account for the same does not add to the liability created by statute. As before intimated, we must consider and decide this question upon general principles, and in the light of public policy. In the case of an officer disbursing the public moneys, much may be said in favor of limiting his liability, where he acts in good faith and without negligence; and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care, and engaged in the conscientious discharge of duty. When considering this side of the case, it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law, which exacted proof of misconduct or neglect. It is at this point, however, that the question of public policy presents itself, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability,

rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents. Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability, which requires a public official to assume all risks of loss, and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States Supreme Court, in *United States v. Thomas*, 82 U. S. 15 Wall. 837, 21 L. ed. 89, held the surveyor of customs for the port of Nashville, Tennessee, and depository of public money at that place, not liable, when prevented from responding by the act of God or the public enemy. If that state of facts is hereafter presented to this court, it will, doubtless, be carefully considered whether it does not present a proper exception to the general rule. It would not be profitable to refer in detail to the many cases, Federal and state, which sustain the strict rule of liability, and we content ourselves with a reference to a number of them involving losses by robbery, burglary, bank failure, and the like. *United States v. Prescott*, 44 U. S. 8 How. 578, 11 L. ed. 734; *United States v. Morgan*, 52 U. S. 11 How. 154, 18 L. ed. 643; *United States v. Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319; *United States v. Keebler*, 76 U. S. 9 Wall. 83, 19 L. ed. 574; *Boyd v. United States*, 80 U. S. 18 Wall. 17, 20 L. ed. 527; *Bevans v. United States*, 80 U. S. 18 Wall. 56, 20 L. ed. 531; *Hancock v. Hazard*, 12 Cusb. 112; *Com. v. Comly*, 3 Pa. 372; *New Providence v. McEachron*, 38 N. J. L. 839; *State, The Township, v. Powell*, 67 Mo. 895, 29 Am. Rep. 512; *Lourey v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114; *Perley v. Muskegon County*, 32 Mich. 133, 20 Am. Rep. 687; *Nason v. Directors of Poor*, 126 Pa. 445; *Omro Supers. v. Kaine*, 39 Wis. 468; *Redwood County Comrs. v. Tower*, 28 Minn. 45; *State, Wyandot County, v. Harper*, 6 Ohio St. 607, 87 Am. Dec. 868; *Halbert v. State, Martin County*, 23 Ind. 125; *Ward v. Colfax County School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477.

The views we have expressed lead to a final judgment against the defendant Merrill as supervisor of the town of Stockbridge, although he is shown by this record to have discharged his official duties in an honorable and faithful manner.

The judgment appealed from should be affirmed, with costs.

All concur, except Gray, J., dissenting, and Martin, J., not sitting.

Harry C. ADAMS, *Respt.*,

NEW JERSEY STEAMBOAT COMPANY,
Appl.

(151 N. Y. 163.)

1. The relations between a steamboat

NOTE.—The above case is a novel and important one on the subject of the liability of a carrier by steamboat as an innkeeper.

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company and a passenger occupying a state room are those that exist between an innkeeper and his guest.

2. Theft of money from the clothing of a steamer passenger during the night while he is occupying a state room with door locked and windows fastened renders the carrier liable for the loss as an insurer and without any proof of negligence. If the sum lost was reasonable and proper for the passenger to carry on his person to defray the expenses of his journey.

(December 8, 1883.)

APPEAL by defendant from a judgment of the General Term of the Court of Common Pleas for the City and County of New York affirming a judgment in favor of plaintiff in an action brought to recover money stolen from him while a passenger on one of defendant's boats. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. P. Prentice and R. K. Prentice, for appellant:

The mere proof of the loss of money by a passenger while occupying a berth does not make a prima facie case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given.

Morris v. Lake Shore & M. S. R. Co. 148 N. Y. 182; *Henderson v. Louisville & N. R. Co.* 123 U. S. 61, 31 L. ed. 92; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456; *Gleason v. Goodrich Transp. Co.* 32 Wis. 85, 14 Am. Rep. 716; *Abbott v. Bradstreet*, 55 Me. 530; *McKee v. Owen*, 15 Mich. 115; *Weeks v. New York, N. H. & H. R. Co.* 73 N. Y. 50, 28 Am. Rep. 104.

Carriers of passengers by water are not innkeepers.

2 Hutchinson, Carr. § 700, note 1.

But innkeepers are held to no such liability as this without a chance of defense.

Rosenplaenter v. Rasse, 54 N. Y. 262; *Becker v. Warner*, 90 Hun. 187.

There was notice to deposit valuables with the clerk.

Hyatt v. Taylor, 51 Barb. 682, *Affirmed* 42 N. Y. 258; *Walah v. Porterfield*, 87 Pa. 376; *Swann v. Smith*, 14 Daly, 114; *Becker v. Warner, supra*; *Hayes v. Forty-Second Street & G. S. F. R. Co.* 97 N. Y. 259; *Belch v. New York O. & H. R. Co.* 90 Hun. 477.

No negligence on the part of defendant had been shown. Every precaution and care required of defendant had been exercised.

Carpenter v. New York, N. H. & H. R. Co. 124 N. Y. 53, 11 L. R. A. 759; *Kelly v. Manhattan R. Co.* 112 N. Y. 443, 8 L. R. A. 74; *Potter v. New York O. & H. R. B. Co.* 136 N. Y. 77.

The plaintiff had not shown facts sufficient to constitute a cause of action, and in addition had not shown that the property of which he claimed the loss had been committed to the care of the defendant.

Carpenter v. New York, N. H. & H. R. Co. supra; *Roth v. Hamburg-American Packet Co.* 27 Jones & S. 49; *Morris v. New York C. &*

As to the liability to passengers on sleeping car, see *Mann-Boudoir Car Co. v. Dupre* (C. C. App.) 21 L. R. A. 220, and note.

H. R. R. Co. 106 N. Y. 678; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 359, 57 Am. Rep. 729, and cases there cited; *Wohlfahrt v. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406.

Messrs. Gibson & Davis, for respondent:

Defendant is a common carrier and an insurer.

Hutchinson, Carr. 2d ed. pp. 63, 199, 818; *Hollister v. Nowlen*, 19 Wend. 234, 83 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251, 82 Am. Dec. 470; *McArthur v. Sears*, 21 Wend. 190; *Powell v. Myers*, 26 Wend. 591.

The liability of the defendant is also analogous to that of an innkeeper.

Crozier v. Boston, N. Y. & N. S. B. Co. 43 How. Pr. 466; *Mudgett v. Bay State S. B. Co.* 1 Daly, 151; *Gore v. Norwich & N. Y. Transp. Co.* 2 Daly, 254.

And the liability of an innkeeper is that of an insurer.

Hulett v. Swift, 88 N. Y. 571, 88 Am. Dec. 405; *Piper v. Manny*, 21 Wend. 282; 3 Parsons, Cont. 6th ed. p. 145.

Defendant being liable both as common carrier and as an insurer, the presumption is that the loss occurred through defendant's default, and this can only be repelled by proof that the loss was attributable to negligence or fraud of plaintiff, or to act of God, or of the public enemy.

Crozier v. Boston, N. Y. & N. S. B. Co., and *Hulett v. Swift*, *supra*.

Defendant is liable though loss happened without its fault.

Hulett v. Swift, *supra*; *Grinnell v. Cook*, 8 Hill, 485, 38 Am. Dec. 663; *Macklin v. New Jersey S. B. Co.* 7 Abb. Pr. N. S. 229 (affirmed in court of appeals though not reported); *Crozier v. Boston, N. Y. & N. S. B. Co.* *supra*.

Nor can defendant by a mere notice relieve itself from the vigorous rule of the common law, which, in the absence of a clear, special, and express contract, makes it an insurer.

Holsapple v. Rome, W. & O. R. Co. 86 N. Y. 275; *Westcott v. Fargo*, 61 N. Y. 543, 19 Am. Rep. 300; *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 818, 328, 829, 21 L. ed. 297, 302.

And no presumptions will be indulged in, in favor of exemptions from common-law liability.

Edsall v. Camden & A. R. & Transp. Co. *supra*.

An express contract cannot spring from a notice.

Hutchinson, Carr. 2d ed. p. 370.

The money and clothing which plaintiff was entitled to have in his stateroom were in the custody and possession of defendant.

Mudgett v. Bay State S. B. Co. *supra*; *Macklin v. New Jersey S. B. Co.* *supra*; *Calley's Case*, 8 Coke, 88; *Gore v. Norwich & N. Y. Transp. Co.*, and *Crozier v. Boston, N. Y. & N. S. B. Co.* *supra*.

Plaintiff was entitled to have in his stateroom sufficient money for the expenses of his journey, and while there it was in the custody of defendant.

Crozier v. Boston, N. Y. & N. S. B. Co. *supra*; *Merrill v. Grinnell*, 30 N. Y. 594; *Torpey v. Williams*, 8 Daly, 162; *Taylor v. Monnot*, 1 Abb. Pr. 325; *Hutchinson*, Carr. 2d ed. p. 819; 34 L. R. A.

Fairfax v. New York O. & H. R. R. Co. 78 N. Y. 167, 29 Am. Rep. 119; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 371; *Merrill v. Grinnell*, and *Holsapple v. Rome, W. & O. R. Co.*, *supra*.

Defendant is unquestionably liable for plaintiff's loss, unless plaintiff, by his own negligence contributed to the loss; and if such were the fact, the burden of proof was on defendant to show it, as well as his own freedom from negligence.

Aiken v. Westcott, 14 Daly, 504; *Faucett v. Nichols*, 64 N. Y. 377; *Crozier v. Boston, N. Y. & N. S. B. Co.* 43 How. Pr. 466.

Plaintiff was under no obligation whatever to read a notice posted in his stateroom.

Macklin v. New Jersey S. B. Co. 7 Abb. Pr. N. S. 229; *Hollister v. Nowlen*, 19 Wend. 234, 83 Am. Dec. 455; *Camden & A. R. & Transp. Co. v. Belknap*, 21 Wend. 354.

Nor can defendant claim exemption under the hotelkeepers' liability act. Such act specifically applies to hotelkeepers and innkeepers; and it is well settled that statutes in derogation of the common law must be strictly construed.

Fitzgerald v. Quann, 109 N. Y. 441; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 861; *Sedgw. Stat. & Const. L.* 2d ed. p. 287.

But even if plaintiff saw the notice, or if it was brought home to his knowledge, it was unreasonable, so far as it claimed to cover personal effects and money necessary for traveling expenses.

Pope v. Hall, 14 La. Ann. 324; *Profillet v. Hall*, Id. 530; *Johnson v. Richardson*, 17 Ill. 802; *Krohn v. Sweeney*, 3 Daly, 200; *Gile v. Libby*, 86 Barb. 70.

O'Brien, J., delivered the opinion of the court:

On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer *Drew*, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of \$160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person who apparently reached it through the window of the room.

The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is, whether the defendant is in law liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at general term, and that court has allowed an appeal to this court.

The defendant has therefore been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. *Story*, Bailm. § 464; 2 Kent, Com. 592; *Hulett v. Swift*, 83 N. Y. 571, 88 Am. Dec. 405.

The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.

The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff unless the loss was caused by the act of God or the public enemies, and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. *Merrill v. Grinnell*, 80 N. Y. 594; *Merritt v. Earle*, 29 N. Y. 150, 86 Am. Dec. 292; *Elliott v. Russell*, 10 Johns. 7, 6 Am. Dec. 806; *Brown*, Carr. § 41; *Redf. Carr.* § 24; *Angell*, Carr. § 80.

Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money under the circumstances than for the loss of what might be strictly called baggage.

The question involved in this case was very fully and ably discussed in the case of *Crozier v. Boston*, N. Y. & N. S. B. Co. 43 How. Pr. 466, and in *Macklin v. New Jersey S. B. Co.* 7 Abb. Pr. N. S. 229. The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the court in both actions upon reason, public policy, and judicial authority. It appears from a copy of the remittitur attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this

court, though it seems that the case was not reported.

It was held in *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation.

This class of conveyances is attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation and liability for loss of baggage is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different with respect to his personal effects from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases and that do not apply in the case at bar. *Ulrich v. New York C. & H. R. R. Co.* 108 N. Y. 80; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Lewis v. New York Sleeping Car Co.* 143 Mass. 267, 58 Am. Rep. 185.

But aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked and otherwise guarded from intrusion. In the latter case, when he retires for the night, he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which

the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule, and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect, and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract before the question of responsibility can arise, whether the passenger be in one of the sleeping berths or in a seat in the ordinary

car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest, and it would perhaps be unjust to so extend the liability when the nature and character of the duties which it assumes are considered.

But the traveler who pays for his passage, and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

The judgment should be affirmed.

All concur

KENTUCKY COURT OF APPEALS.

OHIO & MISSISSIPPI RAILWAY COMPANY, *Appl.*,

v.

Justus TABER.

(.....Ky.....)

1. Provisions in a carrier's contract that notice of injury to cattle must be given before they are unloaded or mixed with others, and that no animal shall be considered as worth more than a specified sum, conflict with a constitutional provision that common carriers shall not contract for relief from their common-law liability.
2. Prohibiting common carriers from contracting to limit their common-law liability does not interfere with the power of Congress to regulate interstate commerce.

(September 24, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Hardin County in favor of plaintiff in an action brought to recover damages for injuries to live stock while in defendant's possession for transportation. *Affirmed.*

NOTE.—As to the power of a carrier to limit the amount of liability in cases of negligence, see note to *Bailou v. Earle* (R. I.) 14 L. R. A. 432.
84 L. R. A.

The facts are stated in the opinion.

Mr. W. H. Marriott, for appellant:

The petition, in failing to set out the whole contract and aver the performance of the condition precedent, has failed to show facts sufficient to constitute a cause of action.

Newman, Pl. 678; *Hodges v. Holeman*, 2 Dana, 396.

As between plaintiff and defendant this was a contract for interstate commerce, and cannot be controlled by state legislation, and the provision of the Constitution referred to, as to such a contract, is void.

Norfolk & W. R. Co. v. Com. 88 Va. 95, 13 L. R. A. 107; *Leisy v. Hardin*, 185 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86; *Norfolk & W. R. Co. v. Pennsylvania*, 186 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178; *Brown v. Maryland*, 25 U. S. 19 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Stockton v. Baltimore & N. Y. R. Co.* 30 Fed. Rep. 9, 1 Inters. Com. Rep. 411.

To say that the defendant shall not insert a condition in its contracts for the carrying on of interstate commerce would be to regulate commerce between the states.

The condition imposed by the 11th section of the bill of lading is a reasonable stipulation and valid, and will be enforced in the absence of fraud or mistake, unless waived.

Owen v. Louisville & N. R. Co. 87 Ky. 626; *Hutchinson, Carr.* p. 801, § 258; *Sprague v. Missouri P. R. Co.* 84 Kan. 847; *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 885.

Nor was it necessary that the plaintiff should read the contract.

See *Hutchinson, Carr.* § 240, p. 272, note 1; *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 597.

It is not a contract for relief from its common-law liability, but is only a condition with which the shipper must comply or lose his claim.

Southern Exp. Co. v. Hunnicutt, *supra*; *Selby v. Wilmington & W. R. Co.* 118 N. C. 588; *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 6 L. R. A. 849; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329; *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 844, 12 L. ed. 465; *New York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 647, 15 Am. Rep. 740.

The care to be exercised is not such as would require the company receiving the car to test the strength of the metal or the material out of which the car was constructed, or to make that rigid examination into the car's condition as could only be arrived at by actual tests.

Louisville & N. R. Co. v. Williams, 95 Ky. 189.

In *Hart v. Pennsylvania R. Co.* 112 U. S. 831, 28 L. ed. 717, Blatchford, J., observes: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss."

Gibson v. Paynton, 4 Burr. 2298; *Batson v. Donovan*, 4 Barb. & Ald. 31; *Squire v. New York C. R. Co.* 98 Mass. 289; *Moulton v. St. Paul, M. & M. R. Co.* 81 Minn. 85; *Alair v. Northern P. R. Co.* 53 Minn. 160, 19 L. R. A. 764; *Southern P. R. Co. v. Maddox*, 75 Tex. 300; *Conover v. Pacific Exp. Co.* 40 Mo. App. 31; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 326; *Louisville & N. R. Co. v. Sowell*, 80 Tenn. 17; *Coward v. East Tennessee, V. & G. R. Co.* 16 Lea, 225.

Such a contract, fairly made, is not void as against public policy or for any other reason.

Hart v. Pennsylvania R. Co. 112 U. S. 831, 348, 28 L. ed. 717, 721; *Baughman v. Louisville, E. & St. L. R. Co.* 14 Ky. L. Rep. 268; *Orndorff v. Adams Exp. Co.* 3 Bush, 194; *Louisville & N. R. Co. v. Owen*, 98 Ky. 201, and *Baughman v. Louisville, E. & St. L. R. Co.* *supra*,—all recognize the right of the carrier and the shipper to agree upon the value of the property shipped.

See *Hoeing v. Adams Exp. Co.* 8 Ky. L. Rep. 154; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 588; *Johnstone v. Richmond & D. R. Co.* 89 S. C. 55.

On petition for rehearing.

The contract sued on in this case was a contract to carry a carload of cattle from Cecilian in the state of Kentucky to Cincinnati in the state of Ohio

34 L. R. A.

That this was a contract for interstate commerce there can be no doubt.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86.

Persons engaged in interstate commerce are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments.

Stockton v. Baltimore & N. Y. R. Co. 80 Fed. Rep. 9, 1 Inters. Com. Rep. 411; *Norfolk & W. R. Co. v. Com.* 88 Va. 95, 13 L. R. A. 107.

If the commerce so attempted to be regulated is interstate commerce such statutes are invalid.

Corington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244.

Railroad companies, in the absence of statutory requirements or of special contract, are not liable as common carriers in the transportation of live stock.

Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 647, 15 Am. Rep. 740.

Mr. Charles H. Gibson, with *Mr. Walker D. Hines*, also in support of petition for rehearing:

The common-law liability of a common carrier does not apply to the transportation of live stock. Section 196 of the Constitution has no application in any case to the transportation of live stock.

Louisville, C. & L. R. Co. v. Hedger, 9 Bush, 645, 15 Am. Rep. 740.

The word "commerce" includes the transportation of property and of persons.

Philadelphia & R. R. Co. v. Pennsylvania ("State Freight Tax"), 82 U. S. 15 Wall. 275, 21 L. ed. 161; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 208, 29 L. ed. 161; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325.

A regulation of the rates of carriage is a regulation of commerce, and, moreover, a regulation which a state is not permitted to make, as to interstate commerce, even though Congress may have been silent on the subject.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 575, 30 L. ed. 244, 250; *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485.

The Kentucky Constitution absolutely fixes the liability of the common carrier in all cases, and denies to the parties the right of varying that liability as they see fit.

The Supreme Court of the United States has always recognized these provisions as regulations of commerce.

Moore v. American Transp. Co. 65 U. S. 24 How. 1, 16 L. ed. 874; *Roid v. Heatt* ("The Lottawanna"), 88 U. S. 21 Wall. 581, 23 L. ed. 663; *Lord v. Goodall, N. & P. S. Co.* 102 U. S. 541, 26 L. ed. 224; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1088.

As to all regulations of that part of interstate commerce consisting in transportation of persons and property from state to state the power of Congress is exclusive.

Cooley v. Philadelphia Port Wardens, 53 U. S. 12 How. 299, 816, 13 L. ed. 996, 1008; *Philadelphia & R. R. Co. v. Pennsylvania* ("State Freight Tax"), 82 U. S. 15 Wall. 232, 279, 21 L. ed. 146, 162; *Wetton v. Missouri*, 91 U. S. 275, 280, 23 L. ed. 847, 849; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204, 29 L. ed. 158, 162; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Western U. Teleg. Co. v. Pendleton*, 123 U. S. 847, 30 L. ed. 1187, 1 Inters. Com. Rep. 806; *McGann v. Eddy* (Mo.) 27 S. W. 541; *Gatton v. Chicago, R. I. & P. R. Co.* (Iowa) 28 L. R. A. 556.

The agreement in the contract of shipment herein, that \$30 apiece for the cattle is as much as they are reasonably worth, being the basis of a reduced rate of freight, is valid and should be enforced.

Hart v. Pennsylvania R. Co. 112 U. S. 381, 28 L. ed. 717; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *South & North Ala. R. Co. v. Hentlein*, 52 Ala. 606, 23 Am. Rep. 578; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Louisville & N. R. Co. v. Sherrard*, 84 Ala. 178; *Western R. Co. v. Harwell*, 91 Ala. 340; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 286; *Ex. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *Coupland v. Housatonic R. Co.* 61 Conn. 581, 15 L. R. A. 534; *Rosenfeld v. Peoria, D. & E. R. Co.* 103 Ind. 121, 53 Am. Rep. 500; *Pacific Exp. Co. v. Foley*, 46 Kan. 457, 12 L. R. A. 799; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284; *Moulton v. St. Paul, M. & M. R. Co.* 81 Minn. 85, 47 Am. Rep. 781; *Alair v. Northern P. R. Co.* 53 Minn. 160, 19 L. R. A. 764; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538; *McFadden v. Missouri P. R. Co.* 92 Mo. 843; *Dunley v. Boston & M. R. Co.* 66 N. H. 283, 9 L. R. A. 449; *Durgin v. American Exp. Co.* 66 N. H. 277, 9 L. R. A. 458; *Ballou v. Earle*, 17 R. I. 441, 14 L. R. A. 438; *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Louisville & N. R. Co. v. Sovell*, 90 Tenn. 17; *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 6 L. R. A. 849; *Abrams v. Milwaukee, L. S. & W. R. Co.* 87 Wis. 485; *Boorman v. American Exp. Co.* 21 Wis. 153; *Black v. Goodrich Transp. Co.* 55 Wis. 319, 42 Am. Rep. 718.

The same doctrine seems to have been recognized for a long time in Illinois.

Oppenheimer v. United States Exp. Co. 69 Ill. 63, 18 Am. Rep. 596; *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 8 L. R. A. 508; *Brehms v. Adams Exp. Co.* 25 Md. 328; *Zimmer v. New York C. & H. R. R. Co.* 137 N. Y. 460, and cases there cited.

The supreme court of Texas has stated in *Southern P. R. Co. v. Maddox*, 75 Tex. 300, that a fairly agreed valuation would be upheld.

No decision of the court of appeals of Kentucky is in conflict with this firmly established principle.

Orndorff v. Adams Exp. Co. 3 Bush, 194, 96 Am. Dec. 207; *Louisville & N. R. Co. v. Owen*, 93 Ky. 201; *Baughman v. Louisville, E. & St. L. R. Co.* 94 Ky. 150.

Messrs. Hobson & O'Meara, for appellee:

The carrier of live stock is an insurer of his

vehicle and answerable for all loss from defects in it.

Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 53, note; *Hutchinson, Carr.* §§ 292, 293, 505; *Schouler, Bailm.* § 402.

The state had the same right to prohibit the making of such contract within her borders as to pass the statute of frauds or the statute of limitations.

McDaniel v. Chicago & N. W. R. Co. 24 Iowa, 412; *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; 7 Lawson, Rights, Rem. & Pr. §§ 8814, 8873.

The proposed notice in this case was to have been given after the carriage had ended and after the liability accrued, and the state had a right to dispense with this requirement just as it might have dispensed with the requirement of a prior notice in any other form of action.

Gulf, C. & S. F. R. Co. v. Gann, 8 Tex. Civ. App. 620; *Galveston, H. & S. A. R. Co. v. Johnson* (Tex. Civ. App.) 29 S. W. 428; *Armstrong v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.) 5 Inters. Com. Rep. 247; *Missouri P. R. Co. v. Vandevanter*, 26 Neb. 232, 8 L. R. A. 129; *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572.

The carriage of live stock is within the common-law liability of a carrier.

Schouler, Bailm. § 370, note; *Hutchinson, Carr.* §§ 216a-221; *Kansas P. R. Co. v. Nichols*, 9 Kan. 235, 12 Am. Rep. 494; *Bamberg v. South Carolina R. Co.* 9 S. C. N. S. 61, 30 Am. Rep. 18.

This contract, being made here, and being sued on here, will be governed by our laws.

Hutchinson, Carr. §§ 140-145; 7 Lawson, Rights, Rem. & Pr. § 3715.

Guffy, J., delivered the opinion of the court:

This appeal is prosecuted from a judgment of the Hardin circuit court rendered in the suit of the appellee against the appellant. It appears that the appellee contracted with the Newport News & Mississippi Valley Railroad Company to transport one carload of cattle from Cecilian, Kentucky, to Cincinnati, Ohio, which company had no line of road to Cincinnati, but under authority from the appellant to contract for the carrying of the cattle over appellant's lines; at least, such is the contention of appellee. It further appears that after the cattle were placed in appellant's charge, and while being transported to Cincinnati, one of them was killed, and others injured, in the sum of \$200, for which sum suit was instituted in the Hardin circuit court, and a trial resulted in a verdict in plaintiff's favor for \$135. Appellant's motion in arrest of judgment, and also for a new trial, having been overruled, it prosecutes this appeal.

A number of grounds for reversal are insisted upon, some of which need not be noticed in detail. We are of opinion that the Hardin circuit court had jurisdiction of the cause of action. The contract having been made in that county, and service had upon appellant's agent or chief officer in Jefferson county, the slight mistake in the true name of the appellant is not sufficient to invalidate the

service. We do not think that any error prejudicial to the substantial rights of the appellant was made in the admission of testimony. If it be conceded that appellee should not have been allowed to state or read the report of what the cattle sold for in Cincinnati, yet the same facts were testified to by Bethel, who knew the facts of his own knowledge, and no attempt was made to disprove the same; hence the testimony of Taber did not prejudice the substantial rights of the appellant. The instructions given contained the law of the case, and those refused were properly refused.

It appears that a written contract was signed by appellee and the agent aforesaid, which, among other things, provided that written notice of any injury to the cattle, or claim for damages, should be given to appellant before the cattle were unloaded, or mixed with other cattle,—otherwise, appellee should not be entitled to recover for any injury or damage; also, that it was agreed in said contract that the cattle were not worth over \$30 each. No written notice was given, nor was appellee held on the trial to the valuations mentioned; and of this appellant complains, and insists that appellee could not recover anything, no notice having been given. Appellee admits the signing of the contract, but says he did not read it, and pleads that the stipulations therein are in violation of § 196 of the Constitution of this state, which provides that no common carrier shall be permitted to contract for relief from its common-law liability. It seems to us that the provisions quoted are in violation of the section *supra*. We do not agree with counsel for appellant that the section quoted is void because it conflicts with the interstate commerce clause of the Federal Constitution. It is in no sense an attempt to regulate interstate commerce, but simply determines what may or may not be a valid contract in this state. See *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485. It is true that the common law as to the transportation of live stock is not the same in all respects as in regard to other articles, yet the carrier is bound to furnish a suitable and safe car, and no special contract can exonerate the carrier from liability for damage caused by the failure to so provide. *Rhodes v. Louisville & N. R. Co.* 9 Bush, 690.

The proof conduces to show that the injury complained of was the result of the floor of the car breaking. Certain it is that when the car reached Cincinnati there was a large break in the floor of the car containing the cattle. Public policy, as well as the weight of authority, requires that the carriers, in such cases, must show that the injury was not caused by the breakage, else they will be liable for such injuries or damage as may accrue to the stock, when it appears that such breakage would reasonably cause the injuries or damage shown to have occurred.

The proof in this case was sufficient to authorize the verdict.

Judgment affirmed, with damages.

A petition for rehearing having been filed, *Guffy, J.*, on June 5, 1896, handed down the following response:

We have considered the very earnest and 34 L. R. A.

able petition of appellant for a rehearing in this case, and its brief in support of the same, but we fail to see that the former opinion delivered herein is in any respect erroneous. The contract relied on by appellant, if enforced, would practically relieve it from all the responsibility of a common carrier. The notice required to be given as a condition precedent to appellee's right to sue or recover, if enforced, would clearly limit the liability of appellant for injury to the cattle to a much shorter time than the common law allowed, and would, if enforced, relieve appellant from all liability in this case, however gross or negligent appellant might have been; and, this being true, the stipulation is void, because prohibited by § 196 of the Constitution. And this case illustrates the propriety and justice of the provision, *supra*. The cattle were injured in the car, one being dead and the others injured, and the bottom of the car broken, thus making it important to unload and dispose of the cattle as soon as possible, and it was the privilege, if not the bounden duty, of appellant's agents or servants to see to the unloading of the cattle, and it is fair to conclude that the agents did see to the unloading and were therefore well aware of the damage sustained; and it further appears that the shipper was not in fact aware of any such provision being in the bills of lading, and, besides, it nowhere appears that appellant was in any way injured, or any advantage taken of it, by appellee's failure to give the notice. The case of *Gulf, C. & S. F. R. Co. v. Gann*, 8 Tex. Civ. App. 620, was a case where the shipper had signed or accepted a bill with a condition requiring notice of damage before suit should be brought, but a Texas statute provided, in substance, that such agreement should be invalid; and the court sustained the validity of the statute, and allowed the shipper to recover, notwithstanding he had failed to give the stipulated notice. In *Galveston, H. & S. A. R. Co. v. Johnson* (decided by the same court January 23, 1897), reported in 29 S. W. 428, substantially the same question was raised, and decided adversely to the contention of appellant. The shipment was made from Texas to another state. The opinion of the court was delivered by James, Ch. J. We quote as follows: "The first assignment presents the action of the court sustaining plaintiff's (appellee's) exception to that part of the answer which set up that plaintiff was barred of his action by reason of a clause in the contract of shipment providing that suit should be commenced within forty days after the damages accrued, or such lapse of time should be conclusive against the validity of the claim. The pleadings showed an interstate shipment of live stock, and the position that appellant takes, in making this defense, is that our statute of March 4, 1891, prohibiting the making of a stipulation contract or agreement by which the time is limited to a shorter period than two years, has no application to such contracts. The provision plainly does not in any manner attempt to regulate commerce. It imposes no burden or restraint on trade or transportation, but does that which every state has power to do, namely, to provide and regulate the remedy within its jurisdiction when a cause of action arises. It would not be contended that its stat-

utes of limitation prescribing a period of time within which suits may be brought do not apply to actions growing out of a transaction of interstate commerce as well as to others. It must follow from this that the states may make such statutes absolute; that is to say, not subject to be varied in their operation by a contract. The provision above referred to is within the scope of such power, and it applies to actions growing out of a contract of interstate character. *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572; *Gulf, C. & S. F. R. Co. v. Eddins*, 7 Tex. Civ. App. 116." In *Armstrong v. Galveston, H. & S. A. R. Co.* (decided Feb. 27, 1895) reported in (Tex. Civ. App.) 5 Inters. Com. Rep. 247, the same question was presented and decided in the same way. See also *Missouri P. R. Co. v. Vandewater*, 26 Neb. 222, 8 L. R. A. 129. If a mere statute of a state can render null and void such contracts, surely a constitutional provision can do the same. In the case of *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740, it was held that if live stock should be lost or injured while in the custody and care of the company or its agents, for transportation, this should be prima facie evidence of negligence, and the burden of proof is on the carrier to rebut this presumption. It was also held that a carrier cannot release himself by contract for ordinary negligence. Former decisions of this court, quoted by appellant to sustain its contention, have no application to this case, because they were rendered before the adoption of the present Constitution.

The case of *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 416, was an action against the railroad to recover for injury to cattle shipped from Clinton, Iowa, to Branch Station, Chicago, Illinois. The contract of shipment contained a provision exempting the company from any liability over \$100 on horses or valuable live stock, except by special agreement. The damage claimed was over \$100. We quote as follows from the opinion in that case: "By chapter 118 of the Laws of the Eleventh General Assembly, it is enacted 'that in the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule, or regulation shall exempt such railroad or other company, person, or firm from the full liabilities of a common carrier, which, in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property.' Laws 1866, p. 121. No question is made but that under the operation of this statute the special contract in this case would be void, so that the rights and liabilities of the parties would be measured by the common law, as applicable to common carriers. But it is claimed by appellant's counsel that the contract, though made in Iowa, was to be, by its terms, wholly performed in Illinois, and that the law of the place where the contract is to be performed must govern in determining its validity and effect. The general rule is that, in conformity to the presumed intention of the parties, the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. Story, Conf. L. § 280. But

it is also a general rule that, if the contract is void or illegal by the law of the place where it is made, it is held void and illegal everywhere. Id. § 248, and authorities cited. In this case, however, it is unnecessary to rest the decision upon any general rule; for by the express terms, as well as by the necessary implication, of the contract, it was to be partly performed in Iowa. The cattle were received in Clinton, Iowa, 'to be delivered at Chicago, Illinois.' To do this, it was necessary to transport them some distance, more or less, in Iowa, before they could reach Illinois. The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made." The foregoing opinion was quoted with approval by the Supreme Court of the United States in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 457, 32 L. ed. 797, in the following language: "In *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailling of trains, were injured in Illinois by the negligence of the company's servants; and the supreme court of Iowa, Chief Justice Dillon presiding, held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of the contract. The court said: 'The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made.'"

The case of *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 486, was a suit to recover damages for injury to horses shipped from Des Moines, Iowa, to the town of Miller, in Dakota territory. The contract provided, in substance, that the defendant should not be liable for more than \$100 damages to each horse. Section 1808 of the Code of Iowa provides that no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule, or regulation been made or entered into. We quote the third and final paragraph of the decision in the above named case: "The evidence tended to prove that two of the horses were worth \$150 each, and that two others were worth \$125 each, and that the others were worth \$100 each. Defendant asked the circuit court to instruct the jury that, under the contract, defendant's liability for the horses could not exceed \$100 per head. The court

refused to give this instruction, and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation, or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule, or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport the property from this state into another state or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of defendant for the horses to an amount less than the actual value of the property, is repugnant to its provisions, and consequently invalid. It is contended, however, that the state has no power to place a restriction of that character upon the carrier who contracts for the transportation of property from this state into another state or territory. The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among the states,—a subject which, under the Federal Constitution, is within the exclusive jurisdiction of the Congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of

communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract; nor is any rule prescribed for his government respecting it. That it is within the power of the state to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the state in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the Supreme Court of the United States in what are known as the '*Granger Cases*.' See *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97."

It seems clear to us that the contract relied upon by the appellant is in violation of § 196 of the Constitution, and therefore void where the contract was made; and, being void in this state, it is void everywhere. Story, *Conf. L.* § 248; 7 *Laws, Rights, Rem. & Pr.* § 8878. Section 196, *supra*, is in no sense an attempt to regulate or interfere with interstate commerce. It does not seek to impose any condition on commerce, nor to regulate freight charges, rate of speed, or kind of cars, nor change or define the duties or responsibilities of common carriers, but is merely the exercise of the undoubted right of the states to determine what shall be a valid contract, and to control the remedy in her own courts. *Owen v. Louisville & N. R. Co.* 88 Ky. 696.

Judgment affirmed.

OREGON SUPREME COURT.

R. A. FRAME *et al.*, *Appts.*,

v.

Charles F. SLITER *et al.*, *Respts.*

(29 Or. 12L.)

A grantor of real estate has no implied equitable lien thereon for the unpaid purchase money after he has delivered an absolute deed to the property and placed the grantee in possession.

(June 15, 1896.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Clatsop County in

favor of defendants in an action brought to enforce a vendor's lien. *Affirmed.*

The facts are stated in the opinion.

Mr. J. B. Thompson, for appellants:

The doctrine of vendor's lien exists.

Pease v. Kelly, 8 Or. 417; *Kelly v. Ruble*, 11 Or. 75; *Gee v. McMillan*, 14 Or. 268, 58 Am. Rep. 815; *Lewis v. Henderson*, 23 Or. 548; *Thomas v. Thomas*, 24 Or. 251; *Jones v. Gates*, Id. 411.

There is nothing in the policy of our laws, or of the laws in relation to the registration of instruments affecting the title to real property generally, which calls for the overthrow of this doctrine.

NOTE—In connection with the above case as to vendor's liens, see some authorities in note to 34 L. R. A.

O'Connor v. O'Connor (Tenn.) 7 L. R. A. 38, and *Gemmer v. Palmater* (Cal.) 13 L. R. A. 187.

See Hill's Code, § 414.

The grantee of the original vendee took the title with full notice. So there is no secret lien. The policy which permits the enforcement of secret liens as to personal property, after the same has gone out of the possession of the true owner as the case of *Singer Mfg. Co. v. Graham*, 8 Or. 18, 34 Am. Rep. 572, should permit the adoption of the doctrine of vendor's lien, in this state.

Chilton v. Lyons, 67 U. S. 2 Black, 458, 17 L. ed. 804; *Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91; *Thredgill v. Pintard*, 58 U. S. 12 How. 24, 18 L. ed. 877.

The following states have adopted and recognized the doctrine:

Alabama: *Bankhead v. Owen*, 60 Ala. 457.
Arkansas: *Harris v. Hanie*, 87 Ark. 848.
California: *Cahoon v. Robinson*, 6 Cal. 226.
Colorado: *Francis v. Wells*, 2 Colo. 660.
Dakota: Civil Code, § 1801.
District of Columbia: *Ford v. Smith*, 1 MacArth. 592.

Florida: *Woods v. Bailey*, 3 Fla. 41.
Idaho: Code, § 8440.
Illinois: *Manning v. Frazier*, 96 Ill. 279.
Indiana: *Richards v. McPherson*, 74 Ind. 158.

Iowa: *Eaecher v. Simmons*, 54 Iowa, 269;
Fisher v. Shropshire, 147 U. S. 183, 37 L. ed. 109.

Kentucky: *Emison v. Riasque*, 9 Bush, 24.
Maryland: *Schours v. Stein*, 29 Md. 117;
Glise'in v. Fergusson, 4 Harr. & J. 525.
Michigan: *Hiscock v. Norton*, 42 Mich. 320.
Minnesota: *Selby v. Stanley*, 4 Minn. 65.
Mississippi: *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429.

Missouri: *McKnight v. Bright*, 2 Mo. 110.
New Jersey: *Ogden v. Thornton*, 30 N. J. Eq. 589.

New York: *Chase v. Peck*, 21 N. Y. 581.
Ohio: *Whetzel v. Roberts*, 31 Ohio St. 503.
Rhode Island: *Kent v. Gerhard*, 12 R. I. 92, 84 Am. Rep. 612.
Tennessee: *Russell v. Dodson*, 6 Baxt. 16.
Texas: *Waldrom v. Zacharie*, 54 Tex. 503.
Wisconsin: *De Forest v. Holm*, 38 Wis. 516.

In the states of Georgia, Vermont, and Virginia the earlier decisions adopted the doctrine. *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60; *Tompkins v. Mitchell*, 2 Rand. (Va.) 428; *Mims v. Lockett*, 23 Ga. 287, 68 Am. Dec. 521. But it is now abolished by statute.

In the following states it has neither been adopted nor repudiated:

Connecticut: *Watson v. Wells*, 5 Conn. 472;
Meigs v. Dimock, 6 Conn. 468.
Delaware: *Budd v. Busti*, 1 Harr. (Del.) 69.
New Hampshire: *Arlin v. Brown*, 44 N. H. 102.

In Washington the doctrine has been recognized, though not directly decided to exist: *Sheldon v. Jones*, 4 Wash. 692.

The only states which have denied the existence of the doctrine are:

Kansas: *Simpson v. Mundee*, 3 Kan. 172.
Maine: *Philbrook v. Delano*, 29 Me. 410.
Massachusetts: *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449.
Nebraska: *Edminster v. Higgins*, 6 Neb. 265.
34 L. R. A.

South Carolina: *Wragg v. Comptroller General*, 2 Desaus. Eq. 509.

In North Carolina the case of *Mast v. Ripper*, 81 N. C. 830, seems to recognize the doctrine, though the earlier case of *Wemble v. Battle*, 3 Ired. Eq. 182, denied it.

The Supreme Court of the United States has repeatedly recognized the doctrine.

Chilton v. Lyons, 67 U. S. 2 Black, 458, 17 L. ed. 804.

The doctrine was adopted and enforced by Judge Deady, in *Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. 574.

See 8 Pom. Eq. Jur. §§ 1249 et seq.; *Mackreth v. Symmons*, 15 Ves. Jr. 829.

BEAN, Ch. J., delivered the opinion of the court:

The single question in this case is whether a grantor of real estate, by absolute deed, followed by delivery of possession to his grantee, has an implied equitable lien thereon for the unpaid purchase money. It has been several times mooted in this court, but the doctrine of the English court of chancery, which recognizes and upholds such lien, has never been recognized or established here, although the state is classed by many text-writers among those in which the lien prevails. The earliest case in which reference is made to the question, and the one most strongly relied upon to sustain the doctrine, is *Pease v. Kelly*, 3 Or. 417, but the court in that case only decided that, by taking a mortgage to secure the payment of purchase money, the vendor waived the equitable lien and therefore could not maintain the suit. Nothing more was in fact decided in that case, although it is stated in the opinion that "the lien exists if there is no higher security." It is next referred to in *Kelly v. Ruble*, 11 Or. 75, where the court, after disposing of the case on other grounds, says: "We have thus far impliedly admitted the existence of the equitable lien of a vendor of real estate for the unpaid purchase price. But we doubt the actual existence of the lien in this state. *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Kauffelt v. Bower*, 7 Serg. & R. 64, 10 Am. Dec. 428. It is not believed the existence of such a lien was decided in *Pease v. Kelly*, 3 Or. 417." The question again arose in *Gee v. McMillan*, 14 Or. 268, 58 Am. Rep. 315; and Mr. Justice Strahan puts his decision in that case squarely on the doctrine of the existence of a grantor's lien, but Chief Justice Lord dissents *in toto*, and Mr. Justice Thayer, while concurring in the result upon other grounds, expressly disclaimed any intention to decide whether the principles upon which the doctrine is supposed to be founded are broad enough "to uphold a vendor's lien to the extent of raising a trust in favor of a grantor who has conveyed by deed of absolute conveyance, so as to admit of the purchase price being made a charge upon the property conveyed, in an ordinary case of sale of real estate." In *Lewis v. Henderson*, 22 Or. 548; *Thomas v. Thomas*, 24 Or. 254; and *Jones v. Gates*, Id. 415, where the doctrine is again referred to, the court carefully avoided approving it even by inference. From these decisions it is apparent that it has never received judicial sanction, or become a law of real property

in this state, and its decision is now made necessary for the first time. We therefore feel at liberty to determine the question as one of first impression, and, after having given it the careful and deliberate consideration which its importance demands, we are clearly of the opinion that the doctrine of a grantor's lien is so opposed to the general policy and course of legislation in this state that it ought not to prevail here. The whole tenor of our legislation is to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer, by discouraging all secret or latent equities, and requiring all conveyances thereof and encumbrances thereon to be made a matter of public record.

The doctrine seems to have been borrowed by the English courts of chancery from the civil law, as a means of evading the rule of the common law under which land was not liable, both during and after the life of the debtor for simple-contract debts, and, after the reason for its original adoption had ceased to exist, was enforced upon the ground that the previous decisions had "the effect of contract, though no actual contract had taken place." *Mackreth v. Symmons*, 15 Ves. Jr. 329. Many of the courts of this country, following the English cases, have adopted the rule; but they have never been able, in our opinion, to place the doctrine upon any satisfactory principle applicable to the condition of affairs in a country where real estate is one of the principal articles of commerce, and liable for the debts of the owner, and in which a system of registration prevails. The doctrine has been variously stated to rest upon natural equity, a supposed intention of the parties, a trust arising out of the vendee's holding the land without paying the price, the implied agreement of the parties, and an equitable mortgage. But, manifestly, it cannot be supported as an equitable mortgage, because there is no pretense in such cases that there was any agreement for security on the land, which is essential to an equitable mortgage; nor can it be supported as a trust, for a constructive trust cannot arise from the mere breach of a contract to pay money in the absence of fraud; nor on the ground of an implied agreement, because, as said by Mr. Justice Gibson, in 7 Serg. & R. 76, 10 Am. Dec. 428, "the implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." Nor do we think it can now be put upon the natural equity "that a person having got the estate of another shall not, as between them, keep it and not pay the consideration," because there is no reason for a resort to equity in this country, where real estate is liable to seizure upon attachment and execution, and the courts of law afford a creditor a speedy remedy for the enforcement of his claim. And, besides, "it is inconsistent with natural justice," quoting again from Mr. Justice Gibson, in the case referred to, "that a vendor who publishes to the world, by the terms

of his deed, that he has parted with his whole interest and has trusted to the personal security of the vendee, should become an object of special protection, against the consequences of his own negligence; and that, too, at the expense of a third person, who, in purchasing from the vendee, even with notice that the purchase money was unpaid, has been guilty of nothing positively immoral or even unconscionable." If a vendor sells and conveys real estate, and, either through negligence or overconfidence, chooses to rely upon the personal security of his vendee for the purchase money, he has no special claim to the aid of a court of equity to protect him from the consequences of his own act, by enforcing some secret lien which, in the nature of things, could be known only to himself and his vendee and such persons as they might take into their confidence—a practice which, if tolerated, would have a tendency to open wide the door to fraud and perjury.

The earliest English case which contains a full discussion of the doctrine and the reason and authorities by which it is supported is *Mackreth v. Symmons*, *supra*. In that case, Lord Eldon was only able to determine that two points were clearly settled: (1) That, generally speaking, there is such a lien; and (2) that, in those general cases in which there would be a lien as between vendor and vendee, the vendor will have a lien against a third person with notice that the money was not paid. But, as to what would be sufficient to make a case in which the lien would not exist, he felt obliged to declare, from the authorities, that it was "obvious that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain upon that point;" and that "it has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution, or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist." And, although the doctrine of the English court of chancery has been the subject of much learned discussion in this country, it is no more satisfactory now than it was in Lord Eldon's time. Indeed, it is much less so. From the very nature of the lien itself, there can be no fixed rules concerning it. It is "a mere creature of a court of equity, which it molds and fashions according to its own purposes," and "has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all other equities between the parties." Story, J., in *Gilman v. Brown*, 1 Mason, 191. And Mr. Justice Potter says: "Its existence depends upon and is controlled by no settled rules, but, on the contrary, the existence of the lien generally is made to depend upon the peculiar state of facts and circumstances surrounding the particular case, that is, whether or not a case of natural equity is established:

and, if so, whether it is not made to yield to higher or superior equities in some other person,—whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity, or whether, by the acts or omissions to act, or by the neglect of the party claiming such lien to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands." *Pisk v. Potter*, 2 Keves, 64.

Under the authorities, it would seem that, where the doctrine prevails, each case must be determined upon its own peculiar circumstances, according to the views of the chancellor, and the weight of the argument at the bar; so that it is impossible to tell, without the judgment of a court, whether the lien does or does not exist. It may be well doubted whether any subject connected with the American law of real property has provoked more judicial discussion and controversy, and is now in a more chaotic state, than the doctrine of a grantor's lien where such lien is held to exist. There is hardly a rule upon the subject which has not been somewhere denied, and hardly any two states agree upon the essential points of the doctrine. "No other single topic belonging to the equity jurisprudence," says Mr. Pomeroy, "has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver, or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflicting. It is practically impossible to formulate any general rules representing the doctrine as established throughout the whole country." 8 Pom. Eq. Jur. § 1251. Indeed, the remark attributed to Lord Mansfield, that "the more we read, the more we shall be confounded," is peculiarly applicable to the condition of the law upon this question. It has been adjudged that the lien does not exist under any circumstances after an absolute conveyance, by such able jurists as Mr. Justice Gray, of Massachusetts (now of the Supreme Court of the United States), Gibson of Pennsylvania, Nash and Ruffin of North Carolina, Crozier of Kansas, Shipley of Maine, and Maxwell of Nebraska, to whose opinions in *Kaufelt v. Bower*, 7 Serg. & R. 64, 10 Am. Dec. 428; *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Womble v. Battle*, 3 Ired. Eq. 183; *Simpson v. Mundee*, 8 Kan. 173; *Philbrook v. Delano*, 29 Me. 410; *Edminster v. Higgins*, 6 Neb. 265,—we refer for arguments which seem to us conclusive against the existence of such a lien. In some of the states it has been adopted by the courts, and afterwards abolished by the legislature; and in others, although the courts have felt bound to follow earlier cases, it has of late years been done with expressions of regret that such liens were ever admitted in this country, where registration is so generally provided for and practised.

In courts of the United States the doctrine has been recognized where established by the local laws of different states (*Rice v. Rice*, 86 84 L. R. A.

Fed. Rep. 858); but it does not seem to have been looked upon with favor, if we may judge from the remarks of Mr. Chief Justice Marshall in *Bayley v. Greenleaf*, 20 U. S. 7 Wheat. 51, 5 L. ed. 395, that "it is a secret invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world the vendee appears to hold the estate divested of any trust whatever; and credit is given to him, in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not he is in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien." The authorities *pro* and *con.* are collated in 28 Am. & Eng. Enc. Law, p. 163; 3 Pom. Eq. Jur. § 1251; 2 Jones, Liens, § 1061; 1 Beach, Mod. Eq. Jur. §§ 296, 297; and note to *Mackreth v. Symmons*, 1 Lead. Cas. in Eq. 447. And we think an examination of them and the discussion of the question by the several authors will clearly show that the whole doctrine is inconsistent with the general policy prevailing in this country of making all matters of title dependent upon record evidence, so that interested parties may know whether the land is encumbered by a lien without waiting for the judgment of a court, as is admittedly the case in many instances where a grantor's lien exists; that it bristles with difficulties, snares, and dangers, and ought not to find lodgment in this state, where its only effect would be to render the title to real estate uncertain, embarrass its alienation, foster litigation, and offer temptation to fraud and perjury, with no substantial benefit to anyone except to protect some grantor from the consequences of his own voluntary act. The decided tendency of modern legislation and legal learning is clearly against the existence of such a lien under any circumstances. Mr. Pomeroy ventures the opinion "that the original grounds and reasons for admitting the grantor's lien do not exist in our own country, and the lien itself is not in harmony with our general real property law. The tendency both of our legislation and of our social customs is to make land a subject of commerce, and its transmission as free as possible; while the rights of grantors can be fully protected by mortgages which, in nearly all the states, are widely different from the instrument bearing the same name in England." 3 Pom. Eq. Jur., note to § 1250. And Mr. Jones says that "it is to be noticed that, within a few years, several states have abolished this implied lien, and that strong expressions of disapprobation of the doctrine have been used in others. Moreover the practical tendency in the older states is to rely upon formal instruments for security when security is wanted. It may be doubted, therefore, whether this doctrine will long survive." 2 Jones, Liens, note to § 1063. And the learned editors of the *Leading Cases in Equity*, upon an exhaustive review of the authorities, conclude that "there can be little doubt that this principle, of an implied lien for purchase money, has no just application in a country where every debt may be at once made a lien by judgment, and where

debts generally are a lien on the lands of decedents; and that the courts of those states which have wholly expelled the doctrine have exhibited a more accurate appreciation of its nature and purpose than those which have retained it." 1 Lead. Cas. in Eq. 502. The doctrine may have been less objectionable in a country where land was not liable for the con-

tract debts of the owner, although incurred in its purchase, and where the policy of the law was to discourage the alienation of real estate; but we are satisfied that it is repugnant to the registration law and general policy of this state, and is no part of our law.

The decree of the court below will be affirmed.

MICHIGAN SUPREME COURT

MUTUAL FIRE INSURANCE COMPANY OF CHICAGO

v.

PHENIX FURNITURE COMPANY, *Plff. in Err.*

(.....Mich.....)

A decree in a sister state as to the amount of assets and debts of an insolvent mutual insurance company, and of the amount of assessments necessary to liquidate its liabilities, rendered by a court to which a statute has given entire jurisdiction in the matter, without service upon or notice to the stockholders or members, is conclusive on a stockholder when sued upon a note which was a chose in action in possession of the company and under the control of the court which made the decree, although the court in which he is sued takes a different view of the case as to the assessments.

(*McGrath, Ch. J., and Long, J., dissent.*)

(December 31, 1896.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action brought to enforce an assessment on a note given for premium for fire insurance. *Affirmed.*

Plaintiff was an Illinois corporation doing mutual fire insurance business in Michigan. Defendant is a Michigan corporation which insured with plaintiff and executed the following premium note:

Chicago, Ill. May 1, 1889.

For value received in policy No. 5739, dated

the 1st day of May, 1889, we promise to pay the Mutual Fire Insurance Company the sum of two hundred and forty dollars, by instalments, at such a time as the directors of said company may order and assess, for the losses and expenses of said company, pursuant to its charter and by-laws. It is hereby expressly understood and agreed that this note is not transferable, and that there is no liability beyond the face amount thereof.

The secretary is authorized to number and date application and note, No. 5739.

(Signed)

Phoenix Furniture Co.

R. W. Merrill, Treas.

Plaintiff made one assessment on this note which was paid by defendant on October 1, 1890. The auditor of public accounts of the state of Illinois instituted proceedings to wind up the affairs of the company, collect its assets, pay its debts; and for this purpose a receiver was appointed. The receiver instituted a proceeding to determine the amount of assessment on premium notes which would be necessary to liquidate the debts of the corporation to which only the company and its officers and directors were made parties. The court found that an assessment of 65 per cent would be necessary for that purpose and this action was instituted to enforce that assessment.

Further facts appear in the opinion.

Meers, Fletcher & Wanty, for plaintiff in error:

An assessment can only be laid upon the conditions stated in the charter, and for the purposes therein mentioned.

NOTE.—Effect of assessment on stockholders made under order of court in another state as *res adjudicata*.

Since the extent to which a decision of a state court must be held conclusive in another state is a Federal question, the decisions of the Supreme Court of the United States constitute the final authority on the question of the extent to which an assessment upon stockholders, made under order of a state court, will be binding upon nonresident stockholders in other states. That court has to a considerable extent settled the law of the subject.

It held in *Great Western Teleg. Co. v. Purdy*, 102 U. S. 329, 40 L. ed. 936, that a release, or payment, or the statute of limitations, or any other defense going to show that the defendant is not liable upon his contract of subscription, can be pleaded by him in an action brought to enforce an assessment made by a court in another state.

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An order of assessment which is, in effect, as it is in terms, simply a "call or assessment" upon all stockholders who had not paid for their shares in full, whether it is made by the directors as provided by the contract of subscription or by the court as the successor of the directors in this respect, is not and does not purport to be a judgment against anyone, and does not undertake to determine the question whether any particular stockholder is or is not liable in any amount. *Id.*

Yet it also said in the same case that such an order is doubtless conclusive evidence of the necessity for making such an assessment, and to that extent binds every stockholder without personal notice to him, unless it is directly attacked and set aside by appropriate judicial proceedings.

So, in *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 232, it was decided that a stockholder in a foreign corporation when sued on an assessment cannot impeach, except for fraud, the conclusiveness of a

2 May, Ins. § 557; *Pacific Mut. Ins. Co. v. Guss*, 49 Mo. 829, 8 Am. Rep. 132; *American Ins. Co. v. Schmidt*, 19 Iowa, 502.

It is necessary for an assessment to be made for the just proportion of the losses and expenses which occurred during the life of the policy for which the premium note was given, and it is therefore necessary to ascertain and have before the court proof of such losses and expenses for each assessment made on each note.

Davis v. Oakkosh Upholstery Co. 82 Wis. 488; *Great Western Teleg. Co. v. Burnham*, 79 Wis. 47; *Boren v. Kuehn*, Id. 58.

A receiver must show that the contingency has happened which authorizes an assessment, and that the assessment is a legal one assessed on each premium note according to the contract therein contained, and for losses and expenses which have occurred during the life of the policy for which the notes were given; and this is true even when the assessment is made by order of the court.

Bangs v. Duckinfield, 18 N. Y. 592; *Jackson v. Roberts*, 81 N. Y. 804; *Cuykendall v. Corning*, 88 N. Y. 129.

Hawkins v. Glenn, 131 U. S. 819, 33 L. ed. 184, was a case of a suit against the stockholder of an ordinary corporation whose subscription was payable absolutely and not conditionally. In such a corporation the directors have the power while the corporation is a going concern to make and call for any portion or all of an unpaid subscription, and such a call is binding upon the stockholders.

Budd v. Multnomah Street R. Co. 15 Or. 418; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286.

The directors having the power, before the corporation becomes insolvent, to make a call binding upon the stockholders, a court of equity can do the same thing.

Under the statute of Illinois the assessment made on the stockholders under an order of the court would have no binding force on any stockholder who was not made a party to the proceeding.

Ill. Rev. Stat. chap. 32, § 25; *Chandler v. Brown*, 77 Ill. 338; *Lamar Ins. Co. v. Gulick*, 102 Ill. 41; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338.

We should not be assessed to pay losses which had not been incurred, and the unearned premiums were not a proper subject of assessment, and including them in it made the

assessment void, for the defendant by its contract contained in its notes agreed to pay assessments for losses and expenses of the company only, and it cannot be assessed for anything else.

Detroit Manufacturers' Mut. F. Ins. Co. v. Merrill, 101 Mich. 398; *Dewey v. Davis*, 82 Wis. 500.

Messrs. D. J. Schuyler and Mark Norris, for defendant in error:

By the laws of Illinois the decree of the Illinois court bound defendant.

Great Western Teleg. Co. v. Gray, 123 Ill. 630; *Rand, McN. & Co. v. Mutual F. Ins. Co.* 58 Ill. App. 528; Ill. Rev. Stat. 1887, pp. 848 et seq.

And being binding there, it is here, as it must here receive the same faith and credit that are given it in Illinois.

Bonesteel v. Todd, 9 Mich. 371, 90 Am. Dec. 90; *Dickinson v. Seaver*, 44 Mich. 624; U. S. Rev. Stat. § 905; *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 8 L. ed. 411; *Hampton v. McConnell*, 76 U. S. 3 Wheat. 284, 4 L. ed. 378; *M'Elmoyle v. Cohen*, 38 U. S. 13 Pet. 312, 10 L. ed. 177; *Christmas v. Russell*, 72 U. S. 5 Wall. 200, 18 L. ed. 475; *Green v. Van Burkirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109; *Hanley v. Donoghue*, 116 U. S. 4, 29 L. ed. 536; *Cole v. Cunningham*, 133 U. S. 111, 33 L. ed. 541.

The proceedings in Illinois were taken under an act entitled, "An Act in Regard to the Dissolution of Insurance Companies," approved February 17, 1874, and in force July 1, 1874.

Ill. Rev. Stat. 1887, p. 848, §§ 103-111; *Great Western Teleg. Co. v. Gray*, *supra*.

A court acquires jurisdiction to appoint a receiver of corporate assets by service of process upon the corporation. The stockholder is represented in his interest, as such, by the presence of the corporation.

2 Morawetz, Priv. Corp. § 822; *Ward v. Farwell*, 97 Ill. 598; *Glenn v. Williams*, 60 Md. 98; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 230.

Defendant's promise was to pay as the directors, from time to time, might order. The directors, who were defendant's agents, having neglected to make order for payment, a court of equity in their place might make the order.

Sanger v. Upton, *supra*; *Hawkins v. Glenn*, 131 U. S. 819, 33 L. ed. 184; *Glenn v. Williams*, *supra*; *Hamilton v. Glenn*, 86 Va. 901; *Wardle v. Cummings*, 86 Mich. 896; *Hamilton*

judgment rendered in another state establishing the propriety and necessity of making an assessment.

In *Hawkins v. Glenn*, 131 U. S. 819, 33 L. ed. 184, it held that the fact that a foreign stockholder was not a party to the cause between a creditor and the corporation in which an assessment was made does not prevent him from being bound by the call which is made by the court, and that it is not necessary that he should be present or have any service of process or notice in order to make a valid assessment.

In *Glenn v. Springs*, 26 Fed. Rep. 494, it was held that an assessment made by a court upon stockholders of a corporation in a suit against it by creditors is conclusive even upon one who was not personally served with notice, in the absence of fraud, on the questions of the power to make the call, the informalities in the incorporation, the ex-

istence of bona fide debts against the company, and the defenses of laches and the statute of limitations.

"If an assessment has been made in the state of Illinois, either by the board of directors or by the court, such assessment cannot conclude or affect the stockholders in this state, and who are defendants in this case, because they were not parties to it or in anywise bound by it," said the court in *Holmes v. Sherwood*, 16 Fed. Rep. 723, in an action brought in the circuit court of the United States in Iowa. But this was said in a case in which it did not appear that any assessment had been made, and it was said in upholding the right of judgment creditors of a corporation to sue stockholders in Iowa without any previous assessment and without making all the stockholders parties.

In an action in the circuit court of the United States in Indiana to recover of an Indiana stock-

Mut. Ins. Co. v. Parker, 11 Allen, 574; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 212.

The decree of the Illinois court in making the assessment in question was binding upon the members of the company in Illinois.

Great Western Teleg. Co. v. Gray, 122 Ill. 630.

This contract was made, as appears by its face, in Illinois, under Illinois law, and should therefore be decided according to Illinois law.

Story, Confli. L. §§ 263, 266; Bissell v. Lewis, 4 Mich. 459; *Collins Iron Co. v. Burkam*, 10 Mich. 289; *Holdridge v. Farmers' & M. Bank*, 16 Mich. 70; *McIntyre v. Michigan State Ins. Co.* 52 Mich. 193.

It therefore cannot be presumed to be a Michigan contract.

American Ins. Co. v. Cutler, 36 Mich. 261; *Rand, McN. & Co. v. Mutual F. Ins. Co.* 58 Ill. App. 528.

Members of a mutual company are liable to be assessed for unearned premiums as a part of the losses and expenses of the company.

Re Minnesota Mut. F. Ins. Co. 49 Minn. 291; *Clark v. Manufacturers' Mut. F. Ins. Co.* 180 Ind. 832.

The item of \$25,000 for expenses of receivership come within the word "expenses" in the premium note and may be included in an assessment.

Wardle v. Townsend, 75 Mich. 385, 4 L. R. A. 511; 3 May, Ins. § 559; 3 Biddle, Ins. § 986.

Grant, J., delivered the opinion of the court:

After a full argument upon the rehearing of this cause, we are satisfied that we were in error in reversing the judgment. The testimony was not returned, and the case is before us on findings of fact and law, to which no exceptions were taken. The sole question, therefore, is, Do the facts found support the judgment? We held, in *Detroit Manufacturers' Mut. F. Ins. Co. v. Merrill*, 101 Mich. 393, that the defendants, under such a note, were not liable to an assessment for unearned or return premiums. That case would, of course, control this, unless the decree of the Illinois court is conclusive upon the courts of this state. The Constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Article 4, § 1. In the early case

of *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411, it was held that the decrees and judgments of the courts of one state were conclusive in the courts of sister states. This case has since been uniformly followed. Where a court has jurisdiction of the cause and of the parties, its judgment is conclusive in other courts, and the only remedy is by direct proceeding in the original cause. *Hanley v. D. oghue*, 116 U. S. 4, 29 L. ed. 536; *Cole v. Cunningham*, 133 U. S. 111, 33 L. ed. 541; *Bone steel v. Todd*, 9 Mich. 871, 80 Am. Dec. 90. It is conceded that as against the corporation itself, and the directors and officers thereof, the rule applies. It is, however, contended that it does not apply to a stockholder of such corporation who is not made a direct party to the original suit. That is the question in this case. We are not dealing with a case where a stockholder is interposing the defense of payment, or any other defense which was not passed upon in the original suit against the corporation. In such a case there is no judgment or decree of the court of a sister state which other courts must recognize. But the very point now urged as a defense was involved and determined by the Illinois court. This was an Illinois contract. These notes were chosen in action, were first in possession of the company in Illinois, were turned over by it to the receiver, and were under the direct control of the Illinois courts. That court entered a decree, upon evidence placed before it, determining the amount of assets and debts, and the amount of the assessment necessary to liquidate its liabilities. If every stockholder may now contest this decree, the difficulty thus thrown in the way of an orderly and practical settlement of the affairs of the insolvent corporation is apparent. Different courts might adopt different rulings upon the amount of the assessment. We think the better doctrine is that each stockholder or member of the corporation is an integral part thereof, and is represented in such suit through the corporation itself, and that such decree is binding and conclusive upon him. Two courts have so held in regard to the case now under consideration. *Rand, McN. & Co. v. Mutual F. Ins. Co.* 58 Ill. App. 528; *Parker v. Stoughton Mill Co.* 91 Wis. 174. In the latter case two points were raised: First, that the receiver in Illinois could not sue in the courts of Wisconsin, and, second, that the as-

holder the amount of an assessment decreed by the district court of the United States in Illinois against the stockholders of a bankrupt insurance company is enforced in Payson v. Withers, 5 Bias. 200. But the question whether or not the assessment was res adjudicata was not discussed, and various defenses were made and considered at length.

In respect to an assessment rendered against stockholders ordered by a court of one state when suit thereon is brought in a Federal court sitting in another state, an objection that it appears to have been ex parte is answered by saying that if the assessment were to have the force of a judgment against the defendant there would be great force in the objection, though possibly not controlling force; but the court says: "I understand that all defenses specially applicable to this defendant, such as that he was not a stockholder, etc., are still open to him, and, indeed, perhaps the 84 L. R. A.

whole subject may be open. Enough is alleged in the declaration to put him to his defense. Demurrer overruled." *Cuykendall v. Miles*, 10 Fed. Rep. 842.

An order by the bankrupt court under U. S. Rev. Stat. § 4972, that the balance unpaid upon stock of an insolvent corporation should be paid to the assignee, can be made without the presence of the stockholder. *Sanger v. Upton*, 91 U. S. 66, 23 L. ed. 220. This was a case in which the action against the stockholder to recover the amount due from him was brought in the same court, but the decision seems applicable to such an action brought anywhere.

A decree against a corporation by a court of the state in which it is domiciled is conclusive against the stockholders wherever they reside, so far as it affects the condition and status of the corporate property, although they were not personally made

assessment was inequitable and unjust and hence should not be enforced. The distinction between the rights of property situated in other states, and those of choses in action, is there very clearly pointed out. Upon the first point the court says: "There is no question here of a transfer of property in this state. No such transfer was attempted. The property in question (that is, the defendant's note and its liability to pay assessments) was in Illinois at the office of the company. They were choses in action, and their situs was at the residence of the company." Upon the second point the court says: "If a judgment is conclusive in the state where rendered, it is conclusive here. The decree by which the assessment in question was made was undoubtedly conclusive on the members or policy holders of the defunct company, unless attacked in a direct proceeding, notwithstanding they were not present when it was rendered."

... We can come to no other conclusion than that we are bound under the constitutional requirement of 'full faith and credit' to hold that the decree making the assessment in question, being conclusive in Illinois upon all members and policy holders unless attacked by direct proceeding is conclusive here and not open to collateral attack."

The point appears to be expressly decided in *Hawkins v. Glenn*, 181 U. S. 819, 33 L. ed. 184. The proceedings in that case were substantially the same as in this. The defense was that the stockholder was not a party to the suit, that the cause of action was barred by the statute of limitations, that he was not responsible on 150 shares, and that interest should not have been allowed. The stockholder was sued in North Carolina. A decree had been rendered in a court of chancery in Virginia which had ascertained the extent of the liabilities and assets of the corporation, and decreed the assessment required to pay its liabilities. The court held the decree conclusive, and, in deciding it, speaking through Chief Justice Fuller, says: "A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member," citing *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220. The same question was again before the court in *Glenn v. Liggett*, 135 U. S. 538, 34 L. ed. 262, and the same conclusion reached, quoting from *Hawkins v. Glenn*.

The same was held in *Looming F. Ins. Co. v. Langley*, 62 Md. 311. The learned counsel for the defendant cite *Chandler v. Brown*, 77 Ill. 333, and *Lamar Ins. Co. v. Gulick*, 102 Ill. 41. These cases are distinguished from a case like the present in *Great Western Teleg. Co. v. Gray*, 123 Ill. 630. The two former cases were based upon a statute which provided that stockholders should be made parties to the suit. Ill. Rev. Stat. 1889, chap. 32, §§ 1-40. The decree of the Illinois court in this case was based upon an act in regard to the dissolution of insurance companies. Ill. Rev. Stat. 1889, chap. 73, §§ 103-111. This does not provide for any service upon or notice to the stockholders or members, but confers the entire jurisdiction in such cases upon the courts. Upon the question of notice to stockholders, see *Wardle v. Cummings*, 36 Mich. 400. Mr. May, in his work on Insurance (vol. 2, § 557), says: "The receiver of an insolvent corporation stands upon no better footing" than would the directors in making an assessment, and cites *Jackson v. Roberts*, 81 N. Y. 804; *Embree v. Shideler*, 36 Ind. 428.

If these decisions sustain the rule contended for, we could not follow them, as we think they are opposed to the clear weight of authority. The New York statute is clearly different from that in the present case. It reads as follows: "In case the corporation, in regard to which a receiver has been or shall hereafter be appointed, is or shall be a mutual insurance company, such receiver shall have full power under the authority and sanction of the court appointing him, to make all such assessments on the premium notes belonging to such corporation, as may be necessary to pay the debts of such corporation, as by the charter thereof the directors of such corporation have authority to make; and the notice of such assessment may be given in the same manner as is provided in the charter of said company for the directors of said company to give; and the said receiver shall have the like rights and remedies upon and in consequence of the nonpayment of such assessments, as are given to the corporation or the directors thereof by the charter of said corporation." Laws 1852, chap. 71. It thus appears that the power of the receiver was expressly limited to the power of the board of directors, and to the *modus operandi* of collecting the assessments. In *Embree v. Shideler*, it ap-

parties to the proceedings by service of process. *Lehman v. Glenn*, 87 Ala. 618.

The fact that Maryland stockholders were not parties to the proceedings in Virginia in which a decree was made directing an assessment upon stockholders of the Virginia corporation is held, in *Glenn v. Williams*, 60 Md. 98, to be insufficient to prevent the Virginia assessment from being conclusive against them.

So, in *Howard v. Glenn*, 35 Ga. 228, it is held that the fact that a stockholder of a corporation is a citizen of another state, and is not served with process in a suit against the company at his domicile, in which it is declared insolvent, and a trustee in insolvency appointed and an assessment and call upon the stockholders made, does not prevent the decree from being binding upon him when an action is brought against him for the assessment in another state.

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Maryland stockholders who had been sued at their residence for assessments on stock of an insolvent Virginia court, appeared in that court in the case of *Hamilton v. Glenn*, 85 Va. 901, and asked that the cause might be reheard on the ground that the suit against the insolvent corporation was in effect against the stockholders, and that they were not represented in the suit by the company nor by trustees to whom its property had been assigned, but their petition was denied.

Another action to enforce an assessment decreed by the Virginia court was sustained in *McKim v. Glenn*, 66 Md. 479.

Long delay in making a call on stockholders is held, in *Glenn v. Liggett*, 135 U. S. 538, 34 L. ed. 262, to constitute no defense to a stockholder in another state when sued in a Federal court, and the statute of limitations is held to constitute no defense until the full period of the statute has run after

peared, upon the face of the complaint, that neither the receiver, nor the court to which he had reported his action, had examined and determined upon the validity of the claims against the company. This was expressly required by the charter of the company. It was therefore said that "the assessment is the act of the receiver, and in and with him is the authority to act in the premises." The decree in the present case was erroneous only in that it included some items which, under *Detroit Manufacturers' Mut. F. Ins. Co. v. Merrill*, this court would have excluded. Judgments and decrees cannot be attacked collaterally because they include items which courts, other than those by whom they were rendered, might hold to be illegal. See *Morawetz, Priv. Corp.* § 822.

The judgment must be affirmed.

Montgomery and Hooker, JJ., concurred with **Grant, J.**

McGrath, Ch. J., dissenting:

After reargument of this cause, I see no good reason for a change of opinion upon the main issue involved. The case presents two questions: First, whether the decree of the court is *res judicata* as to the amount of the assessment directed; and, second, whether we are bound, under the constitutional requirement of "full faith and credit," to regard that decree as conclusive.

1. There are a number of authorities which hold that, in a proceeding against a stockholder, under a statute which makes him liable to creditors, and based upon a judgment against the corporation, such judgment is prima facie evidence of the indebtedness of the corporation. *Grand Rapids Sav. Bank's Appeal*, 52 Mich. 557; *Hoagland v. Bell*, 86 Barb. 57; *Hastings v. Drew*, 76 N. Y. 9; *Schaeffer v. Missouri Home Ins. Co.* 46 Mo. 248. Other authorities hold that the judgment is conclusive, and cannot be attacked, except for fraud. *Corse Bros. v. Sanford*, 14 Iowa, 235; *Grund v. Tucker*, 5 Kan. 70; *Coalfield Co. v. Peck*, 98 Ill. 139; *Conklin v. Furman*, 8 Abb. Pr. N. S. 161; *Miliken v. Whitehouse*, 49 Me. 527; *Henry v. Vermillion & A. R. Co.* 17 Ohio, 187; *Wilson v. Pittsburgh & Y. Coal Co.* 43 Pa. 424; *Merchants' Bank v. Chandler*, 19 Wis. 457; *Marsh v. Burroughs*, 1 Woods, 468; *Stephens v. Fox*, 88 N. Y. 518. There is still another class of

cases which holds that a stockholder, in the absence of a statute requiring it, is not a necessary party to proceedings to wind up the affairs of the corporation, determine its insolvency, and appoint a receiver; that a decree of court determining such matters, declaring the necessity for an assessment upon stockholders or for the collection of unpaid subscriptions to the capital stock, and directing the collection thereof, is not open to attack in a suit brought to enforce the collection of the assets of the corporation, the unpaid subscriptions to the capital stock, or assessments so ordered. *Glenn v. Williams*, 60 Md. 93; *Lycoming Ins. Co. v. Langley*, 63 Md. 196; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 230; *Glenn v. Springs*, 26 Fed. Rep. 494; *Hawkins v. Glenn*, 131 U. S. 819, 33 L. ed. 184; *Lehman v. Glenn*, 87 Ala. 618; *Gilchrist v. West Virginia Oil & Oil Land Co.* 21 W. Va. 115, 45 Am. Rep. 555. The cases, with many others, recognize the rule, but some of them carry the rule to an extent which is not warranted by the principle which underlies the rule, and others use language which is inapplicable to the facts of the particular case before the court. A judgment against a corporation is decisive, as against a stockholder of that corporation, because the proceeding in which it was obtained was one between the contracting parties,—the parties who had the legal right to determine that question.

The only question, then, open, is the amount due from the stockholder to the corporation, or, if he is liable by reason of a statute, the extent of his liability under the statute. If he is exempted from certain classes of claims against the corporation, such exemption may be shown. If the statute imposes a liability as for labor claims, the character of the claim must be established. In *Wilson v. Pittsburgh & Y. Coal Co. supra*, the stockholders were made personally liable for all debts except loans, and the court held that the defendant might show either that he was not a stockholder, or that the debt was a loan. In other words the judgment is conclusive as to the amount due from the corporation to the creditor, but is only conclusive as to the stockholder when his liability is established.

As is said in *Union Bank v. Wando Min. & Mfg. Co.* 17 S. C. 389, 359: "There can be no doubt of the rights of the stockholders in this action to set up any available defense that goes

the making of a call or demand, although by the laws of the state in which the stockholder is sued the insolvency of a corporation would set the statute running without any call or demand. To the same effect are *Hawkins v. Glenn*, 131 U. S. 819, 33 L. ed. 184; *Glenn v. Marbury*, 45 U. S. 499, 36 L. ed. 790.

The plea of the statute of limitations, set up by a stockholder in a foreign corporation, against whom action was brought on an assessment made under a decree in another state, was also ineffectual in the Georgia case of *Glenn v. Howard*, 81 Ga. 383, on the ground that the statute did not begin to run until the call was made.

A defense of the statute of limitations raised by stockholders in a foreign corporation when sued to recover assessments made by decree in another state also failed on the ground that the statute did not begin to run until the call was made, in *Glenn v. Williams*, 60 Md. 93.

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Suit by the trustee of a foreign corporation to recover an assessment from a stockholder was also contested in the Alabama case of *Glenn v. Semple*, 80 Ala. 159, 60 Am. Rep. 92, solely on the ground that the liability was barred by the statute of limitations, and this turned on the question whether the statute began to run before the call or assessment was made, and it was held that it did not.

In suit against a stockholder of a Virginia corporation to recover an assessment made by a Virginia court, where he contended that there had been no recognition of his liability as a subscriber from the time when his subscription was made up to the time of suit, which was more than twenty years, and that the claim was barred on the ground that the law would presume that the call for assessments had long since been made and satisfied, the Alabama court held that the Virginia decree

to the question of their liability upon the note upon which judgment has been obtained against the company. The defendants in this action were not, as individuals, parties to the action in which judgment was recovered. That suit was against the corporation, which, in law, is a distinct person from the individual members which compose it. The ground of the liability of the company may not prevail against the stockholders. For it is only when a judgment is obtained against the company upon debts of a certain description, and upon which suits have been brought within a specified time, that the stockholders are liable. In this action it is, therefore, necessary to establish that the conditions of the liability of the stockholders exist. To do this necessarily involves an inquiry in this action into the grounds of the stockholders' liability. Of course, then, it is competent for these defendants to interpose any defense that goes to the question of their liability upon the notes upon which the judgments were obtained."

In *Marsh v. Burroughs, supra*, it was contended that the unpaid subscriptions of capital stock were not assets for the payment of debts, either legal or equitable; that they existed merely as possibilities; that they were not a debt due, having never been called in; that no one could call them in but the directors; and in them it was a mere discretionary power, which could not be exercised either by the assignee, the receiver, or the court itself, and could not be assigned; that said unpaid subscriptions were no part of the capital stock of the bank; and that the real capital stock was what had been called in. The court held, however, that the amount subscribed, and not the sums actually paid in, was the capital stock; that the authority to make calls was not a mere power vested in the bank, to be exercised or not, in its discretion, but that it was a right; that the mode of calling it in prescribed by the charter was a mere form of remedy given to the bank to enforce the subscription, and that unpaid subscriptions were corporate property, constituting a trust fund which could be reached by creditors.

In *Sanger v. Upton, supra*, it was held that the order of the bankruptcy court as to the right of the assignee to bring suit was conclusive. The court refers to the application of the rule to an order made by the comptroller of the currency, citing *Kennedy v.*

Gibson, 75 U. S. 8 Wall. 505, 19 L. ed. 478, wherein the court says: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him." The court then says: "It was competent for the court to order payment of the stock, as the directors, under the instructions of a majority of the stockholders, might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been." Other questions affecting the liability of the stockholders were raised and the court determined them.

In *Hall v. United States Ins. Co.* 5 Gill, 484, the question arose upon the admissibility in evidence of the equity proceeding in which the order directing the call had been made, and the court held that the order for the institution of the suit was conclusive.

In *Glenn v. Williams, supra*, it was held that the chancery court of Richmond had power and jurisdiction to make assessments upon the unpaid subscriptions to the capital stock to raise funds with which to pay its debts, and that the decree of the court determining and making an assessment upon the capital stock for such purpose was binding and effective upon stockholders not parties to that cause.

In *Parker v. Sloughton Mill Co.* 91 Wis. 174, a demurrer was interposed to the complaint, on the ground of want of capacity in the plaintiff to sue. The court below sustained the demurrer, and the supreme court reversed that holding. There is no doubt of the correctness of that decision. That question is *res judicata*.

In *Hawkins v. Glenn, supra*, Mr. Chief Justice Fuller thus states the issues involved: Counsel for plaintiff in error contend that the decree of the Richmond chancery court making the call and assessment was void as against him, because he was not a party to the suit; that the cause of action was barred by the statute of limitations; that he was not responsible upon 150 shares of the stock; and that interest

making the assessment was binding *prima facie* on all whose names appeared upon the company's books as members and stockholders, and necessarily adjudged that the assessment was not then barred by prescription or laches. *Semple v. Glenn*, 91 Ala. 245.

So, in *Lehman v. Glenn*, 87 Ala. 618, the assessment in Virginia is conclusive as to the effect of the statute of limitations on the claims of creditors up to the time it is rendered and as to the authority of the court to make a call or assessment and the right of the trustee to bring suit thereon.

A horizontal assessment on all shareholders alike except those who have paid in full, made by a court of equity in another state which had appointed a receiver of a corporation, was refused enforcement in *Great Western Teleg. Co. v. Burnham*, 79 Wis. 47, and *Bowen v. Kuehn*, Id. 53, where the complaints to recover such assessment showed 34 L. R. A.

that some of the stockholders assessed had paid as much as 40 per cent on their shares, while others had not paid more than 2 per cent. The court held that any call or assessment must be uniform and in ratable amounts, and that any call or assessment which requires some of the shareholders to pay a higher rate than other shareholders is unjust and should not be enforced. To the contention that full faith and credit must be given to the proceedings of the court of another state, and that it could not be presumed that such court would make an unfair and unequal assessment, it is answered that the allegations of the complaint must be taken as they stand with their obvious sense and meaning, and that from them it fairly appears that an unequal and unjust assessment was made. The court says: "Nor can the fact that the call or assessment was made by the court in the suit before it change our conclusions as to its inequality and unfairness. A

should not have been allowed from the date of the call, but only from the time of the filing of the complaint. While the learned chief justice does say, as to the determination of the Richmond chancery court, that the court may have erred in its conclusions, but its decree cannot be attacked collaterally, the court does not rest its decision upon the adjudication referred to, but proceeds to discuss the question at length, holding that, as between creditor and stockholder, the latter could not protect themselves from paying what they owe by setting up the default of their own agents.

It must be borne in mind that that case was one for an unpaid subscription to stock. It was a sum which was a part of the capital stock of the company,—a trust fund, held for the benefit of creditors, and the obligation to pay which could not be discharged, as against creditors, by the corporation itself. The contract to pay the sum sought to be recovered was one arising under the charter at the outset. It could not be affected as to creditors by the acts or laches of the corporation. In the present case the limit of the liability of the defendant member is not only expressed in the note upon which suit is brought, but in the charter of the corporation as well. No act of the corporation could extend that liability. Defendant pleads no release from his undertaking, nor does he seek to escape by reason of the laches of the corporation in their failure to enforce the contract, nor have creditors any demands upon defendant except such as arise from his undertaking. The receiver, on behalf of the creditors, is simply subrogated to the claim of the corporation against defendant. No assessment made by the corporation in excess of his liability would have been binding upon him. This is a proceeding against the stockholder as an adversary party. He has the same right to insist that the class of debts for which he has been assessed are not such as he contracted to pay as a stockholder would have, under our own statute, in respect to labor claims, if sued upon a judgment against the corporation.

2. In view of the conclusion reached, it is unnecessary to discuss the question as to whether the finding of facts supports plaintiff's contention that the note in question is an Illinois contract. No attempt was made

to show that the charter and by-laws of the plaintiff corporation enlarged the defendant's liability. The adjudication which, it is insisted, is binding upon us, was not one involving the validity of a contract, or the validity or construction of a local charter, statute, or Constitution; nor was it a question of construction, depending upon the intent of the parties, as affected, at the inception of the contract, by any fixed local rules of law; nor did it involve a rule of property. The Federal judiciary act provides that the laws of the several states, except in given cases, shall be regarded as rules of decisions in trials at common law in the courts of the United States; yet, at an early day, the Supreme Court of the United States held that this provision did not apply to the decisions of the state courts in the construction of ordinary contracts or on questions of general commercial law. *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865. And it has been held that the Federal courts were not bound by decisions of the state courts construing and determining the legal effect of insurance contracts (*Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044); nor by decisions of state courts as to rights of the parties to negotiable paper, such rights depending on the law of negotiable paper (*Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61); nor by a decision on the construction of a contract of carriage (*Michigan C. R. Co. v. Myrick* ("Myrick v. Michigan C. R. Co."), 107 U. S. 102, 27 L. ed. 825); nor by a decision construing a deed by the rules of the common law (*Farcraft v. Mallett*, 45 U. S. 4 How. 853, 11 L. ed. 1008). See also, as to the application of this doctrine, cases cited in 23 Am. & Eng. Enc. Law, pp. 40, 41.

The question here presented is whether the determination of the Illinois court, made after the insolvency of the corporation, as to the legal effect of defendant's promise, is conclusive upon the defendant, and binding upon us. I think not. There was no law of place that attached to and formed a part of the contract at its inception. The judgment should have been for defendant, with costs of both courts.

Long, J., concurred with McGrath, Ch. J.

court by its decree cannot make that which is essentially wrong and unjust right and just."

But substantially overruling this case, a decree of a court in another state levying an assessment of a certain per cent upon all the premium notes and membership liabilities of all the members of a mutual insurance company was held, in *Parker v. Stoughton Mill Co.* 91 Wis. 174, to be conclusive and not open to collateral attack, since it is protected by the constitutional requirement of full faith and credit. The assessment in this case was attacked on the ground that it was inequitable and unjust, and was in fact a horizontal assessment. The court says that whatever was said in *Great Western Tele. Co. v. Burnham*, *supra*, inconsistent with this conclusion, will not be followed.

An order made by an English court under the English companies acts 1862 was held not to be conclusive in Canada under a statute then in force. *Barnes's Banking Co. v. Reynolds*, 36 U. C. Q. B. 256. In this case it was held that defendant might set up any defense which he could set up in the original proceedings. After an amendment to the 84 L. R. A.

declaration in this case it appears again in 40 U. C. Q. B. 435, and 3 Ont. App. Rep. 371, and was passed upon by the supreme court February 3, 1880, in a decision which does not seem to be reported. But these later appearances of the case involve the sufficiency of the declaration, which is finally held bad without passing directly upon the conclusiveness of the order of the English court.

In *PARKER v. LAMB*, assessments by a receiver under direction of a court of another state for a percentage of the premium notes held by a mutual fire insurance company was expressly held not to constitute an adjudication against the defendant in that case who was not a party to the proceedings in the other state, and whose policy had been surrendered and his notes delivered up to him before the insurance company became bankrupt. But the conclusiveness of the assessment in this case was considered with reference to a defense that the defendant had ceased to be a stockholder, and not with reference to the validity of the claims against the corporation and the propriety and necessity of making an assessment to that amount. The case

Willard E. WARNER, Receiver of the Minneapolis Mutual Fire Insurance Company,
Pf. in Err.,

DELBRIDGE & CAMERON COMPANY.

(.....Mich.....)

1. One who becomes a member of a foreign corporation subjects himself to such laws of the government of its *situs* as affect its powers and obligations.
2. An assessment which will be binding on nonresident policy holders may be made under the Minnesota statutes upon the premium notes of the holders of mutual policies in an insurance company organized in that state to repay unearned premiums on cash policies issued by the company.
3. The suggestion that a foreign insurance company had no authority to do business in the state comes too late on appeal to prevent the enforcement of an assessment upon premium notes.

(July 31, 1896.)

ERROR to the Circuit Court of Wayne County to review a judgment in favor of defendant in an action brought to compel defendant to pay an assessment upon its premium note which had been given for insurance.
Reversed.

The facts are stated in the opinion.

Mr. C. E. Warner, for plaintiff in error:

It was even proper for the receiver to include a liberal sum for contingencies and an assessment on members might include the expenses of receivership and an amount to cover shrinkages and uncollectible assessments.

Ionia, E. & B. Farmers' Mut. F. Ins. Co. v. Davis, 100 Mich. 606; *People's Equitable Mut. F. Ins. Co. v. Rabbitt*, 7 Allen, 235; *Bangs v. Gray*, 12 N. Y. 477; *People's Mut. Equitable F. Ins. Co. Petitioners*, 9 Allen, 319; *Wardle v. Townsend*, 75 Mich. 885, 4 L. R. A. 511; *Seamans v. Miller Mut. Ins. Co.* 90 Wis. 496; *Davis v. Shearer*, Id. 250.

If we exclude all liability for unearned premiums, it appears that the receiver could not realize at best an amount exceeding about \$30,000 to pay fire losses and expenses of the company amounting to \$40,386.53.

In *Re Minneapolis Mut. F. Ins. Co.* 49 Minn.

291, the court considered the liability of premium note makers for unearned premiums in cash policies so called, and after a consideration of the several statutes of Minnesota applicable to the corporation the court upholds the assessment.

The rights of the parties in the present case must be adjudicated according to the requirements of the statutes and jurisprudence of the state of Minnesota which state created a corporation and in reference to whose laws the contracts of the members were made.

Glenn v. Liggett, 185 U. S. 533, 84 L. ed. 264; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020; *Life Assn. of America v. Rundle* ("Reife v. Rundle"), 103 U. S. 232, 26 L. ed. 337; *Mutual F. Ins. Co. v. Phantix Furniture Co.* (Mich.) ante, 694, holds that the maker of a premium note given to a mutual fire insurance company operating in the state of Illinois will be bound by a decree entered in a proceeding had before the courts of that state fixing the amount of an assessment to be paid to the receiver of such corporation.

A receiver or other trustee appointed in another state will be permitted on the principle of comity to bring an action in the domestic forum for the purpose of collecting the assets of the insolvent for distribution in accordance with the laws of the jurisdiction within which the receiver has been appointed, when so to do will not contravene the rights of the citizens of the state in which the action is brought.

Baldwin v. Hosmer, 101 Mich. 119, 25 L. R. A. 789; *High, Receivers*, 2d ed. § 211; *Manlove v. Burger*, 38 Ind. 211; *Hayes v. Brotzman*, 46 Md. 519; *Frank v. Morrison*, 53 Md. 428; *Terry v. Bamberger*, 44 Conn. 558; *Cooke v. Orange*, 48 Conn. 401.

Authority was expressly conferred upon the receiver by the order appointing him to bring suit in his representative capacity, and this is sufficient.

High, Receivers, § 201; *Coops v. Bowles*, 42 Barb. 87.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, does not repudiate the doctrine of *Mutual F. Ins. Co. v. Phantix Furniture Co.* *supra*.

Mr. E. E. Kane for defendant in error.

does not intimate that as to matters of this sort the decree would not be conclusive.

The three cases of *MUTUAL F. INS. CO. v. PHANTIX FURNITURE CO.*, *WARNER v. DELBRIDGE & C. CO.*, and *PARKER v. C. LAMB & SONS* seem to be good illustrations of the different phases of the subject, and not inconsistent with each other. The case of *MUTUAL F. INS. CO. v. PHANTIX FURNITURE CO.* does not go beyond the decisions of the Supreme Court of the United States, although those which were relied upon therein are said in the later case of *WARNER v. DELBRIDGE & C. CO.* to have been limited by the decision in *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, which was rendered after the decision in *MUTUAL F. INS. CO. v. PHANTIX FURNITURE CO.*; but the gist of the latter case is that a decree in a sister state is binding so far as it determines the amount of assets and debts of the corporation and the amount of assessments necessary to liquidate its liabilities. To that extent the cases generally agree that the decree in another state is binding. In *WARNER v. DELBRIDGE & C. CO.* the 34 L. R. A.

defense against an assessment of 100 per cent made on stockholders by the Minnesota court was that the assessment included an allowance for unearned premiums which could not be allowed if the contract to be enforced was to be treated as a Michigan contract, but it was held that the Minnesota statute as construed by the supreme court of that state must be deemed to be the law of the contract, and that under that law the assessment might include an allowance for unearned premiums.

The rule to be deduced from all the decisions does not differ materially from that laid down in *Great Western Teleg. Co. v. Purdy*, *supra*, to the effect that an assessment which purports simply to make a levy upon all stockholders is not conclusive of the question whether or not a particular stockholder is or is not liable in any amount, but that it is conclusive of the necessity for making the assessment, that is to say, it is conclusive so far as it decides the amount of liabilities and of assets of the corporation and the need of making an assessment to such an amount as it orders. B. A. R.

Montgomery, J., delivered the opinion of the court:

On the 8d of April, 1890, defendant applied for and received a policy of insurance in the Minneapolis Mutual Fire Insurance Company, and executed and delivered the following agreement:

Minneapolis, Minn., April 8d, 1890.

For value received, in policy No. 01,087, dated the 8d day of April, 1890, we promise to pay the Minneapolis Mutual Fire Insurance Company the sum of three hundred and seventy-five dollars, by instalments, at such time as the directors of said company may order and assess, for the losses and expenses of said company, pursuant to its charter and by-laws. It is hereby expressly understood and agreed that this note is not transferable, and that there is no liability beyond the face amount thereof.

Delbridge, Cameron, & Dingeman Co.

No. 01,087.

On the 18th of December, 1890, an application was made by a policy holder, in the district court of Hennepin county, Minnesota, alleging the insolvency of the company and praying for the appointment of a receiver and the distribution of its assets among the creditors entitled thereto. On the 24th of January, 1891, a decree passed adjudging the insurance company insolvent and appointing a receiver. On the 19th of May following, an order making an assessment of 50 per cent upon all premium notes and policy obligations was made; but this order was subsequently set aside as illegal, and a petition was filed showing the financial condition of the company, and the necessity for an assessment; and February 8, 1892, an order was made authorizing an assessment of 100 per cent or as much thereof as might be necessary to pay the claims which accrued against the said insolvent company during the time said policies were in force, to be levied upon the balance due upon each and all of said premium notes and policy obligations at the time of the appointment of a receiver for the insolvent company in 1890. This order further directed that upon this assessment the receiver should credit and deduct the amount of any especial assessment theretofore made by the insurance company, and actually paid by the makers of the premium notes and policy obligations, and also the amount actually paid upon the assessment of 50 per cent theretofore ordered by the court. The items included in this assessment of 100 per cent were for losses, salaries, unearned premiums on cash policies, and miscellaneous claims. On the application of the complainant in the original suit, made to the circuit court for the county of Wayne, in chancery, setting forth the proceedings in Minnesota, complainant was appointed an ancillary receiver in the state of Michigan. This suit was brought against the defendant to recover, upon the premium note mentioned, the 100 per cent assessment.

On the trial, the circuit judge directed a verdict for defendant, on the ground that the assessment was void, for the reason that it included an assessment for unearned premiums, 34 L. R. A.

acting upon the authority of *Detroit Manufacturers Mut. F. Ins. Co. v. Merrill*, 101 Mich. 393. If this contract is to be treated as a Michigan contract the holding should be sustained, unless it be held that the order making the assessment, made at the *situs* of the home company, is conclusive, not only as to the authority to make the assessment, but as to the extent of the defendant's liability. This question was recently before the court in the case of *Mutual F. Ins. Co. v. Phoenix Furniture Co.* (Mich.) *ante*, 694; and the conclusion was then reached that the decision of a court of a sister state is binding upon the courts of this state in all these respects. This conclusion was based upon the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Article 4, § 1. And an examination of the decisions of the Federal Supreme Court led us to the conclusion that a stockholder of a corporation is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member, and that a determination that an assessment upon the policy holders in a certain amount and for certain obligations of the company should be made was final and conclusive, and could not be attacked collaterally when suit was brought upon such assessment in another state. In reaching this conclusion, the question involved being a Federal question, we felt ourselves bound by the determination of the Federal Supreme Court in *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, and *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 234. But since the decision of this court in *Mutual F. Ins. Co. v. Phoenix Furniture Co.* the question has been again before the Federal Supreme Court, and the doctrine of the cases upon which we relied for our decision limited; and in *Great Western Telog. Co. v. Purdy*, 163 U. S. 329, 40 L. ed. 986, it is held that an order making a call or assessment upon all stockholders of a corporation who have not paid their shares in full is merely such a call as the directors might have made before the matter was brought within the court's jurisdiction, and is not a judgment against the particular stockholder, so as to be entitled to such full faith and credit, under the Constitution and laws of the United States, and that in such action defendant is entitled to rely on any defense which he might have to an action upon the contract of subscription.

Plaintiff, however, contends that this is a Minnesota contract, and that under the statute of Minnesota, as interpreted by the supreme court of that state, an assessment for unearned premiums upon nonparticipating policies was legal. The contract by which the insured became a member included, not only the note, but the policy, which contained the following provision: "The insured heretofore named becomes a member of this company, and agrees to pay them the premium annually, during the life of this policy, and, in addition thereto, such sum or sums, in no event to exceed in the aggregate five times the amount of said annual premium, at such time or times, and in such manner, and by such instalments, as the directors of said company

shall assess and order, pursuant to its charter and by-laws and the laws of the state of Michigan. It is suggested by defendant's counsel that it is only for assessments for losses and expenses made according to the laws of Michigan that the defendant is made liable by his contract. It is difficult to understand the reference to the laws of the state of Michigan. This was certainly known by both parties to be a Minnesota corporation, and we are aware of no provision of the laws of this state which relates to the assessment authorized by such corporation. We think, therefore, that the contract must be treated as a Minnesota contract. Every corporation necessarily carries its charter wherever it goes; and, while it may be restricted in the use of some of its powers while doing business away from its corporate home, every person who deals with it everywhere, and particularly one who becomes a member of the corporation, is bound to take notice of the provisions which have been made in its charter, and subjects himself to such laws of the government of its *situs* as affect the powers and obligations of the corporation. See *Canada S. R. Co. v. Gebhard*, 109 U. S. 587, 27 L. ed. 1024, and *Life Assn. of America v. Rundle* ("Relfe v. Rundle"), 108 U. S. 225, 26 L. ed. 839.

The statute of Minnesota under which this company was organized authorized the company to engage in business and to receive premium notes, and provides that "every person effecting insurance in any company organized under this act, and the heirs, executors, and assigns of such person, continuing to be so insured, shall thereby become members of such corporation during the period of insurance, and shall be bound to pay for losses and such necessary expenses as may occur in the management of such business, in proportion to the amount of such premium note." Gen. Stat. 1894, § 8261. And in another section it is provided that whenever the capital stock of any company shall amount to the sum of \$200,000, of which amount not less than \$40,000 shall be actual funds, such company may assume risks on the "all cash" plan, and issue policies against loss or damage by fire or lightning to an amount not exceeding 5 per cent of its capital. This statute has been construed by the supreme court of Minnesota in the case of *Es Minneapolis Mut. F. Ins. Co.* 49 Minn. 291, in which the court says: "This construction of the statute and of the contracts under consideration leads to the conclusion that the premium notes of the members of the corporation, which constitute its 'contingent fund,' may be resorted to, if necessary, to pay the unearned premiums on policies of simple (not mutual) insurance, whose holders sustain no other relation to the corporation than that

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of parties who have thus contracted with it. Such notes constitute a part of the 'capital' of the corporation, . . . and comprise a part of the 'capital' required by the act of 1885 to be held by the company as a condition of its right to engage in this kind of insurance. They are to be deemed a part of the fund upon the credit of which such contracts of insurance are entered into." It is to be noted that in *Detroit Manufacturers' Mut. F. Ins. Co. v. Merrill*, *supra*, the policy was a policy upon the mutual plan, and the unearned premiums were unearned premiums on mutual policies. We think the statute of Minnesota, as construed by the supreme court of that state, must be deemed to be the law of the contract between the parties to this engagement, and that, under this law, an assessment for unearned premiums upon cash policies is within the contract.

These considerations would dispose of the case were it not that defendant's counsel contends that, even if the court were in error upon this question, the plaintiff failed to make a case. We have examined the points suggested by counsel, and deem it unnecessary to discuss them at length.

We think the construction of the order appointing complainant receiver which counsel makes is too technical. Complainant was appointed receiver of all equitable interests, choses in action, and of all property and assets, whether herein designated or not, belonging to said defendant corporation within the state of Michigan, and of all books, papers, property, documents, of any and every description, belonging to said defendant, and with full power and authority to sue in his own name as such receiver, or in the name of defendant corporation, for all assets, money, or property, and obligations due from residents of the state of Michigan to the defendant.

The suggestion that it was not proved that the foreign insurance company had authority to do business in the state of Michigan is made for the first time in this court, and, we think, should not control the decision.

As to the contention that the premium note was obtained by fraud, this contention is based upon certain papers which were found in the safe of the defendant company by a witness who personally knew nothing of their origin; and there was no evidence to show the manner in which they came into possession of the defendant, nor was their execution or authenticity proven. Under these circumstances, we are certainly not in a position to say that fraud was conclusively proved.

We think the judgment should be reversed, and a new trial ordered.

Grant, J., did not sit. The other Justices concur.

IOWA SUPREME COURT.

Thomas PARKER, Jr., Receiver of Mutual Fire Insurance Company of Chicago, *Appt.*,

v.
C. LAMB & SONS.

(.....Iowa.....)

1. The principles of comity do not apply to an action by a foreign receiver of a foreign mutual insurance company acting under a decree in the foreign jurisdiction making an assessment on premium notes, even if otherwise applicable, where the notes were taken for insurance on property in the state while the company was doing business within the state in violation of McClain's Code, § 1144, prohibiting foreign insurance companies from doing business without compliance with the conditions therein mentioned.

2. McClain's Code, § 1144, absolutely prohibiting foreign insurance companies from taking risks or transacting insurance business in the state, unless possessed of \$300,000 actual paid-up capital, and unless they comply with other conditions named therein, is not unconstitutional.

3. An assessment on premium notes, made by a receiver of a mutual insurance company under a decree of the court, is not an adjudication binding on the courts of another state as against the maker of one of such notes who was not a party to the proceedings resulting in the assessment, and who before the bankruptcy of the company had surrendered his policy and received back his note.

(October 16, 1904.)

APPPEAL by plaintiff from a judgment of the District Court for Clinton County in favor of defendant in an action brought to recover the amount alleged to be due on premium notes given by defendant to the Mutual Fire Insurance Company of Chicago upon certain policies of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Myron H. Beach, D. J. Schuyler, and C. W. Greenfield, for appellant:

The plaintiff may maintain the suit, although suing in the capacity of a foreign receiver.

Runk v. St. John, 29 Barb. 585; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Comstock v. Frederickson*, 51 Minn. 351; *Lycorning F. Ins. Co. v. Wright*, 55 Vt. 526; *Merchants' Nat. Bank v. McLeod*, 88 Ohio St. 174; *Mowry v. Crocker*, 6 Wis. 326; *Gilman v. Ketchman*, 84 Wis. 60, 23 L. R. A. 52; *Falk v. Janes*, 49 N. J. Eq. 484; *Re Waite*, 99 N. Y. 493; *Ragby v. Atlantic, M. & O. R. Co.*, 86 Pa. 291; *Mezner v. Bauer*, 98 Ind. 427; *Woodward v. Brooks*, 128 Ill. 223, 3 L. R. A. 702; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 123 N. Y. 37; *Bacon v. Horne*, 123 Pa. 452, 2 L. R. A. 355; *Ayres v. Siebel*, 82 Iowa, 348; *Parker v. Stoughton Mill Co.*, 91 Wis. 174.

The plaintiff is entitled to recover judgment for the full amount of the deposit notes.

Ill. Stat. chap. 78 (1 Starr & C. Stat. (Ill.) 1815); *Taylor v. Port Jefferson Mill Co.*, 65 N. Y. S. R. 542.

The decree levying the assessment is conclusive against all members of the company, and cannot be attacked collaterally.

Great Western Teleg. Co. v. Gray, 123 Ill. 630; *Ward v. Farwell*, 97 Ill. 593; *Hawkins v. Glenn*, 181 U. S. 819, 33 L. ed. 184; *Glenn v. Liggett*, 185 U. S. 538, 34 L. ed. 264; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Smith v. Hopkins*, 10 Wash. 77.

Under the Federal Constitution and statutes the decree of the Illinois court levying the assessment is entitled to the same faith and credits in the courts of Iowa that are given the same in the state of Illinois.

Mills v. Duryee, 11 U. S. 7 Cranch, 481, 3 L. ed. 411; *Christmas v. Russell*, 73 U. S. 5 Wall. 290, 18 L. ed. 475; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189, 19 L. ed. 109; *Hanley v. Donoghue*, 116 U. S. 4, 29 L. ed. 537; *Brown v. Parker*, 28 Wis. 27; *Cole v. Cunningham*, 133 U. S. 111, 33 L. ed. 541; *Holt v. Johnson*, 50 Mo. App. 378; *Griggs v. Becker*, 87 Wis. 818; *Leep v. St. Louis, I. M. & S. R. Co.*, 58 Ark. 407, 23 L. R. A. 264.

The policies are Illinois contracts, and governed by the laws of Illinois.

Lamb v. Bousser, 7 Biss. 315; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Hamilton v. Lycorning Mut. Ins. Co.*, 5 Pa. 339; *Hunt v. Higman*, 70 Iowa, 406; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 418.

Statutes abridging the right of contract are void.

Low v. Rees Printing Co., 41 Neb. 127, 24 L. R. A. 702; *Re Eight Hour Law*, 31 Colo. 29; *Re House Bill No. 203*, Id. 27; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325; *Com. v. Potomaska Mills Corp.* (Mass.) 28 N. E. 1128; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340.

Section 1144 of the Code of Iowa is void and unconstitutional, in so far as it provides that no foreign insurance company "shall directly or indirectly take risks" in said state of Iowa, without first complying with the laws of said state, with reference to foreign insurance companies doing business in said state.

French v. People, 6 Colo. App. 311; *Lamb v. Bousser*, 7 Biss. 318, 372, and cases cited; *Merrill Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 643; *Hooper v. California*, 155 U. S. 647, 39 L. ed. 297.

If the liability of the member does not cease until all losses and expenses for which such member is liable are paid, then the relation between the member and the company does not cease, and is not changed until such liabilities are paid, although the policy may have been canceled.

Detroit Manufacturers Mut. F. Ins. Co. v. Merrill, 101 Mich. 393; *Ionia F. & B. Farmers Mut. F. Ins. Co. v. Otto*, 96 Mich. 558; *Davis v. Sharpe*, 2 West. L. Month. 40.

Mr. A. P. Barker, for appellee:

The legal authority of a receiver is coex-

NOTE.—See note, ante, p. 694.

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tensive only with the jurisdiction of the court appointing him.

High, Receivers, 2d ed. ¶ 47; *Moreau v. Du Bellet* (Tex. Civ. App.) 27 S. W. 508; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 406; *Booth v. Clark*, 58 U. S. 17 How. 823, 331, 15 L. ed. 164, 167; *Brighman v. Luddington*, 13 Blatchf. 237; *Ayres v. Siebel*, 82 Iowa, 347.

A receiver cannot sue or otherwise exercise his functions in a foreign jurisdiction whenever such acts would interfere with the policy established by law in such foreign state.

Hurd v. Elizabeth, 41 N. J. L. 1.

It is unquestionably the policy of the laws of this state, as expressed by legislative enactment and construed by this court, to exclude from in any manner, directly or indirectly, taking risks in this state, every foreign insurance company that has not complied with its laws, and to deny them the right to recover upon premium notes given by citizens of this state in payment for insurance written in violation of such law.

McClain's Stat. 1707-1709; *Seamans v. Zimmerman*, 91 Iowa, 363; *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.* (Iowa) 63 N. W. 565.

Appellee does not concede that the order directing the receiver to make the assessment is in the nature of an adjudication, and binding upon it without notice and without day in court.

Biddle, Ins. § 929; High, Receivers, § 329.

Judgment cannot be obtained in the courts of this state upon a note given by a citizen of this state for the premium upon a policy of insurance written upon property in this state by a foreign insurance company that has not complied with its laws so as to be authorized to take risks therein.

Seamans v. Zimmerman, and *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.* *supra*; *Stewart v. Northampton Mut. Live Stock Ins. Co.* 38 N. J. L. 486; *Parrior v. New England Mortg. Secur. Co.* 88 Ala. 275; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 693; *Ross v. Kimberly & Co.* 89 Wis. 545, 27 L. R. A. 556; *Seamans v. Temple Co.* 105 Mich. 400, 28 L. R. A. 480; *Beeser v. Walton*, 7 Houst. (Del.) 471.

The appointment of a receiver does not have the effect of changing the contractual relations existing between the original parties.

High, Receivers, 2d ed. ¶¶ 204, 205.

The corporation being the mere creation of local law can have no existence beyond the limits of the sovereignty where created. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose.

Fred Miller Brewing Co. v. Council Bluffs Ins. Co. *supra*; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 693; *Reno, Non-Residents*, ¶¶ 5, 6; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33; Biddle, Ins. §§ 85 et seq.

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When defendant surrendered its policy and received back its notes, it ceased to be a member of the company.

Hyde v. Lynde, 4 N. Y. 395, 396; *Telford v. Church*, 66 Mich. 431.

Rothrock, Ch. J., delivered the opinion of the court:

It appears from the averments of the petition that the Mutual Fire Insurance Company of Chicago was organized under the laws of the state of Illinois, and that the defendant is a corporation organized and doing business under the laws of this state. Applications were made by the defendant for insurance in said company, which applications were accepted, and in part consideration for said insurance the defendant executed and delivered to the said insurance company two premium notes, one for the sum of \$750, and the other for \$525. These notes were promises to pay the said insurance company such sums thereon as the directors might from time to time order and assess to pay losses and the expenses of said company. The contracts of insurance were made, and the premium notes executed and delivered, on the 11th day of April, 1890, and the insurance was for five years. The policies of insurance remained in force until the 11th day of April, 1890, when they were surrendered to the insurance company, and canceled, and the premium notes were returned to the defendant. On the 12th day of November, 1890, a suit in chancery was instituted in the circuit court of Cook county, Illinois, against the said fire insurance company, and on the 21st day of February, 1891, the plaintiff herein was appointed receiver of said company, and of its property and assets. Afterwards, and in July, 1891, an order was made by said circuit court, by which the receiver was directed to assess upon each of the members of said insurance company 65 per cent of the premium notes, and make demand therefor of the persons liable on said notes, and proceed to collect the same. Said order or decree further provided that, if any member or members of said company failed or refused to pay the amount of the assessment for thirty days after notice and demand, the said receiver should then proceed to collect from such member or members the whole of their premium note or notes. The defendant was notified of the assessment, and of the amount that it was required to pay under said decree on each of its premium notes. Payment was refused, and this action was commenced to recover the whole amount of the premium notes, and judgment was demanded therefor.

We have set out the substance of the claim made in the petition so far as it pertains to what we think are the material facts in the case. One ground of the demurrer was in these words: "Said petition shows upon its face that the defendant is a corporation, organized and doing business under and by virtue of the laws of the state of Iowa; that the Mutual Fire Insurance Company of Chicago, as receiver of which plaintiff brings this action, was a corporation organized and doing business under the laws of the state of Illinois; and it is not further shown therein

that said company was possessed of the requisite capital to authorize it to transact business in the state of Iowa, or that said Mutual Fire Insurance Company had in any manner complied with the laws of the state of Iowa, or was entitled to write insurance or transact business in said state." We will not set out other grounds of demurrer, for the reason that we think a proper determination of that part of it above quoted is conclusive of the rights of the parties. It presents the single question whether the plaintiff can maintain the action, or, as stated by appellee's counsel in argument: "Will a foreign receiver of an insurance company, which had never complied with the laws of the state so as to be entitled to transact business herein, be permitted to maintain an action in the courts of this state upon the premium notes executed to such foreign insurance company by a citizen of Iowa for a policy written by it upon property in this state?" It is to be observed that both in the statement of facts and in the demand for judgment this action is founded upon the premium notes. Copies of the notes are not set out in the petition nor exhibited therewith for the alleged reason that the notes are not in the possession of the plaintiff. It appears to us that this court has, in effect, determined the question here presented. In *Ayres v. Siebel*, 82 Iowa, 847, it was held that a trustee of a foreign corporation will not be permitted to maintain an action in the courts of this state upon a contract between such corporation and a citizen of this state. It was conceded in that case that the same rule applied to a receiver, except that in such case the right to maintain an action has sometimes been recognized as a matter of state comity. And the claim is made that such a rule is applicable to the facts here presented. It is to be conceded that there is not entire harmony in the decisions of courts upon this question. We do not think that under the facts in this case there is any comity which can properly be invoked to sustain the action. In *High on Receivers* (§ 289) the following is stated to be the true rule: "Upon the question of the territorial extent of a receiver's jurisdiction and powers for the purpose of instituting actions connected with his receivership, the prevailing doctrine, established by the Supreme Court of the United States and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot, as a matter of right, go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due to the person or estate subject to his receivership. His functions and powers, for the purposes of litigation, are held to be limited to the courts of the state within which he was appointed, and the principles of comity between nations and states, which recognize the judicial decisions of one tribunal as conclusive in another, do not apply to such a case and will not warrant a receiver in bringing an action in a foreign court of jurisdiction." Elaborate arguments are presented by the respective counsel in this case, and numerous authorities are cited, which we have examined, and, without citing them or reviewing them, we believe that the rule as above

stated is correct in principle, and well sustained by the weight of authority.

2. It is contended by counsel for appellant that the doctrine of comity and respect for the judicial orders and decrees of another state should be applied in the case at bar. It is possible that, if this contract of insurance was one which under the laws of this state might lawfully be made, it would be a proper case in which the courts of this state would entertain and determine such an action. But that question we do not determine. The contract of insurance, so far as the right of the company to insure property in this state is involved, was void. By § 1144 of McClain's Code it was absolutely prohibited from directly or indirectly taking any risks or transacting any business of insurance in this state unless possessed of \$200,000 of actually paid-up capital, and complying with other conditions named in said section. It being admitted that there was not even an attempt to comply with the law, the plaintiff is in no position to demand that under any policy of comity he is entitled to maintain the action. In *Hurd v. Elizabeth*, 41 N. J. L. 1, it is said that "the more correct definition of the legal rule would be that a receiver cannot sue or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction." If the rule contended for by counsel for appellant in this case were to be adopted by this court, it would be in direct conflict with the legislative policy of this state. We have already determined this question in *Seamans v. Zimmerman*, 91 Iowa, 863, where we held that a foreign insurance company, not having complied with the statute above cited, cannot recover assessments under the policy of insurance issued on property in this state.

8. It is urged in behalf of appellant that the statute above cited is unconstitutional. We have given that question proper examination and attention, and we discover no ground, either upon principle or authority, for sustaining this contention. We do not believe it to be necessary to give further consideration to this point in the case.

4. But it is said that the assessments made by the plaintiff under the decree of the circuit court of Cook county are an adjudication or judgment of that court as against the defendant, and that said adjudication is binding on the courts of this state. We think this contention is not sustained by the facts stated in the petition nor by the decree. The petition, as we have said, is not founded on the decree. The cause of action is plainly stated to be upon the premium notes. It ought to be understood, also, that the amount is not for any fixed and unalterable sum. It is true, it is named as 65 per cent of the premium notes, and for failure to pay for thirty days the receiver was required to collect the whole amount of the notes. That this decree was no adjudication is also plainly shown by the record. Before the insurance company became bankrupt, the notes were delivered up to the defendant, and the policy was surrendered. There is no presumption that there was any fraud in this transaction, and when the contract was thus canceled

the defendant was no longer a policy holder in the company, and was not a party to the proceedings in the Illinois court.

The case requires no further consideration, and the judgment of the District Court is affirmed.

PENNSYLVANIA SUPREME COURT.

George B. NEAL, *Appt.*,

v.

William H. BLACK *et al.*

(177 Pa. 82.)

1. An incompetent person executing a deed of trust for the preservation of his property need not fully appreciate all the technical intricacies of the transaction to make the deed binding. It is sufficient if he is not deceived or misled by fear or favor.
2. That a voluntary deed by an incompetent person to protect his property was made under advice of his uncle and the attorney for his guardian will not render it invalid, if they had no adverse interest in the estate, and there is nothing in their relations to him and his estate to make them incompetent advisers.
3. A voluntary deed by an incompetent person for the protection of his estate cannot be revoked as improvident if its general purpose is wise and proper, because it strips him of all his property, is irrevocable, leaves the portion to be expended by him at the discretion of the trustee, makes no provision for future contingencies, and does not require the trustee to give security, permits him to appoint a successor without security, while it gives him unlimited power as to conversion of investments and does not require him to account to anybody.
4. One who makes a voluntary deed for his own benefit cannot revoke his act except subject to the approval of a court having jurisdiction of such matters.

(October 5, 1896.)

APPREAL by plaintiff from a decree of the Court of Common Pleas, No. 1, for Allegheny County refusing to set aside a deed of trust. *Affirmed.*

The facts are stated in the opinion of the court below, which was delivered by **Slagle, J.**, and was as follows:

"The bill in this case was filed for the purpose of enforcing a revocation of a voluntary deed of trust made by plaintiff to William H. Black, who, under authority contained in the deed, subsequently appointed Thomas H. Lane as trustee in his stead, who is still acting as trustee. The bill sets forth that plaintiff is the son of James Lawrence Neal and Margaret Neal, both of whom died when he was a child of tender years; that his mother was a daughter of George Black, from whom he inherited a large estate; that Thomas H. Lane was ap-

pointed his guardian, and acted as such until plaintiff came of age, on the 26th day of September, 1889; that on the 19th day of October, 1889, plaintiff executed a paper by which he conveyed to William H. Black all his estate in trust, and subsequently, on December 20, 1889, the said Black appointed Thomas H. Lane as trustee in his stead. The deed is an absolute conveyance of all of plaintiff's property to William H. Black, his heirs and assigns, and gives to him the absolute and unqualified power to take charge of the same, to sell at public or private sale, to invest and reinvest, etc., at the will of the trustee, and to appoint a trustee in his stead. It is further provided that: 'Out of the net income of said trust estate, which shall not be subject to my control or engagements, to pay from time to time such sums as he (said trustee) shall deem proper for the liberal and comfortable support and maintenance of myself and any family and establishment I may acquire or have, or should support, for which sums my receipts shall be vouchers. To reinvest and accumulate the remainder, if any, of such net income during my life, and at my death to convey and assign the whole of said estate, with all its accumulations, as I by my last will, or writing in the nature of such last will, may direct and appoint, and, in default of such will or testamentary writing, to such persons as would inherit my estate under the intestate laws of the state of Pennsylvania, in such shares and interests as by such law directed.' The trustee is authorized to retain \$500 annually out of the income as compensation. The conveyance is made irrevocable. The bill further alleges as follows: 'Fifth. Your orator further avers: That at the time of executing said paper, Exhibit A, and for a long time prior thereto, he lived at the house of his grandmother, Mrs. Jane Black, and said paper was prepared at the instance of William H. Black, who is his uncle, and who lived at the same home of said Mrs. Jane B. Black, until a few months before the preparation of said paper, and continued to visit at said home frequently. Your orator had no knowledge in relation to said paper, or the contents thereof, until the same was presented to him by said William H. Black for signature, on October 19, 1889. That he executed said paper solely at the solicitation and upon the advice of said William H. Black, and at the time he was entirely inexperienced in business, unacquainted with the extent and value of his estate, or its conditions, the information in relation thereto being in possession of said Lane and Black; and they having concealed the same from him; and in executing said paper he acted on the suggestion and advice of said Black, without any independent advice, and under an entire misapprehension

NOTE.—For the power to revoke or set aside a voluntary trust or settlement, see *note* to *Ewing v. Jones* (Ind.), 15 L. R. A. 75.

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as to the terms and legal effect thereof. Sixth. That said William H. Black and Thomas H. Lane, although requested, have neglected and refused to render an account of said trust. Seventh. That on February 22, 1894, he executed a revocation of said trust, etc. The defendants, in their answer, admit all the allegations of the bill, except those contained in the fifth paragraph, which they deny, and set forth at length the circumstances under which the deed of October 19, 1889, was made, and allege that it was made with full information as to his estate, and knowledge of its purposes, and that he was satisfied with it until after he was secretly married in September, 1893; that they refused to give a statement of his property, because they believed that persons other than plaintiff were endeavoring to obtain control of his property. They deny that the revocation was of any effect, because the deed is in terms irrevocable, and to revoke the same would work great injury to the plaintiff.

'It will be observed that it is not disputed that George B. Neal, at the time of the execution of the deed in question, was competent to make a contract. The plaintiff does not allege that he was incompetent, and in fact claims that he is now fully capable of managing his own affairs, and does not show such marked improvement in his condition as to justify an allegation that he was not then legally competent. Of course, the plaintiff's case depends upon his capacity at that time to make a valid contract. There is no evidence in the case to show want of legal capacity at that time. Plaintiff's bill is based upon circumstances attending the execution of the paper, and the character of the instrument itself. Though no request was made by plaintiff for specific findings of fact or of law, the grounds of the application are very clearly set out in the exhaustive and able argument presented by counsel, in propositions as follows: 'First. There being no power of revocation in this deed, and it having been prepared, and the signature thereto procured, by persons who stood in a confidential relation to Neal, the burden of proof rests on defendants. Second. This burden can only be met by clear and decisive proof. Third. This burden is upon defendants to show, by such clear and decisive proof, these things: (a) That Neal had a true and full knowledge of his estate, its extent and value, and of the income therefrom; (b) that he had independent advice in regard to the act which he was performing; (c) that the terms and provisions of the deed were proper and reasonable; (d) that he had a full, clear, and intelligent understanding of the act he was engaged in, and of the effect and consequences of the deed which he was executing.' The defense is that Neal was informed of the amount and character of his estate; that the control of his estate was put into the hands of a trustee at his own request, and he was fully informed as to the contents and purposes of the deed, and it was made irrevocable at his request; and further that, though then and now competent to make a valid contract, he is of weak intellect, without qualifications for the transaction of business, and incapable of acquiring such qualifications as would make it safe to intrust him with control of his estate.

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"The main question in dispute is as to the mental capacity and business ability of George B. Neal, and should be first considered, as it has a bearing upon the other questions of fact and law. The testimony of George B. Neal, and his manner upon the stand, would indicate that he is not a man of full mental vigor or average intelligence, though his testimony was to some extent affected by his defective hearing. He could not tell when his father, mother, and grandfather died. These events happened before he knew anything; but an ordinary person would have inquired, and remembered such important matters. He says he did not know he had a guardian, or had any property, until about two weeks before he came of age. There are not many young men of that age, with a fortune of \$100,000, who would have been ignorant of that fact, or who would not have inquired as to the matter. When he undertook to give the amount of moneys paid to him by Mr. Lane in 1893, he became thoroughly confused, and could give no intelligible answer. Dr. Willard was his attending physician from infancy until he was sixteen or seventeen years old. He testified that, in infancy, George was affected by marasmus, and his development was very slow. He advised his grandmother that he did not think it was proper for him to arrive at the age of twenty-one, unless some disposition was made of his affairs, or someone was appointed to look after him. He also was of the opinion that the best thing that could have been done to develop his mental condition was to keep him at home, under a tutor or governess; that there was no use sending him to school, because he could not take an education. Dr. Fleining had attended him at times for four or five years. He says: 'He had no capacity for understanding what I was talking about. In mental condition he was a child, simply. His mental development was incomplete. He could read, and had a personal identity. He was neat and cleanly in his person. That showed that his moral condition was good. But the intelligence was defective and his judgment faulty.' He gave it as his opinion that Neal did not have mental capacity for dealing with a considerable estate. Miss Benson was employed as teacher for eleven years, and remained with him until his marriage, in 1893. She traveled with him extensively, — to Chicago, Denver, and a long trip in Europe. She says: 'His mental development was weak. His memory was very good, but he hadn't any reasoning power whatever, and is of a dependent nature, — is easily persuaded or influenced by others, especially by anyone to whom he may take a fancy. He was not capable of taking care of his property, or of himself either.' M. L. Durst was employed as teacher about 1893. He says: 'Well, George couldn't learn a rule so that he could use it three or four days later. He could go through the examples or exercises under the rules. He could learn to go through those exercises, and to me it seemed very well, and I thought he was learning those rules so he could retain them, and for two months I supposed he was making very good progress; but at that time I began to make some reviews with him, and had occasion to use the rules that he had been

drilled in, and found that he couldn't use them. At end of year, do not think any progress was made. He was very well in history. Seemed rather broad and well informed in many things, was fairly good in geography, was fairly good in spelling, and was fairly good in writing.' Samuel Rea, an uncle by marriage, knew George from childhood. Saw him frequently at Mrs. Black's and at his own home. Took George to Europe in 1892. He says of him: 'He was very backward as a boy, and seemed incapable of taking an education such as the average boy is able to take. He has a good disposition, exceedingly kind-hearted, very easily influenced by those whom he cares for, but is totally unable to do any business. In my judgment, he is totally unfit to take care of his estate. If a thing is explained to him, he seems to understand it thoroughly, but it is liable to get away from him.' These witnesses have no connection with this case. William H. Black, Thomas H. Lane, and W. A. Lewis, express similar opinions.

"On part of plaintiff, a number of witnesses were called to testify to the capacity and ability of George Neal. Rev. Dr. Fulton had known him for some time. During last summer and the previous summer had correspondence with him, and in January of 1894, taught him for twenty or twenty-five days. He details the course of study, and says that he made a very marked improvement, and adds: 'With the right kind of education, I am satisfied that he would continue to improve; and while I make that statement, there are several things to be taken into consideration.' He was asked this question: 'Assuming that this young man's estate, as it exists at present, to be invested in securities,—Pennsylvania Railroad stock, and the remainder in school, city, and county bonds, etc.,—I wish you would state what your judgment is as to his ability to take care of that property, invested in that way;' to which he answered, 'I think he could do it.' On cross-examination he said that he had not tested George as to his studies after the lessons ceased; that he did not think that George had an ordinarily developed mind; and explained: 'In the first place, George is one of those men in whom the sutures of the brain become hardened early. In the second place, I think his education has not been sufficient, or of the kind, to develop the mind of any boy.' He further said, 'I think he could transact ordinary business.' He was asked the question, 'Suppose he was given his estate to day, of \$200,000, invested in stocks and bonds; do you think he could be trusted to convey that property, and reinvest it safely?' To which he answered: 'No, I don't. I think he can manage that as at present invested. . . . He could take care of it with such advice from counsel or business men that he could secure, but I don't think, without that, he could manage any business complications.' R. G. Gamble, an uncle of Neal's wife. He knew George about eight years. In answer to the same question put to Dr. Fulton says: 'Well, I believe George could take care of money, and I believe he knows when he sees a good investment. I think in time George could be educated, with a little assistance, to manage it himself. Of course, it is very hard for a man that has never

had any experience in business of any kind to manage or transact business,—buy or sell safely.' He was asked:

"Q. Do you think George could be safely trusted to invest \$15,000 to \$20,000?

"A. I don't know about that. That would be hard to tell.

"Q. You don't think he could at present?

"A. Not without assistance, and I don't think any person could."

"He advised George to revoke the deed of trust, and gives a statement of the circumstances: 'I told him it would have to be fixed in some shape. Either he would have to take care of it himself, or have it fixed so he couldn't loose it, and nobody could beat him out of it.' William B. Neal, an uncle, says: 'I consider that George is very careful and cautious in any undertaking, but, owing to his bad education, he would not be able to take care of his affairs without further education and advice. Had him in office from the time he was seventeen or eighteen years old until after he came of age.' W. B. Moyle knew him about eight years. 'Says, He is very cautious in money matters.' In answer to question put to Dr. Fulton, says: 'Well, invested in first-class securities, I suppose, I think, I know he would be capable of taking care of it.' And again: 'Well, I don't think George would be able, perhaps, to increase it to any great extent; but as invested now, he would be able to take care of it.' Reese Neal, an uncle, says: 'He visited our house a great deal, and went with us to Michigan once for two weeks. Bought his own ticket, and looked after his own finances. Always considered him very careful.' In answer to the question: 'If his estate, consisting as it now does, of Pennsylvania Railroad stock and municipal and state bonds, was put into his possession, do you think he would be able to manage that property?' 'A. Yes, sir; I think he could.' In cross examination he said: 'By "managing" I mean that if he had that estate left to him, and if he struck some matter that he didn't understand, he would have sense enough to go and see where it was wrong, if he thought it was wrong.' 'I think he is fully developed mentally. I think he is a little slow in some things, but I think that is partly on account of his hearing. He is a little slow in learning.

"Q. You think it would be safe to give him \$200,000, and let him go out and take care of it himself?

"A. Yes; because he would take advice where he didn't understand."

"Dr. Samuel Ayers, an expert physician, made an examination of Neal for the purpose of testifying in this case. He had ten or twelve interviews with him. Says that 'he is possessed of a very fair degree of mental capacity,—a little under the average in some respects, and average in others. In the mathematical faculty he is defective. In some of his faculties—his observation, for instance—he was very good. . . . His judgment was apparently good in various matters, perhaps defective in some directions. His attention was close and acute. His speech was clear and coherent in all matters. Special senses all normal, except hearing. Handwriting particularly good, and

composition good. Expression of face natural and normal. Caution and care normal.' 'As to mathematics, he is decidedly under the average, in almost every direction you take him. His reasoning powers are quite good.' 'Has difficulty in making change.' 'I think there has been some defect in his development. This marasmus probably stopped the organic growth in the brain. It was an interruption in the early years, undoubtedly; but he seems to have overcome it in later years largely, particularly during his married life. I have no doubt that he has developed in many of his faculties much more readily than before.' Being asked: 'Take George in the condition in which you found him, and give him the position and control of, say \$50,000; do you think that would be a safe thing to do?' He answered: 'Well, yes. I will answer you by yes; that it would be comparatively safe.'

"Q. Do you think, for George's own sake, supposing he was some relation of yours,—say he was the only son of some lost sister of yours,—would you put him in possession of \$200,000 worth of property to handle and dispose of?

"A. No. I don't believe I would.

"Q. Why wouldn't you do it, doctor?

"A. Well, I would not do it for this reason: I think probably he could not manage safely such a large sum without he had some experience, and without some assistance too. He might get along with it, probably, with some losses; but I believe he is capable of profiting by experience of that kind, because he is capable of development.

"Q. If invested as it is said to be invested now, in Pennsylvania Railroad stock and municipal and county bonds, would he be able to take care of it?

"A. I think he would, from what I have seen of him.'

Mrs. Neal finds nothing wrong. 'It is just the way they kept him.'

"A fair conclusion from all this testimony is that though George B. Neal, the plaintiff, is able to understand an ordinary proposition, when presented, and competent to make a contract, his intellectual powers are by nature weak, and have not been fully developed. None of the witnesses for plaintiff state unqualifiedly his ability to take charge of, and safely manage, his estate. They differ from the witnesses on part of the defendants as to the amount of his mental power, and the chances for improvement. They all agree at present that he would require assistance. George himself says that he thinks he is able to take care of his estate, but is not capable of doing business. Thinks he has improved a little in the last year or two, and says: 'I attribute that to—since my marriage—that I have learned a little more; have got out among people; by getting out more with people, business men especially. But I will learn a great deal more.' The criticism made by plaintiff's witnesses as to the education of Neil does not seem to be well founded. There is no evidence that his grandmother and uncles, with whom he lived, were not anxious to do everything best calculated to develop his powers. Those with whom he passed his daily life would be better able to judge as to what was best than

those who met him casually. He was sent to school, provided with teachers, given very considerable opportunity for travel; and his uncle William B. Neal says that for several years he was taken into his office, with a view of his learning something of business. Dr. Willard, who attended him from infancy, and Dr. Fleming, who attended him when grown, would be able to form a more reliable judgment as to his capacity than a physician called in to make an examination.

"The next question of dispute is as to the making of the deed of trust and the circumstances attending it. Defendants claim that, as the allegations of the bill are denied, they should have been supported by the testimony of two witnesses, and, standing on the testimony of Neal alone, all questions thus raised should be resolved against the plaintiff. The plaintiff contends that the relation of the parties casts the burden upon defendants. The testimony having been produced, we think it should be considered and determined upon its weight. This question may be considered under plaintiff's third proposition, to wit, that it must appear (a) that Neal had a true and full knowledge of his estate, its extent and value, and of the income therefrom; (b) that he had a full, clear, and intelligent understanding of the act he was engaged in, and of the effect and consequences of the deed he was executing; (c) that he had independent advice in regard to the act which he was performing. These propositions may be more strongly stated than the law of the case justifies, but they suggest the questions of fact in dispute. George Neal's account of the transaction is that the deed was signed in his grandmother's house. He says: 'I was sitting in the back parlor, reading a book, and William Black and grandmother came to the door. I first noticed them standing in the door, and I just glanced up, and didn't pay no more attention to them; and my grandmother came into the room and spoke to me, and said that Will would like to see me. So I laid down my book, and went out, and followed him across the hall into the sitting room; and he asked me, he would like me to sign this paper. So he held the paper out,—the deed of trust,—and he read it over to me, but didn't explain any of the parts of it. Then he said: 'Do you want to manage this estate yourself, or do you want somebody appointed to manage it for you?' Well, I thought over it a minute or two, and mentioned Mr. Lane. He said, "You would rather have Mr. Lane appointed?" I said, "Yes, sir;" and he said, "Well, sign this." I signed the paper, and he didn't say anything for a while; and I said, "Will, can I look at the papers?" and he said, "Certainly," and I looked over it. Just glanced down each page, and turned it over, but I couldn't understand anything about it. I never saw such a paper as that before. Then I folded it up again, and handed it over to him. He says, "Do you understand it?" I says, "Yes," but I meant that I had appointed Mr. Lane, and that was all there was of it. Then he asked, "There is some other part of it I can't quite remember," but he showed me a paper of some kind that he called a statement. He held it in his hand, but I could not tell you what was on it. I only

heard only a short time before that Mr. Lane was my guardian. Only after I signed this deed of trust, I asked Will, "How much am I worth, Will?" And he said, "Something over \$150,000." On cross-examination he said that before this he knew that he had some property, but did not know how much, or who had charge of it; that a couple of weeks before he heard an aunt say that Mr. Lane was his guardian. 'I didn't think any more of it.' He had no recollection of signing any paper in connection with Mr. Lane's account. The only paper he recollected was the deed of trust. Says he acknowledged the deed of trust at the office of W. A. Lewis, but says, 'He didn't tell me anything about the deed of trust,' and denies that he had any talk with Mr. Lewis as to the terms of the deed, or the account of Mr. Lane. 'He read it over to me but that's all. William H. Black read over something, but I don't know what was on it.' William H. Black says that Dr. Willard had advised that some arrangement should be made for the care of Neal's estate when he came of age; that, when George was about to come of age, he obtained a statement showing accurately the condition of George's property up to that time; that he gave the statement to him, and asked him whether he thought that he was capable of managing his property. He replied, in a very pathetic way, that he didn't feel himself competent to take charge. He then expressed a desire that Mr. Lane should continue the management of his property. He professed that he understood the situation, and at his suggestion I undertook to become trustee in the interim, until Mr. Lane had filed his account as guardian and been discharged. I showed it (the statement) to him, particularly the part showing the aggregate of his property. This was the result of a family consultation. Afterwards saw W. A. Lewis, Esq., and after a number of consultations with him the deed of trust was prepared. Mr. Lewis was not Black's attorney, but had represented George Neal's estate. The deed was signed at Lewis's office. Mr. Lewis went over it with Neal, and discussed it with him. The clause making it irrevocable was inserted at Neal's request. As to his understanding of the statement and deed of trust, he says: 'He had mind enough to understand the total amount, and different items composing his estate, but would not know the difference between a bond and a promissory note. He understood the terms of the deed of trust. Whether he understood the full import, I do not know.' W. A. Lewis says he was attorney for Neal's estate, and for his guardian. He did not see Neal in reference to this matter until the time of executing the deed, but states at length his conference with William H. Black, and his instructions to him, and states the interview when the deed was signed as follows: 'I asked Neal whether he understood what his estate consisted of, and whether or not he wanted me to go over the account of Mr. Lane with him, and explain it to him. He said, "No;" that his uncle William H. Black had gone over it with him, and he understood it pretty well, or as well as he hoped to; that he didn't understand figures or money matters very well, and he didn't want to have anything to do with it,—he would only get twisted up,

—and he wanted me to have his uncle appointed trustee first, so that Mr. Lane could file his account, then when Mr. Lane would get through with his account, and it would be passed by the court, then Mr. Black would appoint Mr. Lane trustee in his stead. I then asked him whether or not he wanted this deed of trust to be revocable at any time, and advised him that he ought to state in the deed of trust whether he wanted it revocable or irrevocable; that it might be drawn to be revocable after ten years, or after he would become fifty, if he thought he would improve; but he said he didn't expect to, that he had been training with teachers and traveling, and the only thing he could learn was a little history, and for me to put in a clause so that it couldn't be coaxed away at any time. That is the word he used. Then I added the clause in his presence, in the office. I wrote these words: "And I hereby make this conveyance irrevocable." This deed of trust was not out of my office after it was signed, until Mr. Neal had been there and talked it over with me and executed it. I read it over and explained it to him. I think we were pretty near all the afternoon over it,—an hour or an hour and a half any way. There was nothing in this paper he did not understand. He was brought to my office for that purpose. Otherwise I could have sent this paper to be signed by him at his grandmother's. It was explained in all its details, and I thought he well understood it. He afterwards joined with his uncles in having Mr. Lane discharged. That is the paper they sent to Grandmother Black's home.' He says the clause in relation to income was inserted after the paper had been drawn, and after discussion with Neal, which he details. 'As the paper was originally drawn, I think he was to draw all the income if he wanted it. And he thought that was giving him too much range, and it might not be best to have it in that shape.' Samuel Rea says: 'I remember one occasion, we were at the Savoy Hotel, I think, in London. He detailed to me the transfer of his estate, and how well satisfied he was that Mr. Lane or his uncles should have charge of it; that he didn't feel that he could take care of it or understand it.' Miss Benson says: 'About the time he was twenty-one, he came to me and told me that they had told him all about his affairs, and asked him if he wanted to take charge of his money, or have someone else do it, and he said, "Oh, no," he wanted somebody else to do it, and they asked him who, and he said Mr. Lane and his uncle Will. Then it seems that he had some papers at home that he wanted to bring up to me to read. He read them over, he said, and could tell me where his money was, and how it was arranged, what railroad stock he had, and different things about it. He tried to explain to me, but I can't tell you anything he said, because I didn't care. I remember he spoke about railroad stocks. I think he told me the amount of the whole. It was something over \$150,000.'

"In view of this testimony, there is no room to doubt that the plaintiff was fully and fairly informed of the condition of his estate, and the terms and conditions of the deed of trust. Whether he fully comprehended them in all

the details is not so certain. He was able to understand in a general way the condition of his estate, the purpose to be accomplished, and the mode of effecting it. This is all that should be required. If it were necessary that a person creating such a trust should fully appreciate all the technical intricacies of the transaction, he should not need a trustee, and one who did would not be able to protect himself against his own weakness and incapacity. It is sufficient that he be not deceived, or misled by fear or favor. In this case there is no allegation of any attempt to deceive Neal or mislead him in any way, except such as may be implied from the statement that he was ignorant of the condition of his estate; 'the information in relation thereto being in the possession of said Lane and said Black, and they having concealed the same from him.' This statement is not fully sustained even by Neal's own testimony. He admits that Black told him that his estate amounted to over \$150,000, and showed him a statement of it, which he read to him. He is not sustained by any other witness. Black says he obtained a statement from Mr. Lane which he showed to Neal, and explained to him. Lewis says he offered to go over the accounts of Lane with Neal, and explain them to him; but he said that it was not necessary, as his uncle William had done so. And he told Miss Benson that he understood all about his estate, and offered to show of what it consisted. We are therefore of the opinion that there is no reason for setting aside this deed because of ignorance or concealment.

"But it is claimed that Neal did not have proper counsel and advice, and that the deed should be revoked, if for no other reason, because Neal acted 'without any independent advice.' Some of the cases say that this of itself is sufficient ground for setting aside a voluntary deed. What is independent advice? We think an examination of the cases will show that the word is used as a synonym of 'impartial.' One of the definitions of the word is, 'Not subject to bias or influence.' It certainly does not mean that, when a person has the advice of one or more impartial friends, he must seek, or the friend must suggest, application to another. Nor do we think, when the friend is a near relative, who is familiar with the condition of the party as to mental capacity and estate, that it is necessary to call in a stranger to make his advice valid. Neal says he acted solely on the advice of William H. Black. If so, why was he not an independent and competent adviser? It is true that he was made trustee, with an annual salary of \$500. But this was a temporary arrangement, to continue until Mr. Lane, the selected trustee, could be properly appointed. Otherwise Black had no personal interest in the deed. All the estate was left to the absolute, final control of Neal. The only interest he could have in the estate would be in case of intestacy. But this he had under the law, and not through the deed. He did not act solely upon his own judgment, but upon the advice of Dr. Willard, and after consultation with other members of the family. In seeking legal advice he did not go to his own attorney, but to Mr. Lewis, who had acted for Neal in appointment of his guardian, and says

that he represented Neal's estate, though he acted as attorney for his guardian. Mr. Lane says he knew nothing of the deed until after it was executed. When a young man, soon after coming of age, makes a voluntary deed giving away his estate, or relinquishing a right in favor of another, and especially if he be of weak mind and inexperienced, the transaction should be carefully considered in view of all the circumstances. But in this case we find no evidence that Black and Lewis did not act fairly and honestly for what they regarded the best interest of Neal, and we do not think there was anything in their relations to him or his estate to make them incompetent advisers.

"But it is further claimed that the deed is improvident, and the revocation should therefore be sustained. When a deed is voluntarily executed by a person, it is doubtful whether he can revoke it merely because it is improvident. But as in this case the deed confers no vested right in any third person, but is solely for the protection of the grantor, a court should inquire whether the provisions are inconsistent with such purpose. Under the circumstances of this case, we regard the general purpose of the deed as eminently wise and proper. Neal was a young man possessed of a large estate. He was of weak intellect, but with sufficient ability to recognize his incapacity. He was inexperienced in business, and whether it was because of improper education, as alleged by his witness, or inability to take a proper education, as said by those more intimately associated with him, the fact remained, and even he himself did not expect improvement. It was certainly wise in him to put it into the hands of someone able and willing to take care of it, and upon terms which would prevent waste by mismanagement, and so that it might not be coaxed from him. The trustee selected was a well-known business man of unquestioned integrity, a friend of his grandfather, who had shown his ability by increasing his estate, while guardian, from about \$97,000 to about \$165,000. Unless something in the special provisions is found to be unreasonable, the deed could not be held to be improvident. We will therefore examine the matters suggested by counsel in their order as stated:

"First. It strips Neal of all his property, without any valid reason therefor.' This is not in accordance with the fact. The deed does not give away any part of his estate, except \$500 a year as compensation to the trustee for management. It does give to the trustee the power to control it, for the very good reason that he did not feel able to safely manage it himself.

"Second. It contains no power of revocation.' This is a fact, but it does not of itself render the deed improvident. It was inserted upon full consideration, and at his request, as stated by Mr. Lewis. To have made the deed revocable would have defeated the purpose for which it was made.

"Third. Because it leaves him at the discretion of the trustee as to what portion of the income he shall receive from his own property.' This provision was made after full discussion, and practically at Neal's suggestion. The income was large, and he felt that it might be wasted, and preferred that it, like the rest of

his estate, should be protected by the judgment of its trustee. No difficulty has so far arisen. Neal has had all he asked, and presumably all he needed. If the trustee should unreasonably withhold the income, he is under control of the court, and may be compelled to do his duty.

“Fourth. Because it makes no provision for future contingencies or emergencies.” The income of the estate was probably deemed sufficient to provide for all contingencies. It is ample for the liberal support of a family, and the accumulations would probably be sufficient to meet any unusual demands. If not, the entire estate is within the control of the court.

“Fifth. Because it gives unsafe and unwise power to the trustee.” If a man retains control of his property, he has unlimited power over it. If he deems it wise to commit it to another a proper management of it requires that he should confer extensive powers. The specifications under this head are: ‘(a) That the trustee is not required to give security.’ We think an examination of the case will show that it is an exceptional case where a trustee created by a voluntary deed is required to give security. There is no reason why he should be, when he is selected by the grantor, and he alone is interested in the estate. Presumably, he is selected because of his ability and integrity, and for the convenience of the grantor, and it would be unreasonable for the grantor to ask a third person to stand good for the default of his own agent. See *Rigler v. Cloud*, 14 Pa. 864. (b) The objection that William H. Black has the power to name a new trustee without security has more force. But this alone ought not to strike down the deed. It may seem unwise to give the power to name a new trustee to Black. Neal doubtless thought that, if the occasion arose, Black would act only for his (Neal’s) good, and that his acquaintance with the business world would enable him to make a better selection. He would not be likely to act without consultation with Neal, and if he undertook, improperly, to act contrary to Neal’s wishes, could be restrained. (c) The trustee has unlimited power as to conversion of property and investments.’ We do not think it an unwise thing to authorize the trustee to make investments outside of those expressly designated by law. So far, the investments of the trustee are largely those made by Mr. Black, from whom the estate came. But, as before remarked, a wide discretion must be confided in a trustee in such a case. (d) The trustee is not required to account to anybody.’ Neal can require an account at any time, and, if refused, the trustee can be compelled to make it. It is alleged that an account has been frequently demanded and refused. It was demanded several times within a few days, about the time the bill was filed in this case. Lane told Neal that he would make it out, but that it would require some time. Lewis offered to go with him and go over the books. A statement was made, and handed to Mr. Black, who concluded that at that time it ought not to be furnished. The legislature has conferred upon the courts very extensive powers over trustees and trust estates. It is therefore unnecessary to reserve in the

deed creating such a trust rights to the *cestui que trust* which he may exercise under the supervision of the court, and it would be unwise and improvident to do so when the trust is created to protect him against his own weakness.

“The foregoing has been written in consideration of the facts of the case, and though some of the principles of law, as we understand them, have been stated, we have not referred to the case by which we believe they are established. Those will now be considered.

“At the first blush, it would seem that one who was *compos mentis* and *sui juris*, who has made a voluntary deed for his own benefit, and by it granted no vested right to another, should have the power to control his own affairs, and revoke the trust whenever he felt disposed to do so. This does not appear to be the law. When such a trust is created the party constitutes himself a ward of the court, and cannot revoke his act, except subject to the approval of a court having jurisdiction of such subjects. This is apparent from the many cases in which the courts have been asked to ratify such revocations, and the many cases in which they have refused to do so. Among the first cases upon this subject in Pennsylvania is *Reese v. Ruth*, 13 Serg. & R. 434. The deed was substantially in the terms of the deed in this case. It was an action of assumption, brought before the extensive equity powers now conferred upon our courts by the act of 1836. The court held that the action would lie, but that the jury should have been instructed ‘that the plaintiff had no right to avoid her deed unless fraudulently obtained, and they might at the same time have directed them that she was entitled to what was necessary for present maintenance, under the restriction which I have mentioned.’ One of the cases upon the subject (*Reidy v. Small*, 154 Pa. 505, 20 L. R. A. 362), is almost identical with the present case, except as to the age of the parties; Reidy being seventy-three years old, and Neal twenty one. Justice Dean, in reversing the decree of the court below, says: ‘We think the execution of this deed, under all the circumstances, was a wise act on part of plaintiff; both he and this trustee have access to the court, who will see to it that the trust is faithfully executed. There is no reason shown why it should be revoked, while there are many why it should be sustained.’ The facts of that case, and the reasoning from them, as stated by Justice Dean, would aptly apply to this case, by substituting ‘natural incapacity’ for ‘drunkenness and fear of insanity.’ It meets nearly every question raised in this case. He very clearly shows that the fact that the deeds contained no clause of revocation did not affect its validity, because such a clause would have defeated the object of the trust. See, to same effect, *Ashhurel’s Appeal*, 77 Pa. 464, and *Ash’s Appeal*, 80 Pa. 500. The other reported cases differ from this in the fact that the deeds in dispute gave vested or contingent rights to third parties, but they seem to have been disposed of upon the same principles as the cases cited. In *Greenfield’s Estate*, 14 Pa. 489, the case seems to have been ruled largely upon *Reese v. Ruth*, *supra*. The court says: ‘Settlements like that before us, reserv-

ing a present interest in the creator of them, and carrying a future benefit or bounty to other designated parties, are very usual. If fairly made and carried into effect, uninfluenced by fraud or circumvention, they cannot be subsequently impeached, as is shown, among other determinations, by our own case of *Reese v. Ruth*, 13 Serg. & R. 484.' Page 501. And Judge Gibson refers to the fact that one of her purposes was to protect herself against the importunities of some of her friends. Page 495. In *Nace v. Boyer*, 30 Pa. 99, it was said that 'nothing but fraud or palpable mistake is ground for rescinding an executed conveyance. . . . But the mere fact that a person is of weak understanding, whether produced by old age, accident, or disease, if there be no fraud or surprise, is not an adequate cause of relief. . . . And the mere fact that a contract is improvident is no ground for setting it aside.' Page 110. 'Advice or even persuasion to make a deed or will in a particular way is not fraudulent. There must be something more, something that amounts to imposition or circumvention.' Page 113. The opinion of Judge Symser considers all these questions very fully and clearly. In this case the court refused to revoke the deed, though it was subsequently declared to be testamentary, and therefore revocable. *Frederick's Appeal*, 52 Pa. 388, 91 Am. Dec. 159. In *Ritter's Appeal*, 59 Pa. 9, Ritter being addicted to drink, made a deed of real estate, in trust to pay debts, \$60 per annum to Ritter, and balance to his wife. The court says: 'This deed is neither testamentary nor revocable, and it is clearly the interest of all parties that it should be sustained. It was made by the plaintiff with a full knowledge of his own weakness, and we cannot doubt he was the best judge of himself.' Page 13. In *Fellows's Appeal*, 98 Pa. 470, it was said: 'The title of a trustee under a deed of trust is complete, and irrevocable by the settlor, although the transaction be purely voluntary.' *Merriman v. Munson*, 184 Pa. 114, was a spendthrift trust. The court below said: 'The proof by these witnesses, as against the plaintiff's own testimony alone, shows that the power of revocation was purposely and knowingly surrendered by the plaintiff, in order to guard against his own inability to control or administer his property.' Page 127, 184 Pa. And the supreme court says: 'To have inserted a clause of revocation in such a trust would have been an act of extreme folly, as it would have rendered it of no value for the protection of his estate.' Page 131, 184 Pa. See also *Simon v. Simon*, 163 Pa. 292.

'None of the cases in which such deeds have been declared void will be found to be inconsistent with the principles upon which the foregoing cases were decided. They will be found to be ineffective as deeds, because not in accordance with some rule of law, or be voidable because they grant estates, and were procured by undue influence, mistake, or fraud. In *Turner v. Scott*, 51 Pa. 126, and *Frederick's Appeal*, 52 Pa. 388, 91 Am. Dec. 159, the deeds were held to be testamentary, and therefore revocable. In *Russell's Appeal*, 75 Pa. 279, a lady in contemplation of marriage executed a deed of settlement, in which she provided for payment of the income of her estate to herself

for life, and after her death to her children, if any, and, if not, to her brother and sisters. There was no power of revocation. Her husband died, leaving her childless. She had been advised that she could dispose of her property by will, though there was no such provision in the deed. The deed was made in view of marriage, and no other purpose appeared. The court held that there was a mistake of fact, and not merely one of law, against which equity could grant relief as against mere volunteers. The court says: 'It may be admitted also that the mere omission of counsel to advise the insertion of a power to revoke will not alone be a ground in equity to set aside a voluntary conveyance. But the absence of such a power, and the failure of counsel to advise upon it, are circumstances of weight, when joined to other circumstances tending to show that the act was not done with a deliberate will.' The court, however, says: 'There may be reasons for continuing the disability intended by the grantor or settlor which would influence the chancellor to maintain it, as where a settlement is made for self-protection against improvidence, or the urgent importunities of others, which the circumstances show it is difficult for the grantor or settlor to resist.' Page 289. *Darlington's Appeal*, 86 Pa. 512, 27 Am. Rep. 726, was a case in which a married woman made a voluntary conveyance of all her estate to her husband, and the controversy was between her own child and the children of her husband by a former marriage. It was held that the confidential relation between the husband and wife required affirmative and positive proof that it was her voluntary act, and not induced by undue influences. In *Rick's Appeal*, 105 Pa. 528, it was held that the evidence 'tends strongly to show that Mrs. Peiffer signed the deed of trust in ignorance of its legal effect; that she had no intention of depriving herself of all control of her property in the future; and that the brother in whom she confided, misled and deceived her. If Mrs. Peiffer signed the deed under the representation that it could be revoked, then a fraud was practised upon her; if under the advice that she could not insert a power of revocation, she was wrongly advised; she acted under a mistake, partly of law and partly of fact; she was misled by those whose duty it was to inform her. . . . Not only was this deed irrevocable in its terms, but it was improvident.' But the court further says: 'It would be unwise in us to hold that a person may not make an irrevocable gift, nor would the authorities sustain it. There may be instances in which it is to the highest interest of a man to place his estate beyond his control irrevocably. He may do so to protect himself against his own infirmities. . . . The intent to make the gift irrevocable should be clear.' The court thus recognizes the principle of *Reese v. Ruth* and *Reidy v. Small*. In *Miskey's Appeal*, 107 Pa. 611, it appeared that Jacob A. Miskey had made a deed by which he conveyed his entire estate—about \$70,000—to his father, reserving for himself the income during his life, making no provision for his wife, and but a slight provision for his son; that Miskey was a drunkard, and largely under the influence of his father, and the deed was prepared by his father,

er's attorney. There was no power of revocation, and no testimony in the case showing that this fact was known to him, or was in any manner explained to him; that it did not appear that the deed was read over or explained to him at or before its execution, etc. The court held the principle recognized in all the cases: 'That wherever one person obtains by voluntary donation a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, . . . falls on the person taking the benefit. But this proof is given if it be shown that the donor knew and understood what it was that he was doing. Especially is this the case where the donee stands in a confidential relation to the donor. And that where there is no power of revocation in such a deed, and no reason appears why it should be irrevocable, it is a fact with other circumstances tending to show that it was not executed with proper advice and understanding.' Justice Green very fully cites and considers the authorities upon these questions, and concludes that in no case was there so strong a combination against the validity of the instrument in question as found in that case.

"These cases establish the principles upon which this case should be determined, and it therefore appears to be unnecessary to refer to the many cases decided in the courts of England and of other states, especially as most of them are considered in one or more of the cases above cited, and some of them are inconsistent with the cases decided by our own courts.

"Counsel for defendants have requested the court to find the following facts: 'First. That, when the trust deed was executed, George B. Neal was not, nor is he now, able to manage and control his property; and the purpose of it was to protect his estate, and prevent the same from being squandered or wrested from him by designing persons.' This is found to be true, as stated. 'Second. That it was prepared in pursuance of advice of Neal's physician, and after a family consultation, and with the advice and approval of his grandmother, with whom he had lived, and who had raised him from infancy.' This is found to be true, except that Dr. Willard, who so advised, was not at that time his physician, but had been from infancy, until he was sixteen or seventeen years old. 'Third. That all George B. Neal's estate covered by the trust deed came from his grandfather George Black.' This is found to be true. 'Fourth. That George B. Neal, prior to its preparation, realized that he was not able to manage his estate, and requested that the management and control of the same should be put in the hands of his uncle William H. Black, who should appoint Thomas H. Lane the trustee when Lewis's account as guardian should be confirmed, and that this was done as agreed upon.' This is found to be true. 'Fifth. When the trust deed was executed, Neal knew of what his estate consisted, and the amount of the same, and said deed was executed by him after the fullest explanation of it, without any solicitation from anyone, and with a full knowledge of its provisions, and after he had changed it in two important particulars.' This is found to be substantially true. We would strike out the word 'fullest,' and insert 'very careful.'

'Full knowledge of its provisions' is perhaps too strong an expression. He appears to have had full information of its provisions, and, we believe, an understanding of its general purpose and effect. The testimony does not show any solicitation, though he acted on the advice of William H. Black and Mr. Lewis. 'Sixth. There was no fraud or deceit or misrepresentation on the part of anyone connected with the preparation or execution of said deed, and the deed itself preserved the estate for Neal's own use, and subject to his disposition by will. There was no attempt to control it, except for Neal's own good.' This is found to be true. 'Seventh. Neal's marriage was secret, and unknown to his family. He remained satisfied with the trust deed for over five years, and was induced to begin proceedings for its revocation after his marriage on the advice of one Gamble, an uncle by marriage. The best interests of Neal should be subserved by upholding the deed, and the attempted revocation would put his property in the peril it was the purpose of the trust deed to avoid.' This is found to be true. But the last sentence is a matter of opinion, and not of fact.

"Upon the full consideration of all the evidence in the case, we find, as matters of fact: That the plaintiff, George B. Neal, arrived at the age of twenty-one years on the 26th day of September, 1889. On the 19th day of October, 1889, he executed the deed of trust in dispute. In pursuance of authority contained in said deed, William H. Black appointed Thomas H. Lane as trustee in his stead, and conveyed the property to him, who from that time to the present has performed the duties of the trust. That George B. Neal was satisfied with this arrangement until about the 24th day of February, 1894, when he executed a deed revoking the trust made October 19, 1889. That Thomas H. Lane refused to recognize the validity of this revocation, and this bill was filed to enforce the same. George B. Neal at the time the deed of trust was executed, October 19, 1889, though of weak understanding, and, by reason thereof, wholly inexperienced in business, and of less than ordinary intelligence, was competent to make a valid deed, and capable of understanding the general purpose of such a transaction, and means by which it was to be effected. That Mr. Lane was selected by him to be the trustee, and he was informed why it was necessary or advisable to appoint Mr. Black in the first instance. Before the deed was executed a statement of his property was made out by his guardian, and submitted to him by William H. Black, who informed him of its contents; at least to the extent of the estate. Black consulted with W. A. Lewis, a reputable and competent attorney, and, when the deed was prepared, Neal, with Black, visited Mr. Lewis, who carefully explained the matter to Neal; and after discussion with him the clauses in relation to the disposition of the income, and making the trust irrevocable, were inserted, in accordance with Neal's conclusion as to what was best. Lane had no knowledge of the deed until after its execution. Neal had no advice or counsel from anyone other than William H. Black and W. A. Lewis. William H. Black is the uncle of George B. Neal, and they lived in the house of Mrs. Black to-

gether until a few months before the execution of the deed. Black acted upon the advice of Dr. Willard, and after consultation with his mother and other members of the family as to the object of the transaction, but it does not appear that he consulted any other person than Mr. Lewis as to the mode of effecting it. He, however, took no interest under the deed, and was therefore wholly disinterested. Lewis was not Black's attorney, but had acted for Neal in having Lane appointed guardian. Neither Black nor Lewis had any interest to serve, other than that of Neal's; and, so far as appears from the character of the men, we are satisfied that they acted and advised Neal solely for what they regarded his best interests. They were independent and unprejudiced advisers. Thomas H. Lane, the trustee, was a proper selection. He has shown his faithfulness and ability by the successful management of this estate as guardian. In view of the control of the courts over the trustee and the estate, the deed is in no respect improvident; and considering the incapacity and inexperience of Neal, the amount of his estate, and the large income derived from it, it seems to have been eminently wise and prudent. There does not appear to have been any marked improvement in his condition, as to mental power or business capacity, in the six years which have elapsed since the execution of the deed. So that the same conditions which made its execution advisable still exist as reasons against its revocation, and that it is not for the interest of plaintiff that it should be revoked. As a matter of law, we find that the plaintiff has not the power arbitrarily to revoke a deed voluntarily made; that such revocation is subject to the judgment of the court, and should not be ratified unless it appear that the best interests of the plaintiff so require. Under the facts and law of this case, we are of opinion that the deed of October 18, 1889, should not be revoked, and the plaintiff's bill should be dismissed at his costs. A decree will be drawn accordingly.

"We feel disposed to add, as an apology for this lengthy opinion, the words of Justice Green in *Miskey's Appeal*, 107 Pa. 632: 'It has seemed to us appropriate to dwell with rather more than usual fullness upon our review of the case, because of the unusual character of the questions involved and the relief invoked, the very large amount at stake, and the earnestness, zeal, and ability with which the argument was conducted by the learned counsel on both sides.' And besides, we do not have the benefit of a master's report; and though we are satisfied that the new rule in equity will greatly facilitate business, and be of advantage to parties, counsel, and the courts, it necessitates a fuller reference to testimony and of the cases bearing upon questions of law than was necessary in passing upon exceptions to a master's report."

Messrs. W. B. Rodgers, Joseph Stadtfeld, and J. H. Beal, for appellant:

The burden of proving affirmatively the validity of this deed is on the defendants, because the parties procuring it stood in a confidential relation to the donor, and the deed contains no power of revocation.

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Black was Neal's uncle. Black stood *in loco parentis*.

Lane was Neal's guardian, with all his accounts unsettled, and still in possession of all of his ward's property.

Lewis was Lane's attorney, and in this very matter he was acting on Black's request, and on behalf of Lane. He therefore stood in precisely the same position as Lane and Black. He was acting for them, not for Neal.

Espey v. Lake, 10 Hare, 260; *Tate v. Williamson*, L. R. 2 Ch. 55.

These facts show a confidential relation.

Dutton v. Thompson, L. R. 23 Ch. Div. 278; *Williams v. Williams*, 68 Md. 871; *Huguenin v. Baeley*, 2 White & Tudor, Lead. Cas. in Eq. 1156; *Darlington's Estate*, 147 Pa. 624; *Wright v. Smith*, 23 N. J. Eq. 106.

Not only did these parties stand in a confidential relation to Neal, but they acquired benefits by this deed.

To Lane:

His compensation in case he should be appointed trustee.

That he would have Black pass upon his account instead of Neal, and be discharged from the guardianship; and thereby relieved from responsibility for Neal's property and his (Lane's) past acts.

To Black the benefits were: The compensation for such time as he might serve.

As one of Neal's heirs at law he would be entitled to a large share of the estate in case Neal died intestate without issue.

These benefits are much greater than in *Dutton v. Thompson*, *supra*; *Whitridge v. Whitridge*, 76 Md. 54; and *Williams v. Williams*, *supra*.

The important fact is that Neal was giving up all his property and all power over it, without any valuable consideration to him.

Williams v. Williams, *supra*.

The fact that the deed contains no power of revocation of itself puts on the defendants the burden of proof.

Coutts v. Acworth, L. R. 8 Eq. 558; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Miskey's Appeal*, 107 Pa. 611; *Russell's Appeal*, 75 Pa. 269.

In order to sustain this deed, they must show, by clear and decisive proof:

Toker v. Toker, 3 DeG. J. & S. 487.

1. That Neal had a true and full knowledge of his estate, its extent and value, and of the income to be derived therefrom.

Taylor v. Taylor, 49 U. S. 8 How. 183, 12 L. ed. 1040.

2. That he had independent advice in regard to the act which he was performing.

3. That his act was uninfluenced and unbiased by the confidence he reposed in Lewis and Black.

4. That the terms and provisions of the deed are reasonable, proper, and provident.

5. That he had a full, clear, and intelligent understanding of the act he was engaged in, and of the effect and consequences of the deed which he was executing.

Neal had never had possession of any of this property, and all of it was in possession or control of the persons who were procuring this deed. This is an important fact.

Will's Appeal, 22 Pa. 332.

The absence of independent professional advice, in the case of a voluntary conveyance, would seem to be decisive in favor of the right of the party executing it to ask that it be set aside.

Mr. Bispham in 18 Am. L. Reg. N. S. 350, note; *Prideaux v. Lonsdale*, 4 Giff. 159; *Rhodes v. Bate*, L. R. 1 Ch. 252.

Black, who was getting possession of this estate as trustee with unlimited powers, was certainly not a "disinterested" and competent adviser.

Miskey's Appeal, 107 Pa. 611; *Archer v. Hudson*, 7 Beav. 551; *Prideaux v. Lonsdale*, *supra*; *Huguenin v. Baseley*, 14 Ves. Jr. 287; *Williams v. Williams*, 68 Md. 871.

The only thing Lewis did, according to his own story, was to tell Neal that he could make the deed revocable after a certain number of years; but he does not pretend to give him any advice or suggestion as to what he should do.

Williams v. Williams, *supra*; *Whitridge v. Whitridge*, 76 Md. 54; *Russell's Appeal*, 75 Pa. 269.

When we show the confidential relation existing between these parties, the law at once presumes that he was induced to execute the deed by their influence; and in order to sustain the deed they must overcome this presumption by clear and convincing proof that Neal acted on his own judgment, uninfluenced and unhampered by the confidence he reposed in them.

Archer v. Hudson, *supra*; *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Kerr, Fraud & Mistake*, 178.

Even if he was not able to buy and sell, to invest and reinvest, this he could have done by appointing an agent to transact business for him; and this is exactly what Neal wanted to do according to Black's testimony, and all that Neal thought he had done. This would have accomplished all that was necessary and at the same time have preserved to Neal, what it was so essential that he should have,—the opportunity to acquire discretion and experience in business.

There was no reason why the deed should be made irrevocable.

Taylor v. Taylor, 49 U. S. 8 How. 183, 13 L. ed. 1040; *Mackason's Appeal*, 42 Pa. 330, 82 Am. Dec. 517; *Johnston v. Harvey*, 2 Penr. & W. 82, 21 Am. Dec. 426; *Russell's Appeal*, *supra*; *Coutts v. Acworth*, L. R. 8 Eq. 553; *Henshall v. Fereday*, 29 L. T. N. S. 46.

There is no provision for future contingencies.

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Rick's Appeal, 105 Pa. 535; *Whitridge v. Whitridge*, *supra*.

In *Everitt v. Everitt*, L. R. 10 Eq. 405, a deed which did not reserve to the grantor a voice in the selection of future trustees, and did not contain a power of revocation (both of which are wanting here) was held improvident.

Wollaston v. Tribe, L. R. 9 Eq. 44.

The effect of the deed of settlement must be brought home to the mind of the party.

Welman v. Welman, L. R. 15 Ch. Div. 570; *Henshall v. Fereday*, 27 L. T. N. S. 743, Affirmed 29 L. T. N. S. 46; *Everitt v. Everitt*, and *Coutts v. Acworth*, *supra*; *Simon v. Simon*, 163 Pa. 293; *Phillipson v. Kerry*, 33 Beav. 628; *Russell's Appeal*, 75 Pa. 269; *Whitridge v. Whitridge*, 76 Md. 54; *Williams v. Williams*, 68 Md. 871. See also *Gibbs v. New York Life Ins. & T. Co.* 14 Abb. N. C. 1; *Ross v. Conway*, 93 Cal. 632; *Anderson v. Elsworth*, 3 Giff. 154; *Buffalow v. Buffalow*, 2 Dev. & B. Eq. 241; *Russell's Appeal*, *supra*; *Dutton v. Thompson*, L. R. 23 Ch. Div. 278; *Williams v. Williams*, *supra*.

As a spendthrift trust this deed is clearly bad.

Mackason's Appeal, 42 Pa. 330, 82 Am. Dec. 517; *Ghormley v. Smith*, 139 Pa. 534, 11 L. R. A. 563.

The provisions as to a spendthrift trust being stricken down, all that is left is a mere power of attorney—an agency—which is revocable at will, even if it be made irrevocable in terms.

Frederick's Appeal, 53 Pa. 338, 91 Am. Dec. 159; *Rick's Appeal*, 105 Pa. 528; *Green v. Rick*, 121 Pa. 180, 3 L. R. A. 48.

The spendthrift trust in the deed being stricken down as illegal, the whole purpose and object of the deed fail.

Russell's Appeal, 75 Pa. 279; *Rick's Appeal*, *supra*.

Neura Watson & McCleave for appellees.

Per Curiam:

We find no error in this record that would justify either a reversal or modification of the decree. The learned judge's findings of fact and conclusions of law are substantially correct, and fully warranted the decree dismissing the bill at plaintiff's costs. There appears to be nothing in either of the specifications of error that requires discussion.

The decree is affirmed and appeal dismissed, with costs to be paid by the appellant.

CONNECTICUT SUPREME COURT OF ERRORS.

Charles S. DAVIDSON, *Appt.*,

v.

[Michael E. HANNON *et al.*

(87 Conn. 312.)

A photographic lens owned and used by a photographer in the prosecution of his business is within a provision of a statute exempting from attachment implements of the debtor's trade.

(Hamersley, J., *dissenta.*)

(February 21, 1896.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Hartford County in favor of defendants in an action brought to recover possession of a photographic lens which defendants had attached for debt. *Reversed.*

The facts are stated in the opinion.

Mr. Lucius F. Robinson for appellant. **Messrs. Perkins & Perkins**, for appellees:

The protection extended by this section of the statute is to mechanics and to them only.

Patten v. Smith, 4 Conn. 450, 10 Am. Dec. 166; *Atwood v. De Forest*, 19 Conn. 513; *Seeley v. Guilim*, 40 Conn. 106.

The legislature did not intend that this phrase should have a broad application, for the reason that in the statute itself it took great pains to define the exact goods and the amount thereof to be protected, and was careful to mention other kinds of business as entitled to protection, which by a broad construction might have been included under the phrase in question.

Enos v. Dunn, 44 Conn. 93, 26 Am. Rep. 430; *Wallace v. Bartlett*, 108 Mass. 52.

A photographer is not a mechanic within the meaning of the statute.

Story v. Walker, 11 Lea, 515, 47 Am. Rep. 805.

Fenn, J., delivered the opinion of the court:

This is an action of replevin to recover property attached. The only question necessary for us to decide upon this appeal is whether the court below erred in holding such property was not exempt from attachment and execution under that clause of Gen. Stat. § 1184, which exempts "implements of the debtor's trade." The property in question is a photographic lens. It belonged to one Peters, for whose debt it was attached. He was a photographer, with a place of business in Hartford. He had mortgaged his photographic apparatus and materials, including this lens, to the plaintiff. This mortgage was duly recorded. The plaintiff never had, before the attachment, the possession of said lens, nor the right to the possession of it, except as such mortgagee. Some time after said mortgage, and before said attachment, said Peters

gave up his place of business, and stored his photographic apparatus at his residence in Hartford. He there fitted up a room in his barn for the purpose, and continued up to the time of the attachment to take photographs for friends and neighbors, for pay, when the opportunity offered. A lens similar to the one in question was a useful and necessary implement to Peters in his photographic work.

The statute in question is ancient, though it has been varied somewhat from time to time, both in form and in substance. Several of its provisions have come before this court for consideration, and generally, it may be said, that in the decisions a liberal construction in favor of the debtor has been adopted. A single reference will be sufficient to illustrate this, as shown in cases referring to other clauses than the one now before us. In *Hitchcock v. Holmes*, 48 Conn. 528, the words, "household furniture necessary for supporting life," were construed. It was said: "No fixed or precise definition can be given to the word 'necessary,' as used in the statute. The facts in each case must control its interpretation. Of course, it was susceptible of being confined within very narrow limits; for we know, as a matter of fact, that many families exist, although they are enabled to use very few of the articles to be found in an ordinary household, and these in their rudest forms. But a proper regard for plain legislative intent requires us to use it in a broader, more liberal, and more humane sense; to pass beyond what is strictly indispensable, and include articles which to the common understanding suggest ideas of comfort and convenience." The cases in this state which more directly relate to the clause of the statute now in question are *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166; *Atwood v. De Forest*, 19 Conn. 513; *Seeley v. Guilim*, 40 Conn. 106; *Enos v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430. We will briefly refer to each. In *Patten v. Smith*, *supra*, the question was as to the meaning of the word "tools," in the phrase then used in the statute, "necessary apparel, bedding, tools, arms, or implements of his household, necessary for upholding his life." It was held that an apparatus for printing, consisting of a printing press, cases, types, etc., might be tools, within the meaning of that statute. The court said that printing was unquestionably a mechanical employment; that the statute concerned the public good, which had a deep interest in the prosperity of mechanical employments, and should be construed liberally; that, in relation to the natural description of the goods of which an exemption is demanded, the exposition of the law ought to be liberal. In *Atwood v. De Forest*, *supra*, the words now under consideration, "implements of the debtor's trade," which had been inserted into the statute in 1821, and have since continued there, were construed. The question in that case was whether the debtor was a mechanic, or a manufacturer; whether the ar-

NOTE.—For some other cases of exemptions from execution, see *Watson v. Lederer* (Colo.) 1 L. R. A. 554, and note; *Re McManus's Estate* (Cal.) 10 L. R. A. 84 L. R. A.

567; and *Consolidated Tank Line Co. v. Hunt* (Iowa) 12 L. R. A. 478.

ticles claimed to be exempt were tools or machinery. The work carried on was that of making spectacles. It was held that the articles employed were not exempt, not because spectacle-making was not mechanical, not a trade, but because the facts showed that the parties were manufacturers, and "that they were not spectacle-makers, within the meaning of the statute." The court, in defining "trade," said: "By the word 'trade,' as used in this statute, we suppose is meant the business of a mechanic, strictly speaking, as the business of a carpenter, blacksmith, silversmith, printer, or the like, and that it was not intended to include the business of a manufacturer, any more than it was intended to extend to the business of a merchant or farmer." It is evident that the court did not intend, by the use of such language as we have quoted,—especially when used for the purpose and in the connection in which it appears,—to give a strict or narrow meaning to the word "mechanic," but only to show that distinction to which we have referred, and upon which the decision rests. Concerning this the court adds: "If it be said that the distinction between a mechanic and a manufacturer is not as precise as is desirable, and that there is difficulty in determining to which class certain individuals belong, especially in cases where men are engaged in both the business of a mechanic as well as that of a manufacturer, the answer is, the difficulty is not in the distinction itself,—that seems to be precise enough,—but it is in the application of the distinction to particular facts; and that is a difficulty common to the application of most of the rules of law, and in doubtful cases it can only be solved by the finding of a jury." In *Sealey v. Guillim, supra*, a similar question as to the distinction between a mechanic and a manufacturer, between machinery and tools, arose. In that case it appeared that a debtor carried on the business of bookbinding and manufacturing blank-books; working himself, and employing four hands. Certain of the articles were held to be exempt, and others not. The rule applied is thus stated: "His [the debtor] being a manufacturer does not prevent the statute from operating to exempt the implements of his trade, so far as they are used by him in person. On the other hand, the fact that he is carrying on a trade will not extend the provisions of the statute to articles employed by him as a manufacturer merely." In *Enacoe v. Dunn, supra*,

84 L. R. A.

it was held that the horses and carts of a person engaged in the business of carting coal are not protected from attachment as tools of a debtor's trade. This, it was stated, could not "be said to be the 'business of a mechanic,' either by definitions from the books or by the common understanding and speech of men." Surely this, as it seems to us, is evident enough.

The rules adopted—the principles established—by the cases in the construction of this statute are binding upon us at the present time. The fact that the language in question has continued unchanged in the statute for three quarters of a century indicates conclusively that such language, so liberally construed as it has been by the courts, declares the public policy of the state in relation to the matter. If this be doubted, the remedy of those who thus question lies in an appeal to that body which enacted, and has been content to continue, the law. We think that to such avocations, as those of carpenter, blacksmith, silversmith, printer, bookbinder, spectacle-maker, which have been recognized and declared by this court to be trades,—so clearly as not to require the statement of any reason or explanation why,—there is no reason why the avocation of a photographer carried on as it was by Peters, as stated in the finding, should not be added. Certainly he was not a "manufacturer," as that word has been defined by this court. If his business, carried on in any possible way, could be held to be a trade, we think it should be so held, upon the facts before us. He depended, in the conduct of his craft, upon the labor of his hands. It does not appear, nor, taking judicial notice of matters in the realm of common observation and knowledge, are we led to think, that he required for his work either a liberal or an extensive education. In all probability, some, at least, and perhaps all, of the other avocations referred to above as recognized trades, would require more special knowledge, apprenticeship, and training for their successful exercise than this work of photography, as ordinarily carried on, and presumably in this case. We conclude, therefore, that the court below erred in holding the article in question was not exempt.

There is error in the judgment complained of, and it is reversed.

The other Judges concurred, except **Hamersley, J.**, who dissents.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Mary C. McAFEE, Admr., etc., of James
McAfee, Deceased, *Appt.*,

v.

Frederick W. HUIDEKOPER *et al.*, Re-
ceivers of the Richmond & Danville Rail-
road Company.

(.....D. C. App.....)

**1. The act of crossing a car platform
from one car to another while the train is in**

*NOTE.—Negligence of passenger in passing from
one car to another.*

McAFEE v. HUIDEKOPER follows the rule which has been adopted by the great weight of authority upon the question. There are cases in which the facts show that the attempt to cross the platform was a negligent act, and perhaps with the old style platforms and couplings it might be considered negligence to attempt to pass from one car to another at any time. But with the modern machinery and the smoking car at one end of the train and a dining car perhaps at the other it would hardly seem to be negligence as matter of law to pass through the train, even though they are not vestibuled.

! The general rule.

It is not *per se* negligence for a person to attempt to pass from one car to another when the train is in motion, so as to bar his estate from recovery in case he is killed by a fall from a platform so defective as to show gross negligence on the part of the carrier. *Louisville & N. R. Co. v. Berg*, 17 Ky. L. Rep. 1105.

It is not negligence *per se* for a passenger on a rapidly moving train to pass from one car to another in search of a seat. *Chesapeake & O. R. Co. v. Clowes* (Va.) 24 S. E. 888.

It is not *per se* a negligent act for a mother to permit her boy of the age of twelve years to go from one car to another of a moving train for the purpose of finding a seat, which will bar a recovery in case he is injured in attempting to return to her after the train has stopped at a station. *Downs v. New York C. R. Co.* 47 N. Y. 83.

A person on an excursion train, who is permitted by the conductor to go through the train to sell tickets to persons who have not procured them, is not guilty of negligence in attempting to return to his seat when he is through, although the cars are in motion and he is obliged to pass across a running board on the outside of an open observation car to reach his seat. *Dickinson v. Port Huron & N. W. R. Co.* 53 Mich. 43.

Walking over a train of flat cars while the same are in motion, or even stepping from one of such cars to another while the train is in motion, is not negligence *per se*. *Atchison, T. & S. F. R. Co. v. McCandless*, 38 Kan. 366.

Removing a passenger from one car to another of a rapidly moving train is not negligence *per se*. *Marquette v. Chicago & N. W. R. Co.* 33 Iowa, 562. The court says that within a very short period there have been such wonderful improvements in the platforms and couplings of passenger coaches as that passengers may with comparative safety pass from one car to the other on the fastest trains of the country while in motion. It cannot be true, therefore, as a matter of fact, that to pass from one car to another while the train is in motion at the usual rate of speed is so necessarily dangerous that it may not be justified under any circumstances.

The question is for the jury whether or not a per-
34 L. R. A.

motion is not negligence as matter of law in the absence of any rule of the carrier prohibiting it or any attempt to prevent passengers from so doing.

**2. No presumption of negligence can
arise from the mere fact that a passenger was
injured while attempting to pass from one car to
another while the train was in motion.**

(May 31, 1906.)

A PPEAL by plaintiff from a judgment of
the Supreme Court of the District of

son on an excursion train is negligent in attempting to go into another car for water at a time when the train has almost stopped at a station, and who is thrown between the cars by a sudden jerk of the train caused by an attempt to get it nearer a safe stopping place, by which the coupling pin is broken and the cars separate so that he falls between them. *Otochett v. Savannah & T. R. Co.* 54 Ga. 687.

It is not as matter of law negligence contributing to injury from an electric shock caused by imperfect insulation, for a passenger to swing round from the step of an electric street car to that of a trailer, when the railroad company has no rule prohibiting it and allows it without objection. *Burt v. Douglas County Street R. Co.* 83 Wis. 229, 18 L. R. A. 479.

In *Willis v. Long Island R. Co.* 34 N. Y. 670, affirming 32 Barb. 398, where the plaintiff was injured while standing on the platform when all the seats within the car were full, the court says it is not the duty of passengers to pass from one car to another in search of seats while the car is in rapid motion.

But in Louisiana it is held that it is negligence for a passenger to attempt, without inducement or invitation or necessity, to pass from one car to another when the train is in motion, and if he is thrown from the platform he cannot recover against the carrier. *Bemis v. New Orleans City & L. R. Co.* 47 La. Ann. 1671.

Passenger assumes incidental risks.

It is not an act of negligence for a passenger to pass from one car to another while in motion, but he assumes the risk incident to such undertaking from ordinary causes. *Sickles v. Missouri, K. & T. R. Co.* (Tex.) 35 S. W. 493.

A passenger in going from the smoking car back to his place in the passenger car only assumes the ordinary risks incident to such action on his part, and may recover in case he is injured by falling between the cars in consequence of their separating while he is stepping from one to the other by reason of a defective coupling, which the carrier has negligently left in the train. *Costikyan v. Rome, W. & O. R. Co.* 58 Hun, 590.

Where a passenger took a wrong train and was told by the conductor that if he took one of the two rear cars he would be returned to his station, and he immediately started for them but was thrown from the platform by a lurch of the train upon meeting a passenger there, the court held that the statement of the conductor did not justify the attempt to make the change of cars while the train was in motion at the risk of the company. In going from one car to another of a rapidly moving train merely for his own convenience the plaintiff took upon himself the risk of all accidents not resulting from any negligence on the part of the defendant. And since the evidence failed to show any negligence on the part of defendant which caused the accident the plaintiff was not permitted to recover. *Stewart v. Boston & P. R. Co.* 146 Mass. 605.

Columbia in favor of defendants in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Westel Willoughby for appellant.

Messrs. Leslie Ryan and John P. Shepperd, for appellees:

The burden was on plaintiff to prove that the receivers were operating the train on the morning of September 21, 1892.

Negligence of defendants must be proved in an action like this.

Parrott v. Wells ("The Nitroglycerine Case").

A person does not in going through a train in search of a seat take the risk of a collision with a locomotive engine on another train, so as to prevent his recovery in case the collision occurs and he is injured while on the platform of a car. *DeWire v. Boston & M. R. Co.* 148 Mass. 343, 2 L. R. A. 163.

Obedience of instructions.

It is not negligence as matter of law for a passenger to follow the directions of an officer of the carrier and pass from one car to another of a train for the purpose of finding a seat while the train is in motion. *McIntyre v. New York C. R. Co.* 37 N. Y. 287. *Affirming* 43 Barb. 532.

If the conductor tells a passenger to go forward into another car to find a seat, he is not guilty of contributory negligence in attempting to obey so that he cannot recover for injuries received by being jostled off the platform by the brakeman. *Louisville & N. R. Co. v. Kelly*, 32 Ind. 371, 47 Am. Rep. 149.

It is not contributory negligence *per se* for a man accustomed to railway travel to attempt to pass from a passenger coach to a baggage car while the train is moving less than 4 miles an hour, if after signal for the station is given the conductor tells him that the train will not have time to stop, and directs him to hasten to the baggage car in order to get certain goods preparatory to getting off the train. *Davis v. Louisville, N. O. & T. R. Co.* 69 Miss. 123.

If a passenger on entering a train finds it full, and the conductor announces that another coach has been added in front into which passengers must go, and upon going to the door finds the coach there apparently ready for passengers, he is not guilty of negligence in attempting to step from one platform to the other, so that he cannot recover in case the cars are suddenly jerked apart and he falls between them. *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219.

Where plaintiff upon taking defendant's train found all the seats full, whereupon the conductor announced that another car would be added to the train, which was done, and then the conductor called out, "All aboard," whereupon plaintiff attempted to pass from one car to another, and it was dark and the cars had failed to lock so that they had parted some distance after contact, and the plaintiff fell between them and was injured, the court held that the question of negligence and contributory negligence was for the jury. *Lent v. New York C. & H. R. Co.* 120 N. Y. 437. *Affirming* 22 Jones & S. 317.

Vestibuled trains.

Where a passenger in the rear car of a vestibuled train, desiring to go forward into another car in the night, left the door open to guide him on his return, and in attempting to return mistook a light from a window for the light which he supposed

82 U. S. 15 Wall. 524, 21 L. ed. 206; *Button v. Frink*, 51 Conn. 342, 50 Am. Rep. 24; *DelaWare, L. & W. R. Co. v. Napheys*, 90 Pa. 135; *Mynning v. Detroit, L. & N. R. Co.* 59 Mich. 257.

The estimate of a witness, especially of a nonexpert, of the rate of a moving railway train, is very unsatisfactory proof, and should be received with great caution. If the *res gestæ* renders it impossible, or even highly improbable, that the estimate can be correct, it should be rejected.

Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357.

The mere fact that the accident occurred does not raise a presumption of negligence.

posed would shine from the door, and in going toward it walked out of the outside door, which had been negligently left open, and was injured, the court held that it was error to sustain a demurrer to the declaration. The court said the defendant was under no obligation to provide vestibuled trains for its passengers, but having done so it was its duty to maintain them in a reasonably safe condition. The presence of such an appliance on the train is a proclamation by the carrier that it has provided passengers a safe means of passing from one car to another and an invitation for them to use it as their convenience or necessity may require. Whether, having provided it, it was negligence to leave it without light, and to leave the outside door open without guard, was a question for the jury. On the other hand, the act of the passenger in leaving the door open to light him on his return was an act of care and not negligence, and the optical illusion of the light from the window, and not his negligence, caused the accident. *Bronson v. Oakes*, 78 Fed. Rep. 734.

Negligence in fact.

Where the train is going 40 miles an hour, and the platforms are old-fashioned so that the cars are one moment close together and the next moment 2 or 3 feet apart, it is negligence for an inexperienced traveler to attempt of his own motion to pass from one car to another, but if he is directed to do so by the conductor the question of negligence is one for the jury. *Cleveland, C. C. & L. R. Co. v. Manson*, 30 Ohio St. 451.

A lame passenger who, while the train is standing still, attempts to cross from one car to another for the purpose of finding his seat, is guilty of negligence in stepping on the buffers, so that she cannot recover for the injury in case the train at that moment starts with a jerk and her foot slips between the buffers and is crushed. *Snowden v. Boston & M. R. Co.* 151 Mass. 220.

In *State v. Maine C. R. Co.* 81 Me. 84, where the action was for the death of a person found dead on the track, who when last seen was going through a car toward the end of the train, the court says: "We think it some evidence of carelessness on the part of the deceased that he was rambling through the cars on such an occasion, in a dark night when the train was running swiftly, on a road having frequent and sharp curves, unless there be some excuse or justification for it more than mere restlessness or curiosity."

A person on a train who goes to the engine to get water, and is injured by falling between the tender and the coach in attempting to return, is guilty of such negligence that he cannot recover for the injury, although his fall was caused by the sudden putting on of the air brakes, and the fact that a hand brake on the coach, which he relied on to aid his passage was loose and turned in his grasp so that he lost his balance. *McDaniel v. Highland Ave. & B. R. Co.* 90 Ala. 64.

H. P. F.

State v. Baltimore & O. R. Co. 58 Md. 221; *Holbrook v. Ulrica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502; *Barnard v. Philadelphia R. Co.* 60 Md. 555; *Blanchette v. Border City Mfg. Co.* 148 Mass. 21; *Huff v. Austin*, 46 Ohio St. 386; *East Tennessee, V. & G. R. Co. v. Stewart*, 18 Lea, 482; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

The only exception to the rule that no negligence is presumed from the mere fact of accident is, as said by the court in *Briggs v. Oliver*, 4 Hurlst. & C. 403, where the accident grows out of or arises by reason of some defect or accident to the thing itself, which is shown to be managed by the defendants, or an accident which would not have happened in the ordinary course of human events.

Byrne v. Boadle, 2 Hurlst. & C. 722; *Kearney v. London, B. & S. C. R. Co. L. R.* 5 Q. B. 411; *Rose v. Stephens & C. Transp. Co.* 20 Blatchf. 411.

No rate of speed is as a matter of law negligence *per se*.

Stewart v. Boston & P. R. Co. 146 Mass. 605; *Thompson v. Duncan*, 76 Ala. 384; *Wallace v. St. Louis, I. M. & S. R. Co.* 74 Mo. 594.

Passing from car to car while a train is moving rapidly is negligence *per se*.

Hutchinson, Carr. 649.

In the discharge of his duty it is the province of the court, either before or after verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor; that is for the jury. But, conceding to all the evidence, the greatest probative force to which, according to the law of evidence, it is justly entitled, is it sufficient to justify a verdict?

Pleasants v. Fant, 89 U. S. 22 Wall. 116, 22 L. ed. 780; *Washington & G. R. Co. v. Tobriner* ("Washington & G. R. Co. v. Harmon's Barr."), 147 U. S. 571, 37 L. ed. 284; *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420.

An intimation, or even direction, to a passenger to occupy a position of danger will not render the railroad company liable for injuries resulting therefrom if the danger was so obvious that a reasonable man would not have obeyed or accepted the invitation.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506; *Hazard v. Chicago, B. & Q. R. Co.* 1 Biss. 508; *Chicago & A. R. Co. v. Randolph*, 58 Ill. 510, 5 Am. Rep. 60; *Southwestern R. Co. v. Singleton*, 67 Ga. 307; *South & North Ala. R. Co. v. Schaeffer*, 75 Ala. 136.

Shepard, J., delivered the opinion of the court:

Tried by the rule laid down in *Adams v. Washington & G. R. Co.* (D. C. App.) 24 Wash. L. Rep. 364, the judgment appealed from in this case must be reversed for error in the instruction to the jury to return a verdict for the defendant.

The appellant's intestate was not riding on the platform of a cable car, as Adams was; but was passing from one car to another on defendants' road in a train propelled by steam. He had purchased his ticket and entered the car with his wife, at his home station in Virginia, on his way to Washington. There was no vacant seat for him in the car in which his

wife procured a seat, and he went to the smoking car. There he remained smoking and talking to others until the train approached the "Long Bridge." He got up to leave the smoking car, saying that he would go forward to his wife before reaching the station, as she might otherwise become separated from him in the crowd, which was great. When last seen he was on the platform with one hand holding his hat, and the other probably holding the knob of the car door. According to some of the witnesses, the train was running at a very high rate of speed; others estimating the speed at from 20 miles to 25 miles an hour.

As the intestate reached the platform, the train turned a sharp curve and the lurch of the car threw him therefrom with great violence. His body struck the ground 13 feet from the track, broke through a railing, and stopped rolling at a point 37 feet from the track. He was unconscious when the first witness reached him, and died very soon afterwards. Several passengers familiar with the road testified that the lurching or swaying of the train in turning the curve on that occasion was violent and extraordinary. There were exclamations of surprise and alarm among the passengers in the car when it occurred. Passengers sitting on seats were almost thrown from them, and others who sat on the arms of seats, because there were no others, owing to the crowded condition of the car, were thrown violently across the aisle.

Another witness testified that about six days before the accident he had noticed, in passing over this curve a depression in the track caused as he thought by a "floating tie." He said: "A tie was loose, or two or more ties were loose, and as the train passed over them, it caused the ties to sink and the train and cars to sway at that point." This evidence was admitted without objection at the time, but it is now insisted that it ought not to be considered because its introduction is not warranted by the allegations of negligence in the declaration. Into that point it is unnecessary now to inquire. If the declaration is in fact insufficient, or if there is any doubt on that point, it can and ought to be amended before another trial. Had this objection been made at the trial, the defect of allegation, if it exists, might have been cured in time to prevent injury. As the case was decided upon the equivalent of a demurrer to the plaintiff's evidence as a whole, it would be unjust and unreasonable now to deprive the appellant of the benefit of this evidence in the consideration of the case as it stands.

We have heretofore held that merely riding upon the platform of a horse or cable car is not negligence *per se*. *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420, 423; *Adams v. Washington & G. R. Co. supra*.

Whether riding upon the platform of a car or steam railway would or would not, under any circumstances, amount to negligence in law, is a question that we need not now decide. The intestate was not riding upon the platform of the car. He was in the act of crossing the platform on his way from the smoking car to that in which his wife was seated. His motive is not material. There was no rule of the defendant prohibiting such

passing from car to car, and there had been no attempt, by locking the doors or otherwise, to prevent passengers from so doing.

Railway companies have smoking, sleeping, and dining cars attached to their trains for the convenience and accommodation of passengers. Passengers often go, without objection, to the former, and are often invited to go to the latter, whilst the train is in rapid motion. Accidents rarely happen in passing from car to car, though the act may be necessarily attended with more or less risk all the times. Under all the circumstances, we think it would be unreasonable to hold that the passing from one car to another, save under peculiar and exceptional circumstances, would be negligence as a matter of law. The most that can with reason be said is, that the passenger who passes from car to car under ordinary circumstances, when the car is in motion, takes the ordinary

risk that may attend the act; and if hurt in so doing, he must show, in order to recover, that his injury resulted from some act of negligence on the part of the defendant.

This is all that is decided in the case, much relied on by the appellee, of *Stewart v. Boston & P. R. Co.* 146 Mass. 605. No presumption of negligence can arise from the mere receipt of injury under such circumstances.

The evidence in respect of the operation of the train by the appellees as receivers of the Richmond & Danville Railroad Company is not as strong as it might have been; but it was sufficient to go to the jury on that point, and the direction to the jury cannot be sustained on that ground.

For the error pointed out, the judgment must be reversed, with costs to the appellant, and a new trial awarded.

PENNSYLVANIA SUPREME COURT.

J. L. BROWN

v.

William H. PETTIT *et al.*, Admsrs., etc., of
John S. Davis, Deceased, *et al.*, Appts.

(178 Pa. 17.)

The indorsement of a firm name on a note to the firm from one partner, made in his handwriting, and his discount of the note to his own credit at a bank, are sufficient to put the banker upon inquiry and prevent him from being a bona fide holder, if the indorsement was unauthorized.

(October 5, 1896.)

APPEAL by the administrators of John S. Davis, deceased, from a judgment of the Court of Common Pleas for McKean County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Webb Evans and John S. Davis were partners in business. Evans borrowed money of plaintiff, a banker, upon a note in the following form:

Four months after date I promise to pay to the order of Davis & Evans \$1,250 at the banking house of J. L. Brown, Wilcox, Pa., without defalcation. Value received.

Webb Evans.

He indorsed the note "Davis & Evans" and Joshua Davis stated that the money was for the benefit of the firm, but had the money placed to his individual account. No part of the money was used in the partnership business. Davis was wholly ignorant of the transaction.

Further facts are stated in the opinion.

Messrs. W. P. Weston, Bouton & Gallop, and J. M. McClure, for appellants:

The circumstances were such as to invite inquiry, and the appellee having failed to inquire, bad faith on his part is to be implied, and his claim to be a bona fide holder thereby defeated.

Smith v. Harlow, 64 Me. 510; 2 Randolph, Com. Paper, 999; *Merritt v. Northern R. Co.* 12 Barb. 605; *Tanner v. Hall*, 1 Pa. 417; *Hendrie v. Berkowitz*, 37 Cal. 113; Wood's Byles, Bills & Notes, 101, note 5; *New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574; *Miller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 475; *Haldeman v. Bank of Middletown*, 28 Pa. 440, 70 Am. Dec. 142; *Central Nat. Bank v. Frye*, 148 Mass. 498.

Messrs. William Wallace Brown, T. A. Lamb, A. P. Huey, and F. P. Schoonmaker, for appellee:

The plaintiff is a bona fide holder of a negotiable note for value before maturity, and the only thing that can defeat his recovery will be bad faith on his part, and the burden to prove this bad faith is on the defendants. Even though it should be shown that the plaintiff took the note under circumstances which ought to have excited the suspicion of a prudent man, it would not prevent recovery.

Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402; *McSparan v. Neely*, 91 Pa. 17; *Second Nat. Bank v. Morgan*, 165 Pa. 199; *Richards v. Monroe*, 85 Iowa, 359; *Kitchen v. Loudenback*, 48 Ohio St. 177; *Breckenridge v. Lewis*, 84 Me. 349; *Farrell v. Lovett*, 68 Me. 326, 23 Am. Rep. 59.

Where an individual was a member of two firms, and drew a promissory note to himself, signed it with the name of one firm, and indorsed it with the name of the other firm, it will not present such a case as would compel the plaintiff, a holder for value before maturity, to prove the assent of the partners to such indorsement, or that the proceeds were applied to the benefit of the firm.

Thmsen v. Negley, 25 Pa. 297.

NOTE.—For the effect of circumstances to put a purchaser of negotiable paper upon inquiry, see also *National Park Bank v. German-American* 84 L. R. A.

Mut. Warehouse & S. Co. (N. Y.) 5 L. R. A. 678; also *Canajoharie Nat. Bank v. Diefendorf (N. Y.)* 10 L. R. A. 676, and other cases in note.

The fact that the note and the indorsement are all in the handwriting of the defendant, Webb Evans, is not such an indication of bad faith as appellants seem to think as would make it the duty of the bank discounting it to inquire into his authority for his act.

Ibid.; *Miller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 476.

In *Haldeman v. Bank of Middletown* the court said that the draft was discounted upon the request of Haldeman and the proceeds paid to him is entirely immaterial.

Ex parte Bonbonus, 8 Ves. Jr. 542; *Tanner v. Hall*, 1 Pa. 417.

Where an executor pledges the stock of his estate for a loan which he alleges is for the benefit of his estate, but the proceeds of which are placed by the bank to his individual credit and appropriated by him to his own use, the estate could not recover the stock from the bank.

1 Cook, Stock & Stockholders, 442; *Goodwin v. American Nat. Bank*, 48 Conn. 550.

The form of the note is not such that bad faith is applied upon the part of the plaintiff. *Moorehead v. Gilmore*, 77 Pa. 118, 18 Am. Rep. 485; *Potts v. Taylor*, 140 Pa. 601.

Green, J., delivered the opinion of the court:

In this case the undisputed facts were that Webb Evans was the maker of the note in his own name, made it payable to the order of his firm, Davis & Evans, indorsed the name of the firm on the note, and requested the plaintiff to place the proceeds of the discount to his personal credit on the books of the bank. As between Webb Evans and the firm of Davis & Evans, on the face of the paper, disregarding the forged indorsement of Joshua Davis, the proceeds of the discount should have been placed to the credit of Davis & Evans. That firm, as well as Webb Evans, had an account on the books of the bank, and, in ordinary course, should have had credit for the proceeds. Had Webb Evans indorsed the note in his own name after the indorsement of Davis & Evans, then the face of the paper would have presented an apparent title in Webb Evans, and in its ordinary commercial aspect the paper, with the personal request of Webb Evans to have the proceeds placed to his credit, would not have been out of the usual course. But, with the apparent title to the note being in Davis & Evans, a request by the maker to have the proceeds placed to his individual credit was out of the usual course; and we think, under the authorities, the bank became subject to a duty of inquiry. It seems to us that these facts bring the case within the ruling in *Cooper v. McClurkan*, 22 Pa. 80, and *Tanner v. Hall*, 1 Pa. 417, and distinguish it from the other cases cited for the appellee. In *Cooper v. McClurkan* the facts are briefly stated in the opinion thus: "McClurkan & Fleming were partners in trade, and Fleming drew a bill of exchange in the partnership on himself, and negotiated it to the plaintiff; and now, in a suit upon it, McClurkan defends on the ground that it was not a partnership transaction. This appears to be well taken, for the case, without other evidence, stands just as if Fleming had given the indorsement of his partnership on

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his own note as security for his own debt, which he could not do. 1 Pa. 417." This is precisely what was done by Webb Evans. He gave his own note to his firm for the amount of the note. He then indorsed the firm name on the note, and therefore pledged the liability of the firm for his own debt, and this he could not do. The proper thing for him to do, in ordinary commercial usage, would have been to deposit the note, or its proceeds if discounted, to the credit of the firm. When he did not do that, he departed from the usual course, in requesting the bank to place the proceeds to the credit of his private account, and thereby made a manifest misappropriation of the firm's money to his own use. The responsibility of the bank, in such circumstances, is thus shown in the opinion of Lowrie, J., in the case just cited. He says: "The plaintiff says he is a bona fide holder without notice of the character of the paper. Is he without notice? He is not if the proper inquiries usually made by a prudent man would have led him to the knowledge of the fact that the acceptor or principal debtor had himself drawn the bill, or, in other words, made the contract that is intended to pledge the partnership as security for himself. Common prudence demanded that the authenticity of the signature of the drawers should be ascertained and this led directly to the fact that it was made by Fleming himself, and common sense would indicate that Fleming had no right to bind his partner as his surety. It is urged that, in borrowing money, copartners may give to their negotiable paper what form they please, and that therefore they ought to be liable here notwithstanding the form. The premise is true, but the conclusion needs, for its support, the proof that the copartners did borrow the money. If they did, then Fleming is an accommodation acceptor, and the drawers are bound as the real debtors. Without this proof we must take the apparent transaction to be the true one, and regard Fleming as borrowing money for himself, and attempting to pledge his partner as his surety; that is, we must decide the case according to the evidence." Every word of this is directly applicable to the case at bar, only with increased force, because here the paper was the direct obligation of Webb Evans alone to his firm, and was palpable notice to the bank that it was his private debt to his firm. When he indorsed the firm's name, and asked the banker nevertheless to place the proceeds to his individual credit, it was a direct and immediate application, with the knowledge and consent of the banker, of the firm's money to the personal use of the maker.

Tanner v. Hall, 1 Pa. 417, is in the same line. We held there that an indorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank which discounts it to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. Gibson, Ch. J., stating the facts, said: "Hall drew the note in question in favor of H. Cochran & Co., procured their indorsement of it, indorsed it with the name of his own firm, had

it discounted at the Lumberman's Bank, and had the proceeds put to the credit of his separate account. . . . But that Hall had drawn ostensibly for his separate accommodation, sufficiently indicated that his firm's indorsement was also for his separate accommodation, and made it the duty of the bank to inquire into his authority for the act, as it would have been bound to do had he indorsed the name of the firm on the note of a stranger. The bank then, and the present holder, are affected with knowledge that the transaction was a separate one; and we have the naked case of a note indorsed with the name of a firm, in a transaction out of the line of its business; from which the conclusion is unavoidable, that it was discounted on the faith of an indorsement which was void for want of previous authority or subsequent confirmation." The present case is stronger than this, because there was no intervening third party, outside of the firm, who had made a genuine indorsement for the accommodation of the maker. Here the transaction was direct. The partner made his own note to his own firm, and then indorsed the firm name, and, with the knowledge and participation of the bank, took the proceeds to his own use. It was affirmatively testified by the other partner that he knew nothing of the transaction; that the firm got no part of the proceeds, directly or indirectly; and it was not shown that there was any course of dealing by which indorsements of the firm name by Webb Evans on paper such as this was ever sanctioned or approved by the firm. The nature of the transaction directly informed the bank that the firm indorsement was made by Evans for his private use, and that knowledge put them upon inquiry. In the case of *Miller v. Consolidation Bank*, 48 Pa. 514, 88 Am. Dec. 475, Agnew, J., in commenting on *Tanner v. Hall*, 1 Pa. 417, and pointing out the difference between the two cases, said: "The case of *Tanner v. Hall* differs widely from this. There Hall drew his separate note for his own accommodation to the order of another firm who indorsed it. Then he indorsed the name of his own firm, and procured it to be discounted. It was held that the form of the note and the circumstances sufficiently indicated to the bank that the note was for his individual accommodation, and thus put the bank upon notice."

The case of *Haldeman v. Bank of Middletown*, 28 Pa. 440, 70 Am. Dec. 142, is cited for the appellee with much confidence, and is

claimed to rule in this case. But a very slight examination of the facts in that case shows it to be radically different from this. The draft was drawn in the firm name, in favor of Haldeman, who was one of the partners. Ostensibly, therefore, and on the face of the paper, it purported to be the obligation of the firm to one of its own members. Upon such paper the payee was apparently the owner of the paper, and, in regular course of business, would be entitled to have the proceeds of the draft. There was nothing to give notice to the bank that the transaction was out of the usual course, or was, or was intended to be, a fraud upon the firm. It was upon these grounds that the case was ruled. Said Knox, J., in delivering the opinion: "The case depends upon the question whether the bank was bound to inquire as to the authority of Haldeman to draw the draft in the firm name. It is not pretended that the bank had actual notice that the discount was for Haldeman's separate use; but it is alleged that the form of the draft was sufficient to put the bank upon inquiry. The draft was made payable to Peter Haldeman's order. Was this an indication that it was not drawn by the firm in the usual course of its business? Certainly it was not; for although it may not be the ordinary form in which bills are drawn, it is by no means an unusual transaction, when the object of drawing a draft is to raise money for a firm that it should be made payable to the order and indorsed by one of the members of the firm. . . . Where a draft or bill drawn in the name of the firm by one of the partners is offered for discount, the presumption is that drawing the draft was a partnership transaction, even although it was made payable to the order of one of the members of the firm. Actual knowledge that a bill or note purporting to be drawn or made by a firm was given without the consent of some of the partners, is a good defense as to the nonconsenting partners, but the presumption that the paper is what it purports to be, cannot be overthrown upon a mere matter of form in inserting the name of one of the members of a partnership as payee." The case of *Ihmsen v. Negley*, 25 Pa. 297, is also of the same character, as is fully explained in the opinion in the last case cited. We think the assignments of error are all sustained.

Judgment reversed, and venire de novo awarded.

TENNESSEE SUPREME COURT.

REELFOOT LAKE LEVEE DISTRICT
et al., Appts.,
v.

C. C. DAWSON, Sheriff, et al.

(.....Tenn.)

1. A tax on any property in specie or by the acre is contrary to Const. art. 2, § 28, requiring all property to be taxed according to its value.

2. A tax on land alone in a certain levee district, but excepting land under water, violates Const. art. 2, § 28, requiring all property, real, personal, or mixed, to be taxed.

3. A special tax on land in a levee district, which is especially benefited by a levee for which the tax is made, is a tax within Const. art. 2, § 28, requiring taxes to be levied on all property, real, personal, and mixed, and levied according to value.

NOTE.—Similar to the above case and against the authorities in some states, is *Mauldin v. Greenville* (S. C.) 27 L. R. A. 284.

As to the theory of special benefits to sustain as-
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sessments, see *Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755, and note; and *Oregon & C. R. Co. v. Portland* (Or.) 22 L. R. A. 713.

4. The police power of the state does not extend to the levying of special assessments on property benefited by a levee.
5. The legislature cannot delegate to a levee district the legislative power to levy a tax other than under Const. art. 2, authorizing it to delegate such power to counties and incorporated towns, since this impliedly excludes delegation to any other agency.
6. A levee district created by special law is not within a constitutional prohibition against creating corporations by special law.
7. Taxation of property in a levee district for a levee to protect the property is for a public purpose because beneficial to a large community of people and also to the state.

(June 30, 1896.)

APPPEAL by complainants from a decree of the Chancery Court for Dyer County dismissing a bill filed to have declared the result of an election which had been held to determine whether or not a certain levee should be constructed and a tax levied to meet the expenses. *Affirmed.*

The facts are stated in the opinion.

Messrs. M. M. Marshall, Harwood & Tyree, and Deason & Rankin, for appellees:

This act has three provisions that are repugnant to the constitutional requirement of equality and uniformity of taxation according to value:

1. It provides for the levy of a tax of 10 cents per acre on all the land taxed, indiscriminately, whether the land be worth 30 cents or \$50 an acre.

2. It exempts from taxation all the land "now covered by the waters of Reelfoot lake."

3. All the personal property within the boundaries of the levee district is entirely exempt, as no provision is made by said act for the taxation of anything but land.

McBeon v. Chandler, 9 Heisk. 849, 24 Am. Rep. 308; *Mugler v. Kansas*, 128 U. S. 661, 31 L. ed. 210; *Wilcox v. Paddock*, 65 Mich. 28; *People v. Gillson*, 109 N. Y. 898; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *People, Butler v. Saginaw County Suprs.* 26 Mich. 29; *Jenal v. Green Island Draining Co.* 12 Neb. 168.

The act violates art. 2, § 8, of the Constitution of Tennessee in undertaking to create a corporation by special act.

State v. Wilson, 12 Lea, 247; *Keesee v. Civil Dist. Bd. of Edu.* 6 Coldw. 127; *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.* 108 U. S. 707, 28 L. ed. 601; *Board of Directors For Levying Wabash River v. Houston*, 71 Ill. 818; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 850; *Schultes v. Eberly*, 82 Ala. 242.

The act violates art. 7, §§ 1 et seq., of the Constitution of Tennessee in that it creates tax assessors and tax collectors and other officers without an election of the voters or the people.

Pope v. Phifer, 3 Heisk. 699; *State v. Ross*, 7 Yerg. 75; *People, Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People, Hubbard v. Springwell's Twp. Board*, 25 Mich. 153; *People, Park Comrs., v. Detroit*, 28 Mich. 224, 15 Am. Rep. 202; *Wilcox v. Paddock*, and *Schultes v. Eberly*, *supra*; *Keany v. Bricker*, 60 Pa. 16; *Cypress Pond Draining Co. v. Hooper*, *supra*; *Harward* 24 L. R. A.

v. St. Clair & M. Levee & D. Co. 51 Ill. 130; *Hessler v. Drainage Comrs.* 53 Ill. 111.

The act violates art. 2, § 29, of the Tennessee Constitution in delegating the taxing power to other than a municipal corporation or a county.

Marr v. Enloe, 1 Yerg. 452; *Waterhouse v. Cleveland Public Schools*, 8 Heisk. 857; *Lisecombs v. Dean*, 1 Lea, 550; *Luehrman v. Shelby County Taxing Dist.* 2 Lea, 550; *Kersee v. Civil Dist. Bd. of Edu.* 6 Coldw. 130; *Pope v. Phifer*, *supra*.

Messrs. M. A. Lowe and Leech & Savage, for appellees:

This statute is not a delegation of the taxing power. The body incorporated by this statute has for its purpose to accomplish a public use and purpose.

Turlock Irrig. Dist. v. Williams, 76 Cal. 360.

Such corporations are quasi corporations which are political in their character and are agencies for exercising the powers and duties of local government.

State, Baltzell v. Stewart, 74 Wis. 620, 6 L. R. A. 394; *Carson v. St. Francis Levee Dist.* 59 Ark. 513; *State v. Armstrong*, 3 Sneed, 634; *Morrison v. Shelton*, 1 Head, 24.

The power to make laws has been surrendered by the people and vested in the legislature, so that no law can be made by or emanate from them; but this does not prove that it would be an infringement of the Constitution for their representatives to call for and defer to their opinion on the subject of a new law fully matured by them in all its parts before it shall go into effect.

Louisville & N. R. Co. v. Davidson County Ct. 1 Sneed, 675, 62 Am. Dec. 424.

This statute is an exercise of the police power.

Cooley, Const. Lim. 6th ed. 783; *Carson v. St. Francis Levee Dist.* *supra*; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637; *O'Reiley v. Kankakee Valley Draining Co.* 82 Ind. 169; *Wurts v. Hoagland*, 114 U. S. 611, 29 L. ed. 230; *Tide-Water Co. v. Coaler*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *State, Baltzell v. Stewart*, and *Turlock Irrig. Dist. v. Williams*, *supra*; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569.

Taxation in the sense of art. 2, §§ 28 and 29, of our state Constitution means the exactions by the state government paid by the citizens to the state as a state, and for its support and exactions paid by the citizens to the county and municipal corporations as such for their purposes as municipalities and counties. It means revenue for the purposes of government. The assessment form of taxation has as its foundation special benefit to the property of the citizen.

Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330; *Cooley, Const. Lim.* 6th ed. 613; *Weeks v. Milwaukee*, 10 Wis. 242; *St. Joseph, Gibson v. Owen*, 110 Mo. 445; *St. Joseph, Gibson v. Furrell*, 106 Mo. 437; *Broad Street*, 165 Pa. 475; *Norfolk v. Chamberlain*, 89 Va. 196; *People, Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Louisiana, Southern Bank v. Pillsbury*, 105 U. S. 290, 26 L. ed. 1094; *Mo-Rear v. Chandler*, 9 Heisk. 850, 24 Am. Rep. 308.

The judgment of the legislature expressed in the method of taxation shown in the statute cannot be questioned by the courts.

Reclamation Dist. No. 108 v. Hagar, 66 Cal. 54; *Spencer v. Merchant*, 125 U. S. 355, 31 L. ed. 767; *Cooley*, Const. Lim. 6th ed. 623; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 705, 28 L. ed. 571.

The court will not interfere "unless it appear there is an absence of power, or that the particular method prescribed for the assessment of the peculiar benefits to the abutting property is so plainly inequitable as to offend some constitutional principle.

St. Joseph, Gibson, v. Owen, *St. Joseph, Gibson, v. Farrell*, *Raleigh v. Peace*, and *Norfolk v. Chamberlain*, *supra*.

The bottom of the lake and the land outside the levee are excepted from taxation under § 21 of the act. This is in keeping with the foundation of a special or assessment tax,—that it is an equivalent for a benefit conferred.

Cypress Pond Draining Co. v. Hooper, 2 Met. (Ky.) 850, cited in note to *Cooley*, Const. Lim. 6th ed. 604.

Caldwell, J., delivered the opinion of the court:

In June, 1895, the legislature of the state, while in extraordinary session, by special act, created the Reelfoot Lake levee district, comprising certain territory in the counties of Lake, Obion, Dyer, and Lauderdale, "known as a part of Reelfoot Lake Basin of overflowed lands," and appointed two citizens of each of those counties as "a board of directors" therefor, to serve until the 1st Monday in March, 1898, and until the appointment and qualification of their successors; the said board to have power to "sue and be sued, plead and be impleaded, and have continual succession," for the purpose, and with the power and duty, of erecting and maintaining a levee sufficient to shield and protect the territory mentioned from recurring overflows by the waters of the Mississippi river. Acts 1895 (Ex. Sess.) chap. 1, §§ 1-4. The 5th section of the act provides for the organization of the board; for an estimate by it of the amount of land within the district subject to overflow, of the length and height of the levee required for its protection, and of the probable cost of the same; and for a submission of the question of the necessary taxation to a vote of the people of the district. And the 6th section is as follows: "That for the purposes of building and maintaining the levee aforesaid, and for carrying into effect the objects and purposes of this act, the board of levee directors shall have the power, and it is hereby made their duty, to assess and levy a contribution tax, not exceeding 10 cents per acre, and 2 per cent valuation tax on all the land embraced within the said boundary of said levee district herein named; provided that the board of directors, through their president and secretary, shall notify the sheriffs of Dyer, Lake, Lauderdale, and Obion counties to open and hold an election at the various voting places in the parts of the four (4) counties embraced within the area and bounded and described in the 1st section of this act; and it is hereby made the duty of the said sheriffs aforesaid, upon receiving such notice from the board

of directors hereby created by this act, to open and hold said election in the usual manner prescribed by law for popular elections, after giving not less than ten days' public notice at five (5) different public places in the overflowed district, of each county named, and at the time and places named by them; all the leading and qualified electors according to law shall be entitled to vote at such election, and at such election the proposition shall be written or printed on the tickets so voted, 'For assessment,' or 'No assessment,' and the said sheriffs shall make returns of the said election to the secretary of the levee board, and also to the secretary of state, Nashville, Tennessee, and if it appears that three fourths of those voting are in favor of the assessment, it shall then be the duty of said board of directors to levy said tax for that year, and annually thereafter, so long as it shall be found necessary to accomplish the objects of this act." Section 7 requires the board of directors to elect four citizens of the district—one from each county—to act as a board of tax assessors for the district; and § 8 requires the board of directors to elect from the citizens of the district four tax collectors, one in and for the included portion of each county. The 20th section empowers the board of directors to issue and sell long-term, 6 per cent bonds, from time to time, not to exceed \$700,000 in all, "to raise funds to carry out the purposes" of the act; and the 21st section is as follows: "That for the purpose of providing for the payment of the interest on the bonds authorized by § 20, annually, and to provide a sinking fund for their ultimate redemption, it is hereby enacted that a tax per acre on all the lands embraced within the boundary described in § 1 of this act (except the area now covered by standing water of Reelfoot lake, and the lands outside of the levee), sufficient in total amount to pay the interest on the bonds issued, shall be assessed and collected annually; provided, the said tax shall not exceed 10 cents per acre; and provided further, that an assessment on the valuation of the lands, not exceeding two (2) per cent, shall be assessed annually, and collected as provided for in §§ 6, 7, and 8 of this act, and the same shall be paid over to the treasurer of said board, giving priority to the bonds of first date."

On the 14th day of November, 1895, the Reelfoot lake levee district, by and through its board of directors, and jointly with certain other persons, landowners of Lake county, filed the present bill in the chancery court of Dyer county against the sheriff of the latter county and other citizens thereof, some of them being election officers and others landowners and taxpayers in that part of Dyer county within the levee district. Complainants alleged, among other things, and in substance, that the board of directors provided for by the act was promptly organized, and that it entered upon its duties as therein directed; that it made all requisite estimates for construction and taxation, and thereupon submitted to the vote of the people of the district, in the manner prescribed in the 6th section, their recommendation of a present annual tax of 10 cents on the acre, and of 2 per cent on the value, of all taxable lands within the levee

district; that an election was held throughout the district, upon this recommendation, on the 10th day of September, 1895, and resulted, as shown by the returns sent to the secretary of the board, in a total of 732 votes "For assessment," and 632 votes for "No assessment," that 497 of the votes for "No assessment" were fraudulently cast in Dyer county by persons known not to be legally qualified to vote in that election; that, counting such fraudulent and illegal ballots, the proposed taxation was defeated, and, rejecting them, it was approved. And upon these allegations complainants prayed the court to purge the returns from specified precincts in that county, and eliminate therefrom the alleged illegal and fraudulent ballots, so that the true result might be declared, and its legitimate advantages enjoyed by the people of the levee district. The defendants, by demurrer, disputed the jurisdiction of the court, and also impeached the act in question, as being in violation of the state Constitution in several particulars. Chancellor Cooper, hearing the cause upon these pleadings, sustained the demurrer so far as it assailed the act for violation of the revenue provisions of the Constitution, but overruled it as to other questions. The act was adjudged unconstitutional, and the bill dismissed. Complainants have appealed, and the debate of learned counsel before this court, though embracing the whole demurrer, has been addressed chiefly to the grounds sustained by the chancellor; one side denying, and the other affirming, the correctness of the decree in respect thereto.

The power of taxation is an incident of sovereignty,—a prerogative, coeval with the government itself, and indispensable to its perpetuity. It is essentially a legislative power, and as such, in the general appointment of governmental powers, falls to the legislative department, under § 3, art. 2, of the Constitution which vests "the legislative authority" of the state in the "general assembly." *Marr v. Enloe*, 1 Yerg. 454; *Keece v. Civil Dist. Bd. of Edu.* 6 Coldw. 180; *Waterhouse v. Cleveland Public Schools*, 8 Heisk. 359; *Memphis v. Union & P. Bank*, 91 Tenn. 550; *Cooley*, Taxn. 2d ed. pp. 4, 41; *Burroughs*, Taxn. § 6; 25 Am. & Eng. Enc. Law, p. 18. In respect to taxation, therefore, as to all other subjects of legislation, the general assembly has full power to pass any law not in conflict with the delegated powers of the Federal government, or with the restrictions of the state Constitution; and he who would show the unconstitutionality of the tax legislation, as of other legislation, must be able to put his finger on the provision of the Constitution, Federal or state, violated thereby. *Bell v. Bank of Nashville*, Peck (Tenn.) 269; *Hopie v. Deaderick*, 8 Humph. 8, 47 Am. Dec. 597; *Demoville v. Davidson County*, 87 Tenn. 220; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 511, 12 L. R. A. 70. Confessedly, the act before us does not violate any provision of the Federal Constitution. The restrictions of the state Constitution on the subject of taxation are found in §§ 28 and 29 of art. 2 of the Constitution of 1870. Such parts of those sections as it is desirable now to quote are in the following language, namely:

"Sec. 28. All property, real, personal, or

mixed, shall be taxed, but the legislature may except such as may be held by the state, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except \$1,000 worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer or his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value.

"Sec. 29. The general assembly shall have power to authorize the several counties and incorporated towns in this state, to impose taxes for county and corporate purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value upon the principles established in regard to state taxation.

The language of both sections is plain and positive. Its meaning cannot be mistaken, nor its force evaded. Both sections are mandatory in at least two points that are urged against the present act. Section 28 imperatively requires (1) that all property, of whatever kind, except that mentioned for conditional and unconditional exemption, shall be taxed; and (2) that all such taxable property shall be taxed according to its value. Section 29, though not repeating the first sentence of § 28, makes the same imperative requirements; so that whether a given tax law falls under the one section or the other, or under both of them, those requirements are equally applicable and mandatory. In every instance the requirement that all property (except that mentioned for exemption) shall be taxed, prohibits the legislature from making additional exemptions. *Nashville & K. R. Co. v. Wilson County*, 59 Tenn. 608; *Memphis v. Memphis City Bank*, 91 Tenn. 588. And likewise the requirement that all such property shall be taxed according to its value prohibits the legislature from laying a tax on any property *in specie*, or by the acre. Under the Constitution of 1796, lands were taxed by the 100 acres; but the Constitution of 1834, like that of 1870, contained the provision that "all property shall be taxed according to its value." This means that every property tax shall be graduated by the value of the property on which it is laid. *Jenkins v. Ewin*, 8 Heisk. 478; *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561; *South Nashville Street R. Co. v. Morrow*, 37 Tenn. 406, 2 L. R. A. 853. The 6th section of the act before us utterly ignores the first-named requirement, in that it expressly limits taxes therein provided for to land alone, and thereby exempts all property,—that without as well as that within the exceptions mentioned in the fundamental law; and it also ignores the second-named requirement, in that it provides for taxation mainly by the acre, regardless of value, and not exclusively according to value. Section 31 of the act ignores both of those requirements in the same manner, and the first

one additionally, in that it expressly exempts from all taxation "the area now covered by standing water of Reelfoot lake;" that area being of some value, however small, and not being otherwise exempt.

There can be no doubt, therefore, that §§ 6 and 21 of the act violate the Constitution in the particulars mentioned, if the taxation contemplated by those sections is within and subject to the aforesaid limitations of the organic law. Complainants deny that it is within or subject to those limitations, and seek to sustain that denial and to vindicate the act by the contention that the burden intended to be imposed upon the citizen is a special assessment for the benefit of his land, and not a tax for the support of the state, or any county or municipality therein, and, consequently, that those limitations are inapplicable in this case. The distinction thus urged has been frequently considered by the courts. Judge Cooley, after referring to some of the cases on both sides of the question, says: "The fact very clearly appears that, while there is not such a concurrence of judicial opinion as would be desirable, the overwhelming weight of authority is in favor of the position that all such provisions for equality and uniformity in taxation, and for taxation by value, have no application to these special assessments. . . . It is safe to assume, as a result of the cases, that the constitutional provisions refer solely to state taxation, or, when they go further, to the general taxation for state, county, and municipal purposes; and though assessments are laid under the taxing power, and are in a certain sense taxes, yet that they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our Constitutions and statutes. They may therefore be laid on property specially benefited, notwithstanding such constitutional restrictions as have been mentioned." Cooley, *Taxn.* pp. 684, 686. It could serve no valuable purpose for us at this time to review, or even cite, the numerous adjudged cases on this vexed question. Our examination of them justifies full concurrence with Judge Cooley in the statement that the great weight of authority, for one reason and another, favors the distinction insisted upon by the complainants in this case. Nevertheless, it must be confessed that the adjudications found to be in the minority are not without support in sound reasoning. The great divergence in judicial decisions is due in part to a substantial difference in constitutional provisions, and in part to unlike interpretations put upon similar provisions. This court considered the question elaborately in 1872, and ranged itself with those courts holding what is now the minority view. It thought and held that the distinction then asserted, and now contended for,—being a distinction between local assessments and taxes,—was not allowable in this state, and therefore that local assessments according to lot frontage, and not according to value, were "absolutely void," because in conflict with §§ 28 and 29 of art. 2 of the Constitution, which requires that all taxes shall be equal and uniform, according to value. *McBean v. Chandler*, 9 Heisk. 849, 24 Am. Rep. 308. That construction was approved in the case of *Nashville v. Berry* (1877)

2 Tenn. Legal Rep. 26, and in that of *State v. Butler* (1883) 11 Lea, 419, and has in no instance been departed from. We have been able to find no decision of the court, prior or subsequent, in conflict with that construction. In 1845 it was decided in the case of *Franklin v. Maberry*, 6 Humph. 369, 44 Am. Dec. 315, that the legislature might lawfully authorize the passage of a municipal ordinance requiring lotowners to construct suitable sidewalks along the streets in front of their property at their own expense, and, in case of default, to pay to the corporation the cost of having the same done for them, although the burdens imposed thereby were not equal and uniform as to value, and were not intended to be so; but the ordinance involved in that case was sustained as a legitimate police regulation, and not as a piece of tax legislation. Referring to the ordinance, Judge Green, speaking for the court, said: "We do not think that this law levies a tax. A tax is a sum which is required to be paid by the citizens annually for revenue for public purposes. But this ordinance levies no sum of money to be paid by the citizens. It requires a duty to be performed for the well-being and comfort of the citizens of the town. It is in the nature of a nuisance to be removed. . . . The ordinance in question is therefore not unconstitutional on the ground of being an unequal tax." Id. 872. That ruling was followed in *Washington v. Nashville*, 1 Swan, 180; in *Whyte v. Nashville*, 2 Swan, 369; and in *Nashville v. Berry*, 2 Tenn. Legal Rep. 26. The last-named case, which was decided in 1877, refers to and approves the case of *McBean v. Chandler*, 9 Heisk. 849, 24 Am. Rep. 308, decided five years earlier; and this 9 Heisk. case approves the 6 Humph. and 1 Swan cases, *supra*; saying, however, that they should not be extended.

Coming back to the language of our Constitution, which, after all, must be controlling, we can entertain no other opinion than that the limitations of § 28 of art. 2 apply equally and alike to every kind of taxes that the legislature has the power to levy, whether they be levied for the support of the state government, as such, in the strict sense, or more especially for the benefit of particular governmental agencies or instrumentalities duly ordained for the accomplishment of authorized local ends. They apply to all taxes in which the state has either a direct or indirect interest; and, if an exaction be made of a citizen for an object in which the state is entirely without an interest, that exaction is not taxation, whatever it may be called. Such an exaction cannot be justified by the assertion that it flows from an exercise of the taxing power of the government. To come within that power, the demand upon the citizen must be made for a public purpose; and, in order that a purpose be public, it must include some advantage to the state in the aggregate, or in some one of its counties, incorporated towns, or other authorized governmental agencies or instrumentalities. If the purpose be exclusively private, then it is totally foreign to the taxing power. "It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose." Cooley, *Taxn.* p. 55. Every legitimate function of the taxing power of the government is embraced

in the word "taxation," and all legitimate taxation is embraced in that provision of the Constitution. Likewise, every exaction without that provision is without that power. "Tax" and "taxes," in their most comprehensive sense, and without qualification, are the words employed by the framers of the Constitution. These words, in their usual and general sense, include every burden that may be lawfully laid upon the citizen by virtue of the taxing power; and they must be so interpreted, in the absence of anything showing them to have been used with a different meaning. Constitutions must receive the same interpretation in this respect as other written instruments and laws. Judge Story, speaking on this subject, said: "In the first place, then, every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." Story, Const. § 461. No words of exception or exclusion, as to the purpose of any tax, are to be found in our Constitution. Words of exception and exclusion are used, but they relate alone to the property that may be and that shall be exempt from taxation altogether. The requirement that all property, except that exempt, shall be taxed, embraces every tax that may be legitimately levied; and the requirement that all taxable property shall be taxed according to its value likewise embraces every legitimate tax. These requirements apply in every case, whether the tax be general or special. In like manner, the direction that certain specified property shall be exempt from taxation, and that certain other property may be exempt in the discretion of the legislature, refers alike to each and every tax. If it be true that special assessments, as contradistinguished from general taxes, are not within the aforesaid requirements of equality and uniformity of taxation, and of taxation by value, it must be equally true that they are not within the direction as to exemption; and in the latter event they may include the whole of the taxpayer's personality at full value not deducting \$1,000 therefrom, nor excluding the direct product of the soil, and they may also include all property held for public, religious, charitable, scientific, literary, and educational purposes; and that, too, in the face of the direction that the first two items shall be, and the others may be and are, universally, exempted from general taxation. Special assessments are entirely within or entirely without the provisions of § 28 of art. 2 of the Constitution. If the former, then they are subject to the same requirements as general taxes; and, if the latter, then they are not

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subject to any of those requirements, and may rightfully be laid on property exempted from general taxes, such as the taxpayer's first \$1,000 worth of personality, the direct product of the soil in the hands of the producer or his immediate vendee, churches, schoolhouses, town-halls, court-houses, asylums, and even the statehouse itself, when within the territory contemplated. It is no answer to the latter suggestion to say that special assessments should be confined to the property especially benefited; for, if they be not subject to those provisions, there is nothing to prevent the inclusion of all property, that exempt as well as that not exempt from other taxation. It is not believed that the framers of the Constitution intended to restrict one kind of taxes and not the other kind, or that they intended to discriminate in favor of special assessments, and against general taxation; nor is it believed that they constructed an instrument susceptible of such interpretation. They included all taxes, and excluded none. Construing § 28, art. 2, of the Constitution, in a case involving a claim of exemption from taxation, this court recently said: "This provision comprehends the whole domain of taxation, and, in explicit terms, prescribes the maximum of exemptions, beyond which the legislature may not go. It declares what property may be and what shall be exempted from taxation, and directs that all the rest shall be taxed. By that mandatory direction the legislature is prohibited from making any other exemptions from taxation upon any ground or consideration whatever, and if it attempt to do so, the effort is unavailing and void for want of legislative power." *Memphis v. Memphis City Bank*, 91 Tenn. 588. It was truly said in that case that the particular section of the organic law under consideration there and here "comprehends the whole domain of taxation." The next section (29), however, expressly empowers the general assembly "to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively." The latter section relates alone to taxes laid for county and municipal purposes, and covers the whole domain of county and municipal taxation, so far as the same shall be delegated. *Waterhouse v. Cleveland Pub. Schools*, 8 Heisk. 857, 9 Baxt. 898; *Shelby County v. Tennessee Centennial Exposition Co.* 96 Tenn.—, 88 L. R. A. 717. And under it, as under § 28, the requirements with respect to equality and uniformity of taxation, and as to taxation according to value, must be observed (*Taylor v. Chandler*, 9 Heisk. 368), and all proper exemptions made, each county and each town acting for itself, and not being in any degree constrained or controlled by what any other county or town may have done or may do. Taxes laid primarily for the state must be laid on all nonexempt property according to value, so as to make them equal and uniform throughout the state; and taxes laid primarily for county, municipal, or other authorized local purposes must be laid on all nonexempt property according to value, so as to make them equal and uniform throughout the more restricted territory to be especially benefited thereby. It is perfectly manifest that the present act does not fall within § 29, because the

Reelfoot lake levee district is in no sense either a county or an incorporated town. All taxes that are leviable at all, except those authorized to be levied by counties and incorporated towns, respectively, must undoubtedly be levied by the legislature; and all taxes levied by the legislature must as certainly be levied with reference to the restrictions of § 28. It follows, therefore, that, if a levy of taxes for the benefit of the Reelfoot lake levee district be permissible at all, it must be made by the legislature, and subject to those restrictions. Whether taxes for such an object be allowable in any case will be considered hereafter.

Complainants contend in the next place that, if the act be not sustainable under the taxing power, it can be and should be sustained under the police power of the state. This latter power, like the former one, is an attribute of sovereignty; and it may rightfully have expression in the form of legislation, whenever needful for the promotion of public health, or the preservation of public safety, order, or wellbeing. Rules and regulations established in the proper exercise of this power often require the payment of money for certain specified objects, and thereby in some measure partake of the nature of tax laws, though in primary purpose entirely distinct from them. "The distinction between a demand of money under the police power, and one made under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power. . . . Only those cases, where regulation is the primary purpose, can be specially referred to the police power." Cooley, *Taxn.* pp. 586, 587. Obviously, the burden intended to be laid on the property of the citizen by the act under consideration is not primarily for regulation; but, on the contrary, revenue is the primary and greatly preponderating purpose, if not, indeed, the exclusive purpose, in the legislative mind. The paramount and controlling idea disclosed in every part of the act is to raise a fund with which to reclaim from frequent inundation a large body (some 300,000 acres) of land in the Mississippi valley, and thereby enhance its value and the wealth of its owners. Strictly speaking, it is without an element or feature of regulation. The health of the people in the locality might be somewhat improved, and even life itself might be saved accordingly, by the construction of the contemplated levee, and the consequent prevention of periodical overflows; but those are the most remote of the benefits to be anticipated from such a work, and were, likely not thought of by the members of the general assembly. Without further enlarging upon the subject, we hold unhesitatingly, that this legislation is in no sense referable to the police power of the state, and that it cannot be justified thereunder. It does not fall within the reason of *Franklin v. Maberry*, 6 Humph. 369, 44 Am. Dec. 315; *Washington v. Nashville*, 1 Swan, 180; *Whyte v. Nashville*, 2 Swan, 369; and *Nashville v. Berry*, 2 Tenn. Legal Rep. 26,—before mentioned, but

rather within that of *McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308, and *State v. Butler*, 11 Lea, 419,—before mentioned. The former cases ruled that the municipal ordinances therein considered were in the nature of regulations for the removal and prevention of nuisances along the sidewalks, and were therefore within the police power of the state; and the latter cases ruled that the special assessments there involved were for municipal purposes, in the general sense, and therefore within the taxing power.

The act is unconstitutional for the further reason that the legislature attempts thereby and therein to delegate a portion of the taxing power to the Reelfoot lake levee district, without express authorization so to do. It has already been seen that the power of taxation is essentially legislative, and, that being so, it fell to the legislative branch of the government, in the organic division of governmental power. Such being the case, that branch, and that branch alone, is authorized to levy taxes in the first instance, and it can delegate its power to do so only to the extent expressly stated in the 29th section of art. 2 of the fundamental law; that is, to the extent of authorizing counties and incorporated towns to levy taxes for county and corporation purposes, respectively. No department of the government can resign or abdicate any of its distinctive and essential powers to another department, and much less to a mere subdivision or inferior agency, unless expressly authorized by the organic law itself. *State v. Armstrong*, 3 Sneed, 654. "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation." Cooley, *Taxn.* p. 61; *Waterhouse v. Cleveland Public Schools*, 8 Heisk. 859. The mere apportionment of sovereign powers among the three co-ordinate branches of the state government, without more, imposed upon each of those branches the affirmative duty of exercising its own peculiar powers for itself, and prohibited the delegation of any of those powers, except in cases expressly permitted. Such was the interpretation of the Constitution of 1796, under which an act authorizing county courts to levy taxes for county purposes, and also another act authorizing a navigation tax in a collection of designated river counties, were adjudged to be unconstitutional and void because that instrument did not in terms empower the legislature to confer such authority upon county courts. *Marr v. Entoe*, 1 Yerg. 452. That case was decided at the close of the year 1830, and must have been well known to the delegates composing the convention that framed the Constitution of 1884. That convention had the power to abrogate the rule of construction announced and applied in that case totally, or to subject it to partial modifications. It chose the latter, and authorized the legislature to delegate the power of taxation to the counties and incorporated towns. This was done by the 29th section of the second article of the Constitution,

then framed and subsequently adopted. The convention did not mean to go further. The implication is irresistible that the expression of the authority to delegate the power to the counties and towns is an absolute exclusion of authority to delegate the power to any other agency. It is impossible to doubt that the convention designated the counties and incorporated towns, and authorized the power to be conferred on them, for the reason that without such designation the power of taxation would be restricted to the legislature only. *Keeves v. Civil Dist. Bd. of Edu.* 6 Coldw. 181. That provision of the Constitution of 1834 was copied literally into the Constitution of 1870, without any further modification; and it must be presumed to have been so copied with the understanding and intent that the whole of the taxing power should remain in the legislature, except that part expressly authorized to be delegated. *Waterhouse v. Cleveland Public Schools*, 8 Heisk. 859; *McBean v. Chandler*, 9 Heisk. 372, 24 Am. Rep. 308. The particular feature of the act that is most objectionable as a delegation of the taxing power is that in which the levee district is authorized to decide for itself what rate of taxation, if any, shall be laid annually, only the maximum rate being prescribed. The legislature, before passing the law, should have determined at least three things: (1) that the purpose in view was a proper purpose for taxation; (2) the annual rate required for the present; and (3) the rule under which it should be levied. These matters are within the legislative function, and cannot be delegated, in the absence of express authority of the fundamental law. Such questions may be left to counties and incorporated towns, in respect of their own taxes, and within proper limitations; but that is so because the general assembly is expressly empowered to grant them that authority. No other agency or instrumentality of the government can be given such power. Had the legislature adequate power to create by special law such an agency or instrumentality as that set forth in the act before us? We have been able to discover no good and valid reason why it had not. The intended creature was clearly not a private corporation, and consequently could not have been within the prohibition (Const. art. 11, § 8) that "no corporation shall be created by special law." *State v. Wilson*, 12 Lea. 246; *Ballentine v. Pulaski*, 15 Lea. 633; *Williams v. Nashville*, 89 Tenn. 490. Nor, indeed, was it to be a corporation at all. It could have been but an inferior agency or instrumentality of the state, in the nature of a taxing district, designed to reclaim and perpetually protect about 300,000 acres of land in the northwestern corner of the state,—rich and of great value, but for the periodical overflows to which it is subjected by the high waters of the Mississippi river. The accomplishment of such an object would greatly benefit the numerous owners of the soil, and thereby enhance the resources of the state and enlarge her wealth and population. The owners, who would have to bear the burden of reclamation and continued pro-

tection, would naturally and justly receive the greatest and most direct benefit. Nevertheless, the state would be benefited in the important respects just mentioned. Her general revenues would be increased, not by reason of her receipt of any part of the taxes to be raised under the special act, but because the taxable value of the lands reclaimed and protected would be increased, and the general taxes thereon correspondingly enlarged. The exaction made of the citizens of the district for such an object would be of a public nature, and therefore within the taxing power. It would be for a public purpose in a twofold sense: "First, because beneficial to a large community of people within the district; and, secondly, because beneficial to the state in the particulars already indicated. The taxes to be raised by and for such an agency or instrumentality, however, would be subject to the same requirements as are taxes levied for state, county, and municipal purposes, under §§ 28 and 29 of art. 2 of the Constitution. The creation of levee districts has been adjudged to be within the legislative power in Arkansas (*Carson v. St. Francis Levee Dist.* 59 Ark. 513), in Louisiana (*New Orleans Draining Co. Case*, 11 La. Ann. 338), in Mississippi (*Daily v. Sloop*, 47 Miss. 367), in Missouri (*Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 73 Am. Dec. 276), in Wisconsin (*Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637), and in other states; and the creation of irrigation districts has been held to be within that power in California (*Hagar v. Yolo County Supers.* 47 Cal. 223, and *Turlock Irrig. Dist. v. Williams*, 76 Cal. 860), and perhaps in other states. It is said by Judge Cooley that "taxing districts may be as numerous as the purposes for which taxes are levied." Cooley, Taxn. 151. It is not every act with unconstitutional provisions that must fail in toto. If, notwithstanding and withstanding such provisions, there be left enough for a complete law, capable of enforcement, and fairly answering the object of its passage, the courts will reject only the void parts, and enforce the residue. Cooley, Const. Lim. 215, 216; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 247, 23 L. R. A. 796, 32 S. W. 5; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed 318; *Florida C. R. Co. v. Schutte*, 103 U. S. 118, 26 L. ed. 327; *Tillman v. Coker*, 9 Bart. 429. We regret that the act before us is not susceptible of such division and enforcement. Taking out the taxing feature, and the act is completely emasculated. A levee district without a levee, or the means of constructing one, is a creature without force or power to exist.

Since the bill of complainants must inevitably fail for reasons already stated, it is entirely unnecessary to determine, or even consider, the question of jurisdiction.

Affirm the decree and dismiss the bill.

WISCONSIN SUPREME COURT.

Peter REUTER, *Appt.*,
v.

Catherine A. LAWE, *Exrx.*, etc., of George
W. Lawe, Deceased, *Resp.*

(.....Wis.....)

An equitable estoppel will preclude the public from claiming as a public park land so designated on a recorded plat, where it makes no claim to the land except by failing to assess it for taxes for many years, and then the owner files a new plat on which the land is described as his own property, after which he continues in possession as he always has done, takes down the old fence and makes a new one, expends money in other improvements upon it, pays taxes for a series of years upon it, and builds a sidewalk along one side by order of the city authorities, and there was an express adoption of his new plat about seven years after it was filed by an act incorporating the city.

(November 4, 1896.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Outagamie County in favor of defendant in an action brought to recover damages for breach of covenant of title in a deed of certain real estate. *Affirmed.*

Statement by **Marshall, J.**:-

On the 31st day of October, 1851, George W. Lawe was the owner in fee of certain lands situated in the city of Kaukauna, Outagamie county, Wisconsin, including the premises in question. On that day he caused to be made a plat of said lands, subdividing the same into lots and blocks, and on the 31st day of October, thereafter, caused such plat to be recorded in the office of the register of deeds of such county, for the purpose of establishing a legal town plat of the premises, pursuant to the provisions of chap. 41, Rev. Stat. 1849. On such plat the premises in dispute, except lots 5 and 14, are designated as "Public Square." Immediately after the plat was recorded, Lawe commenced selling lots, describing the same according to such plat, and it was, for all purposes, recognized by him and all persons claiming under him, and by the public as well, as a valid town plat, up to the time of the commencement of this action. On the 29th day of May, 1878, the title to the premises in dispute being in Lawe, except as affected by such plat, he joined with Meade and Black in making and placing on record a new plat covering the same and other lands adjoining. Such new plat was named "Lawe, Black, & Meade's Addition to Kaukauna." The making and recording of such new plat purported to be for the purpose of subdividing into lots and blocks the premises therein described, and making a legal plat thereof under the laws of the state of

Wisconsin respecting the subject. On such new plat, what was designated on the plat of 1851 as "Public Park," with a strip on the northwest side thereof 60 feet wide, in all making a tract 800 feet by 240 feet, was designated as "Lawe's Park." Such park, together with 240 feet by 120 feet on the northwesterly side thereof, subdivided into eight lots each 120 feet by 60 feet, was designated as "Block 21." From the time of the recording of the plat of 1851 till the 15th day of July, 1890, Lawe continued in the actual possession of the premises, the same being actually inclosed and used by him throughout substantially the whole period. The public, during such period, asserted no claim thereto, except in so far as the fact that, from the platting of 1851 till that of 1878, the premises were not assessed for taxes, may be held as a recognition of the existence of public rights therein. After such second platting, down to, and inclusive of, the year 1890, the premises were assessed for taxation and taxed as Lawe's property, and the taxes were paid each year by him, except for the year 1878, till he sold the property in 1890, as hereinafter stated. The city of Kaukauna was incorporated by chap. 11, Laws 1885, by which the aforesaid plats were expressly adopted, and provision was made for an official renumbering of lots by said city, and a re-platting and re-mapping of the premises covered by such plats. Thereafter, pursuant to such power, such proceedings were taken by or under the direction of the common council of said city that on the 1st day of May, 1890, an official plat of the premises was recorded, by which what had theretofore been known as "Lawe's Park" was subdivided into lots numbered 1 to 18 inclusive, of block 21. In 1895, soon after the organization of the city of Kaukauna under its charter, by order of the common council of such city, Lawe constructed a sidewalk along one side of such park. During the spring and summer of 1890, prior to the making of the deed hereinafter mentioned, Lawe incurred some expense in taking out stumps and otherwise improving the premises. On the 15th day of July, 1890, by warranty deed with full covenants, he conveyed the property to plaintiff. On the 17th day of July thereafter, by order of the common council of said city, such premises were stricken from the assessment roll for the year 1890, for the reason that the same had been purchased for school purposes. A purchase for such purposes does not definitely appear. We are left to infer that in some way the conveyance to plaintiff was for the benefit of the corporation for such purposes. In the month of October, thereafter, the city of Kaukauna, by its duly authorized officers, claimed the premises as a public park by virtue of a dedication thereof by the plat of 1851, and took actual possession of the same

NOTE.—As somewhat akin to the subject of the above case, see *note* to *Meyer v. Graham* (Neb.) 18 L. R. A. 146, as to the rights acquired against the public by adverse possession of a highway or city street.

For a denial of the doctrine of equitable estoppel to prevent the public from asserting its rights 34 L. R. A.

against an obstruction in a street, see *Webb v. Demopolis* (Ala.) 21 L. R. A. 62.

For the loss by the public of its right to a highway by mere nonuser or otherwise than by official action, see *note* to *Maire v. Kruse* (Wis.) 28 L. R. A. 440.

under such claim, and so continued up to the commencement of this action. This action was brought for breach of the covenants of title upon the ground that the claim of the city to the premises as a public park was valid, and that Lawe was not the owner thereof at the time he conveyed the same to the plaintiff. The trial court found that, at the time of the making of such deed, Lawe was the owner and seised in fee of the premises in dispute, and that plaintiff was such owner and was so seised under the aforesaid deed at the time of the commencement of this action, free from any claim of the city of Kaukauna, and ordered judgment accordingly, dismissing the complaint. Exceptions were taken to raise the questions discussed and referred to in the opinion. Judgment was rendered in accordance with the aforesaid order, and plaintiff appealed.

Mr. Humphrey Pierce, for appellant:

The town of Kaukauna plat of 1861 is a valid statutory dedication, and vested the title to the land marked "Public Square" thereon in the public for the public use; it substantially complies with the provisions of the statute in respect to plats.

Rev. Stat. 1849, chap. 41, § 5; *Ely v. Bates*, 5 Wis. 467; *Sanborn v. Chicago & N. W. R. Co.* 18 Wis. 20; *Williams v. Smith*, 22 Wis. 598; *Gebhardt v. Reeves*, 75 Ill. 301; *Williams v. Milwaukee Industrial Exposition Assn.* 79 Wis. 524; Dill. Mun. Corp. 4th ed. § 628, note 2.

Where a plat is in doubt it is to be resolved against the donor and in favor of the public.

Elliott, Roads & Streets, 111.

The rule of construction in plats is the same as in grants to effectuate intent of donor.

San Leandro v. Le Breton, 72 Cal. 170.

A mere mistake in the plat cannot affect the validity of the statutory conveyance.

Burbach v. Schweinler, 56 Wis. 890; *Ely v. Bates*, 5 Wis. 467.

Formalities in a plat of statutory dedication to public use are regarded the same as in an ordinary deed of conveyance.

State v. Schwein, 65 Wis. 214; *Emmons v. Milwaukee*, 32 Wis. 434; *Gardiner v. Tisdale*, 2 Wis. 155, 60 Am. Dec. 407.

A deed is sufficient if it is possible to identify the land from the description; and the deed will be sustained if possible, and arbitrary rules will be disregarded.

Devlin, Deeds, § 1012, citing *Scheider v. Kachler*, 49 Wis. 291; *Elliott, Roads & Streets*, 89; *Gebhardt v. Reeves*, 75 Ill. 301; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 22, 97 Am. Dec. 696; *Jarstadt v. Morgan*, 48 Wis. 249.

It was not necessary that the plat be accepted.

Rev. Stat. 1849, chap. 41, § 5; Anno. Rev. Stat. § 2268; *Pettibone v. Hamilton*, 40 Wis. 414; *Williams v. Smith*, 22 Wis. 594; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 1, 97 Am. Dec. 696; *San Leandro v. Le Breton*, 72 Cal. 175; *Elliott, Roads & Streets*, 87; Dill. Mun. Corp. 4th ed. § 628.

Acceptance of a portion of a plat is constructive acceptance of the whole, and acceptance of streets on a plat or map is acceptance also of the public square.

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Derby v. Alling, 40 Conn. 435; *Police Jury v. Foulhouse*, 30 La. Ann. 64; *Jersey City v. Morris Canal & Bkg. Co.* 12 N. J. Eq. 562; *Elliott, Roads & Streets*, 117; *Regan v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52; *Rhodes v. Brightwood (Ind.)* 43 N. E. 942; *Meier v. Portland C. R. Co.* 16 Or. 500, 1 L. R. A. 856; *Carter v. Portland*, 4 Or. 389; *Angell & D. Highways*, 3d ed. § 149.

When a person maps off his land into town lots and streets, and offers his lots for sale by reference to the map, there is no mistaking his intention.

Grogan v. Hayward, 4 Fed. Rep. 161; *Hicklin v. McClear*, 18 Or. 126; *Gregory v. Lincoln (Neb.)* 14 N. W. 423; *Giffen v. Olathe*, 44 Kan. 848; 2 Dill. Mun. Corp. §§ 628, 638, note 3; *Godfrey v. Alton*, 12 Ill. 80, 52 Am. Dec. 476; *Alvord v. Ashley*, 17 Ill. 363; *Belleville v. Stookey*, 28 Ill. 441; *Waugh v. Leech*, 28 Ill. 438; *Field v. Carr*, 59 Ill. 198; *Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Baker v. Johnston*, 21 Mich. 319; *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 17 L. ed. 818; *Donohoo v. Murray*, 63 Wis. 100; *Wiggins v. McCleary*, 49 N. Y. 346; *Heitz v. St. Louis*, 110 Mo. 618; *Maywood v. Maywood*, 118 Ill. 61; *Rices v. Dudley*, 3 Jones, Eq. 126, 67 Am. Dec. 231; 5 Am. & Eng. Enc. Law, title *Dedication*, p. 406, note 3, and cases cited, p. 407, note 3, and cases cited; *Elliott, Roads & Streets*, 90; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *United States v. Hodson*, 77 U. S. 10 Wall. 395, 19 L. ed. 937; *Jarstadt v. Morgan*, 48 Wis. 245; *Rowan v. Portland*, 8 B. Mon. 282; *Irvine v. Dixon*, 50 U. S. 9 How. 31, 13 L. ed. 34.

If there be public squares or places represented on the map, the same rule applies to them, and dedication thereof may be established in the same manner.

San Leandro v. Le Breton, 72 Cal. 175; *Wartown v. Coven*, 4 Paize, 510; *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; 5 Am. & Eng. Enc. Law, title, *Dedication*, p. 416, note 3, and cases cited; Dill. Mun. Corp. 4th ed. §§ 644, 645; *Lennig v. Ocean City Assn.* 41 N. J. Eq. 606, 56 Am. Rep. 16; 5 Am. & Eng. Enc. Law, p. 406.

Where the dedication is express, evidenced by a recorded plat, the intent as expressed in such plat cannot be contradicted by parol.

Rhodes v. Brightwood (Ind.) 43 N. E. 942; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

In case private rights accrue by reason of the dedication there can be no revocation.

Dill. Mun. Corp. § 632; *Rhodes v. Brightwood*, *supra*.

Mere nonuser of a public square until required by the public, however long continued, cannot operate as an abandonment, and all in possession will be presumed to hold in subordination to paramount rights of the public.

Reilly v. Racine, 51 Wis. 526; *State v. Leaver*, 62 Wis. 393; *Elliott, Roads & Streets*, 39; *Shaw v. Ottumwa*, 67 Iowa, 39; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 1, 97 Am. Dec. 696; *Derby v. Alling*, 40 Conn. 410; *Meier v. Portland C. R. Co.* 16 Or. 500, 1 L. R. A. 856; *Henshaw v. Hunting*, 1 Gray, 210.

No title could be acquired by Lawe under such claim of adverse possession.

Livermore v. Maquoketa, 35 Iowa, 858; *Bur-*

ans v. Van Zant, 7 Barb. 91; *San Leandro v. Le Breton*, 72 Cal. 170; *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *Grogan v. Hayward*, 4 Fed. Rep. 161; *Re Olean*, 135 N. Y. 341, 17 L. R. A. 640.

The continued occupation of land by one who has conveyed to another is presumed to be in subordination to the title of the grantor.

Schwalback v. Chicago, M. & St. P. R. Co., 69 Wis. 292; *Schwalback v. Chicago, M. & St. P. R. Co.*, 73 Wis. 139; *State v. Castle*, 44 Wis. 678; *Childs v. Nelson*, 69 Wis. 125; *Dill Mun. Corp.*, 4th ed. §§ 667-675; *Elliott, Roads & Streets*, 665-669; *Simplot v. Chicago, M. & St. P. R. Co.*, 16 Fed. Rep. 350; *Brooks v. Furrell*, 4 Fed. Rep. 161; *Kopf v. Utter*, 101 Pa. 27; *Com. v. Alburger*, 1 Whart 488; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Burbank v. Hay*, 65 N. Y. 71; *Driggs v. Phillips*, 103 N. Y. 77; *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 114, 32 Am. Rep. 286; *Walker v. Caywood*, 31 N. Y. 51; *San Francisco Bd. of Edu. v. Martin*, 92 Cal. 209; *Cross v. Morristown*, 18 N. J. Eq. 805; *Jersey City v. Morris Canal & Bkg. Co.*, 12 N. J. Eq. 561; *Archer v. Salinas*, 93 Cal. 51, 16 L. R. A. 145; *Logan County Supers. v. Lincoln*, 81 Ill. 156; *Indianapolis, P. & C. R. Co. v. Ross*, 47 Ind. 25; *Thibodeaux v. Maggioli*, 4 La. Ann. 78; *Ingram v. Police Jury*, 20 La. Ann. 226; *Louisiana Ice Mfg. Co. v. New Orleans*, 48 La. Ann. 217; *Coleman v. Thurmond*, 56 Tex. 519; *Vicksburg v. Marshall*, 59 Miss. 563; *Philadelphie v. Philadelphia & R. R. Co.*, 58 Pa. 258; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Memphis v. Lenore*, 6 Coldw. 412; *Rhodes v. Brightwood (Ind.)*, 43 N. E. 942.

Defendant's acts in his alleged adverse possession being a public nuisance no such possession could ripen into title.

Elliott, Roads & Streets, 668; *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 866, 10 L. R. A. 586.

The fact that the property was assessed and taxes thereon paid by Lawe does not affect the rights of the public therein; and especially is this true under all the circumstances appearing in the case.

Lenon v. Hayden, 18 Wis. 159; *Rhodes v. Brightwood, supra*; *San Leandro v. Le Breton*, 72 Cal. 170; *Re Commissioners of Public Parks*, 6 N. Y. Supp. 779; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Getchell v. Benedict*, 57 Iowa, 121; *Gilman v. Milwaukee*, 55 Wis. 328; *Angell & D. Highways*, § 821; *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120.

Mr. David S. Ordway, for respondent:

Making a plat of land by the proprietor showing lots, blocks, and streets evidently for the use of those who shall come to occupy the property, and their subsequent sale in such subdivisions according to the plat, is one of the clearest ways of declaring an intention to dedicate, and has been held to conclude the owner so far as the rights of subsequent purchasers are concerned.

Winnetka v. Prouty, 107 Ill. 225; *Grandville v. Jenison*, 84 Mich. 55; 5 Am. & Eng. Enc. Law, title, *Dedication*, p. 406.
84 L. R. A.

But he is not concluded as to the public unless the dedication is accepted by the public.

People v. Jones, 6 Mich. 176; *Tillman v. People*, 12 Mich. 401; *Lee v. Lake*, 14 Mich. 12, 90 Am. Dec. 220; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173.

And such acceptance must be within a reasonable time.

Wayne County v. Miller, 31 Mich. 447; *Field v. Manchester*, 32 Mich. 281; *Cass County Supers. v. Banks*, 44 Mich. 468; *People v. Beaubien*, 2 Dougl. (Mich.) 271.

When the legislature has provided the manner in which such transfer should be accomplished, a compliance with the requirements prescribed is just as essential in order that the original proprietor may be divested of title as the execution of a deed of conveyance would be in the transfer of real estate from one person to another on a purchase.

Gardiner v. Tisdale, 2 Wis. 185, 60 Am. Dec. 407; *People v. Beaubien*, 2 Dougl. (Mich.) 256; *Grand Rapids v. Hastings*, 86 Mich. 122; *People v. Jones*, 6 Mich. 184; *Emmons v. Milwaukee*, 33 Wis. 435.

Whether this plat was valid or not in order to a complete dedication it must have been accepted by the public before actual dedication.

Williams v. Milwaukee Industrial Exposition Asso., 79 Wis. 528; *Winnetka v. Prouty*, 107 Ill. 218; *Littler v. Lincoln*, 106 Ill. 353.

Until acceptance by the municipality, although the owner is estopped to deny the dedication, whenever private rights intervene the act of the owner in platting, etc., is in the nature of a mere offer to the municipality.

Chicago v. Gosselin, 4 Ill. App. 573; *Wayne County v. Miller*, 31 Mich. 447; *Field v. Manchester*, 32 Mich. 279; *Buskirk v. Strickland*, 47 Mich. 389; *Oswego v. Oswego Canal Co.*, 6 N. Y. 264; *Underwood v. Stuyvesant*, 19 Johns. 186, 10 Am. Dec. 215; *State v. Carver*, 5 Strobb. L. 217; *Russell v. New York C. R. Co.*, 26 Barb. 630; *Hamilton v. Chicago, B. & Q. R. Co.*, 124 Ill. 235; *Reilly v. Racine*, 51 Wis. 579.

The city as representing the public is concluded from now opening the park for public use after what has transpired.

Paine Lumber Co. v. Oakbrook, 89 Wis. 449; *Reilly v. Racine*, 51 Wis. 530; *Cochran v. Toher*, 14 Minn. 385; *Derusia v. Winnetka & St. P. R. Co.*, 18 Minn. 133; *Johnson v. Burlington (Iowa)*, 63 N. W. 694.

Marshall, J., delivered the opinion of the court:

Assuming, as appellants contend, that the recording of the plat of 1851 and the subsequent ratification of it by Lawe and the public, under Rev. Stat. 1849, chap. 41, § 5, operated to make a valid town plat and to vest the title to the premises in dispute in the public, notwithstanding noncompliance with statutory requirements, and without regard to any act of acceptance on the part of the public, yet we hold that the doctrine of equitable estoppel *in pais* applies to the case, and effectually bars the public from setting up any claim thereto. That rules this case, and the other questions raised need not be considered.

It is well settled that, though land be dedicated to the public use by a private owner, so as to vest the title in the donee for such use,

until, in the judgment of the trustees, the premises are needed for such use, mere nonuser for any period of time will not operate as an abandonment of the property, so as to revest the title thereto in the donor. *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 398; *Chase v. Oshkosh*, 81 Wis. 818. The title being once vested in the public, the corporation in which it is situated, and upon which devolves the duty to administer the trust, has a broad discretionary power respecting the time when the public interests require the actual enjoyment of the property, as intended by the donor. It can allow such donor, in the meantime, for some purposes at least, to use the property as his own. Neither nonuser by the public, nor such actual use by the donor, standing alone, however long continued, will affect the status of the public right. Nowhere is this principle more thoroughly intrenched than in the jurisprudence of this state. We may go further and say that if the title be once vested in the public under a dedication by a private owner, with or without acceptance by the donee, as circumstances may require, and the property is thereafter erroneously assessed and taxes collected thereon of the donor, that will not of itself, necessarily, affect the rights of the public. That is sustained by numerous well-considered cases cited by appellant's counsel. *Rhodes v. Brightwood* (Ind.) 43 N. E. 942; *San Leandro v. Le Breton*, 72 Cal. 170; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Getchell v. Benedict*, 57 Iowa, 121.

But notwithstanding what has preceded, it is not an open question in this court, that the conduct of a municipal corporation may be such that a change of its position will cause such injustice to those who have relied upon such conduct as to warrant the court in preventing such change by an application of the doctrine of equitable estoppel *in pais*. This subject was so exhaustively discussed in *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, opinion by Mr. Justice Pinney, that it is needless to go over the matter again at this time. It was there in effect held that, though a public corporation cannot alienate public streets and places, and mere laches on its part cannot defeat the public rights thereto, cases may arise where private rights have grown up so as to be in equity paramount to the public rights, and where the prevention of injustice requires the assertion of the doctrine of equitable estoppel *in pais* for the protection of such private rights.

The groundwork of the doctrine is that it would be a fraud in a party to assert what his previous course had denied, when on the faith of such denial others have acted. To prevent the injustice a change of position by such party would cause to such others, under such circumstances, where there is no adequate legal remedy, the doctrine of equitable estoppel comes in and does the work. That the equitable rule is applied as freely against the public, as against private persons, is not maintained, but that the courts may administer justice by its aid, even where that results in controlling the conduct of municipal corporations, when the facts are such in the judgment of the court

as to demand it to prevent manifest injustice and wrong to private persons, is firmly established. A large number of cases are cited in *Paine Lumber Co. v. Oshkosh*, *supra*, where this principle is maintained, to which may be added *State, Mylrea, v. Janesville Water Power Co.* 92 Wis. 496, 83 L. R. A. 891, recently decided by this court; also *Los Angeles v. Cohn*, 101 Cal. 878; *Simplot v. Chicago, M. & St. P. R. Co.* 16 Fed. Rep. 360; and *Oroker v. Collins*, 87 S. C. 387.

The plat of 1878, by which what was formerly known as "Public Park," with a small addition, was platted as Lawe's park; the tearing down of the rail fence about that time, and the construction of a new fence in its place, must be considered, we think, a distinct assertion of a private ownership of the property inconsistent with any public right thereto, and the commencement of possession adverse to the public. The taxing of the property thereafter as private property is a strong circumstance favoring such private ownership and abandonment, to be considered with all the other circumstances in determining whether Lawe was justified in treating it as so abandoned and incurring expense in taking care of and improving the same as discharged of any public right thereto. In *Simplot v. Dubuque*, 49 Iowa, 690, the court held that where lands are granted to a city for public use, and are thereafter occupied by the donor adversely for a long period of time and taxed to him, under the doctrine of equitable estoppel such city cannot subsequently deny the right of such occupant thereto.

In *Getchell v. Benedict*, *supra*, a distinction is made between cases where the lands taxed are adversely occupied and where not. We do not go so far as to approve the doctrine of *Simplot v. Dubuque*, *supra*, that the mere circumstances of adverse possession for a considerable length of time and taxation to adverse occupant and payment of such taxes by him, are sufficient to create an estoppel against the municipality. They are evidently important circumstances to be considered with the other facts in the case. The adoption of the second plat by the act incorporating the city of Kaukauna in 1885; the requirement made by such city of Lawe to build a sidewalk along the side of the park; the construction of such sidewalk; the payment of taxes assessed annually on the property for a long period of years, and the improvement of the property at considerable expense, relying upon the long-continued recognition of private ownership by the municipality in which all persons interested, so far as appears, acquiesced, with all the other facts and circumstances, show satisfactorily that, if a change of position on the part of the public be not allowed, such injustice and wrong will result as to warrant the application of the doctrine of equitable estoppel *in pais* to prevent such injustice. That, we assume, is the view the trial court took of the case, which answered the alleged breach of the covenants of title in the deed from Lawe to plaintiff, and sustains the findings and judgment appealed from.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

Nathan CUSHING

v.

T. Morris PEROT, *Appl.*

(175 Pa. 66.)

1. Judgment against a stockholder of a corporation, and execution levied on his real estate for an amount that exhausts his liability in the state where the corporation was created, are a bar to an action in another state on his liability as a stockholder.
2. It will be presumed, in the absence of any decision to the contrary in a sister state, that the contractual liability of a stockholder in that state goes to a receiver as assets for the payment of corporate debts.
3. A stockholder's liability, which is contractual under the statute, becomes a part of the assets which pass to a receiver for the payment of corporate debts.

(April 18, 1896.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of plaintiff in an action brought to enforce defendant's liability as a stockholder in an insolvent corporation. *Reversed.*

Perot subscribed to fifty shares of the par value of \$100 each of the capital stock of the Western Farm Mortgage Trust Company, a corporation created and doing business in Kansas. The corporation became insolvent. Plaintiff was its creditor. The Constitution and laws of Kansas required the individual stockholders to be personally liable for its debts to the amount equal to the stock held by him. Plaintiff recovered judgment against the corporation, which remaining unsatisfied, he instituted this suit to enforce defendant's

liability under the statutory provisions of the state of Kansas. Defendant resisted the claim on the ground that he was a citizen of Pennsylvania upon whom the laws of Kansas were not binding; that he was a creditor of the corporation to the amount equal to the stock liability, and he claimed a right to set-off of his claim against his indebtedness; that suit had been brought against him on his stock liability in Kansas and judgment entered and execution for the amount issued on real estate owned by him located there.

Further facts appear in the opinion.

Messrs. Albert S. Letchworth and William C. Hannis, for appellant:

The Kansas statute should not be enforced in this state, because: (a) It is penal in its character; (b) to enforce it in this state is a matter of comity, not of right, and it would work a hardship on a citizen of this state who has already paid more than his share; (c) justice cannot be done between the creditors and stockholders in this proceeding.

Dreisbach v. Price, 183 Pa. 560; *Woods v. Wicks*, 7 Lea. 40; *Derrickson v. Smith*, 27 N. J. L. 166; *Moies v. Sprague*, 9 R. I. 541; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; *Gridley v. Barnes*, 103 Ill. 211; *Sayles v. Brown*, 40 Fed. Rep. 8; *Patterson v. Lynde*, 112 Ill. 205; *Rice v. Merrimack Hosiery Co.* 56 N. H. 127; *May v. Black*, 77 Wis. 107; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Bank of North America v. Rindge*, 154 Mass. 208, 13 L. R. A. 56; *Fowler v. Lamson*, 146 Ill. 472; *Hoyt v. Bunker*, 50 Kan. 574; *Leucks v. Tredway*, 45 Mo. App. 507; *Universal F. Ins. Co. v. Tabor*, 18 Colo. 531; *Baines v. Babcock*, 95 Cal. 588; *Wilson v. Seligman*, 144 U. S. 41, 86 L. ed. 838; *Stutz v. Handley*, 41 Fed. Rep. 531; *Curran v. Bradner*, S. & Co. 27 Ill. App. 582; *Libbey v. Tobey*, 83 Me.

NOTE.—Right to enforce stockholder's liability outside of the state of incorporation.

I. In action by corporation or its representative.

II. In action by creditor of corporation.

a. Remedy according to law of forum.

b. For unpaid subscriptions to stock.

1. In general.

2. By creditor's bill.

c. For statutory liability after stock is fully paid for.

1. In general.

2. Nature of the liability.

3. Liability absolute or distinct from statutory remedy.

4. Constitutional liability.

5. Exclusiveness of statutory remedy provided in state of incorporation.

6. Conditions prescribed by statutes in state of incorporation.

7. Action at law.

8. Suit in equity.

d. Remedies in Federal courts.

1. In general.

2. In equity.

3. At law.

III. Contribution between stockholders of foreign corporations.

There are two distinct kinds of liability of stockholders in foreign corporations which there may

be an attempt to enforce at their residence or elsewhere outside of the state of incorporation. One is the liability for unpaid subscriptions to stock, which is clearly a contractual liability, and as to the right to enforce which there can be no question, provided there can be found a proper remedy. Suits to enforce this may be brought by the corporation itself or by its creditors. The other kind of liability is that statutory liability which continues after the stockholder has fully paid for his stock, and which is in the nature of a guaranty or indemnity to the creditors of the corporation against its failure to pay its obligations. This liability is contractual in so far as the statute which creates it may be presumed to have been in the mind of the subscriber and to have become a part of his contract. Yet it is not assumed by an express agreement of the stockholder, and in fact the latter never expects when he becomes a stockholder that this liability will ever arise. It is always contingent on the insolvency or at least the default of the corporation in meeting its own obligations.

As to the right to enforce this statutory liability of stockholders the authorities are in an extremely unsatisfactory condition. Most of them hold that the liability is to be regarded as contractual, and a majority of the cases hold that it can be enforced in courts outside of the state which created the liability when the proper remedy is sought and the necessary conditions complied with; but there are

397; *Aultman's Appeal*, 98 Pa. 505; *Citizens & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564.

The defendant had a right to set off in this action his claim as a creditor of the corporation to an amount equal to his liability as a stockholder on its guaranty of the mortgages purchased by the defendant from the corporation and which proved to be worthless.

Globe Pub. Co. v. State Bank, 41 Neb. 175, 27 L. R. A. 854; *Abbey v. Long*, 44 Kan. 688; *Coquard v. Prendergast*, 35 Mo. App. 243; *Wheeler v. Miller*, 90 N. Y. 353; *Mathez v. Neidig*, 73 N. Y. 100; *Agate v. Sands*, 73 N. Y. 620; *Jerman v. Benton*, 79 Mo. 148; *Weber v. Leighton*, 8 Mo. App. 502; *Merchants' Ins. Co. v. B'il*, 12 Mo. App. 148; *Boyd v. Hall*, 56 Ga. 563; *Richards v. Kinsley*, 12 N. Y. S. R. 125; *Appleton v. Turnbull*, 84 Me. 72.

The defendant had a right in this action to plead in bar that another creditor of the corporation had proceeded against his property by attachment in Kansas, had obtained judgment against him for about \$5,000, and had levied upon his real estate in Kansas for said judgment, and that this judgment exhausted any possible liability he may have incurred.

Wells v. Robb, 43 Kan. 201; *Bittner v. Lee*, 25 Mo. App. 559; *Hoyt v. Bunker*, 50 Kan. 574; *Richards v. Brice*, 22 N. Y. S. R. 289; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56.

A creditor of an insolvent corporation cannot maintain an action in his own behalf to recover for unpaid stock held by a stockholder while the affairs of the corporation are in the hands of a receiver.

Merchants' Nat. Bank v. Northwestern Mfg. & C. Co. 48 Minn. 349; *Capital City Mut. F. Ins. Co. v. Roggs*, 172 Pa. 91.

Mr. A. W. Horton, for appellee:

The Kansas statute should be enforced in this state.

Bagley v. Tyler, 43 Mo. App. 195; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *Tuttle v. National Bank of The Republic*, 161 Ill. 497, *post*, 750; *McVickar v. Jones*, 70 Fed. Rep. 754; *Rhodes v. United States Nat. Bank*, 66 Fed.

Rep. 512, 24 U. S. App. 607, *post*, 742; *Flash v. Conn*, 16 Fla. 423, 26 Am. Rep. 721; *Cuykendall v. Miles*, 10 Fed. Rep. 842; *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. 225; *First Nat. Bank v. Gustin Minera Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676; *Hodgson v. Cheever*, 8 Mo. App. 318; *Paine v. Stewart*, 33 Conn. 516; *St. Louis Sav. Asso. v. O'Brien*, 51 Hun. 45; *Lourey v. Inman*, 46 N. Y. 119; *Ex parte Van Hipper*, 20 Wend. 614; *Aultman's Appeal*, 98 Pa. 505; *Aldrich v. Anchor Coal & D. Co.* 24 Or. 32; *Woods v. Wicks*, 7 Lea, 40; *Thompson, Liability of Stockholders*, § 80; *Ochiltree v. Iowa R. Contracting Co.* 88 U. S. 21 Wall. 249, 22 L. ed. 546; *Howell v. Mangelsdorf*, 33 Kan. 194; *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415.

The defendant cannot set off his claim against the corporation in this action.

Thompson, Liability of Stockholders, § 381; *Long v. Penn Ins. Co.* 6 Pa. 421; *Hiltier v. Allegheny County Mut. Ins. Co.* 3 Pa. 470, 45 Am. Dec. 656; *Abbey v. Long*, 44 Kan. 688.

The defendant cannot shield himself from liability by alleging that judgment has been rendered against him for about \$5,000, and a levy made upon his real estate in Kansas.

Wells v. Robb, 43 Kan. 201; *Thompson, Liability of Stockholders*, § 424; *Cole v. Butler*, 43 Me. 401.

Mitchell, J., delivered the opinion of the court:

The affidavit sets up three grounds of defense: First, that defendant is a citizen and resident of Pennsylvania, and is not bound by the laws of Kansas under which the liability is claimed to arise; secondly, that he is a creditor of the Western Farm-Mortgage Trust Company, as well as a stockholder, and, presumably, that he claims a right of set-off against the liability, if it exists; and, thirdly, that suit has already been brought and judgment obtained against him in Kansas on his liability as a stockholder, and execution has been levied on his real estate there. The second defense is not averred with sufficient precision to be available to prevent judgment, even if it were

a few cases which go nearly, if not quite, to the extent of refusing altogether to enforce such liability which was created in another state. Even where the courts do not altogether deny any remedy of this sort, it remains to a considerable extent uncertain what the proper remedy may be and the conditions of its allowance.

The general doctrine is that a contract of subscription to the stock of a foreign corporation is governed by the law of the state which creates the corporation. This is settled in numerous cases, a few of which are *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Seymour v. Sturges*, 26 N. Y. 134; *Molson's Bank v. Boardman*, 47 Hun, 136; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 753; *Farwell v. Wadsworth*, 35 Ill. App. 469; *Payson v. Withers*, 5 Biss. 269; *Hodgson v. Cheever*, 5 Mo. App. 318; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414.

In some cases persons claiming to be stockholders of a foreign corporation are sued as individuals on the theory that their incorporation is not valid. As to these see note to *Cone Export & C. Co. v. Poole (S. C.)* 24 L. R. A. on page 291.

Remedies against nonresident stockholders sought in the state where the corporation exists 34 L. R. A.

are not considered here, and the general question as to the mode of enforcing the liability of stockholders is not here entered upon any further than to inquire how far these remedies can be had against stockholders outside of the state of incorporation.

L. In action by corporation or its representatives.

The mere fact that a corporation was created in another state is not a defense to an action on a subscription to stock. *Tabler v. Anglo-American Asso.* 17 Ky. L. Rep. 815; *Merrimac Min. Co. v. Levy*, 54 Pa. 227, 33 Am. Dec. 697; *Lycorning F. Ins. Co. v. Langley*, 63 Md. 198.

The right of a corporation to recover in another jurisdiction the amount of calls made upon its stock is said, in *Mandel v. Swan Land & C. Co.* 154 Ill. 177, 27 L. R. A. 313, not to depend upon any principle of comity but upon the right to enforce a contract validly entered into.

An action of contract to recover assessments on stock, brought by a foreign corporation when the subscriber has expressly agreed to pay for it, is sustained in *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 753, although an implied liability

good in substance, which is not entirely clear on the authorities. The third defense, though it is not averred with the precision, as to dates, amounts, etc., which it should have, nevertheless sets up a substantial bar to plaintiff's suit. A levy in execution is presumed to be satisfaction, and the affidavit avers that the levy on his real estate in Kansas was for an amount that exhausted his liability there. This would be a good defense, even in Kansas, for the Constitution of that state limits the individual liability of stockholders to "an additional amount equal to the stock owned by each stockholder;" and it is expressly said in *Houell v. Mangiesdorf*, 38 Kan. 184, that the defendant "may also set up as a defense that he is discharged, by having already paid the amount of his individual liability to other creditors of the corporation." On this point the defendant was entitled to go to a jury, and it was error to enter judgment against him.

The first point, though averred with the generality and looseness that pervade the whole affidavit, raises questions of great nicety; involving general principles of jurisprudence, the comity between states, and the conflict of laws with regard to both rights and remedies. The difficulty of these questions is shown by the conflicting views in a large number of courts of the last resort. The plaintiff asks us to enforce against a citizen of Pennsylvania a liability created solely by the local statutes of Kansas, and to enforce it in the form prescribed by those statutes, although that form is repugnant, not only to our own established mode of procedure in analogous cases, but also to strong considerations of convenience and natural justice. The first question that arises is the nature of the liability created by the statute. If it is penal, the authorities are all agreed that it will not be enforced outside of the jurisdiction of the state imposing it. If, however, it is contractual, or, in the phrase preferred by some writers, statutory only, the authorities differ widely whether it should be enforced at all, and, if enforced, whether in the form directed by the statute, or in that of the *lex fori*. In regard to the Kansas statute

under consideration, my individual opinion is that, by the weight both of reason and authority, the liability created by it is contractual, and should be enforced by any court having jurisdiction of the parties. And I understand our own case of *Aultman's Appeal*, 98 Pa. 505, to tend towards that view. But, for reasons to be given presently, we are not required to enter into this discussion. The cases have been collected and cited in the argument, and the whole subject will be found ably treated in 28 Am. & Eng. Enc. Law, title *Stockholders*, pp. 867, 890-894. As to the mode of enforcement, the decisions of the supreme court of Kansas seem to have settled that the statute contemplates a separate action at law against each stockholder. *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415; *Houell v. First Nat. Bank*, 52 Kan. 133. The courts of some other states however,—notably, of Massachusetts,—have refused to sustain such actions, on the ground that the relations of the creditors, and of the stockholders among themselves, cannot be properly determined in that way. Certainly, by far the most convenient and just method is by bill in equity, to which all the stockholders can be made parties, and their rights settled. This is the established mode of procedure in Pennsylvania in analogous cases. The special fact, however, that makes it unnecessary in the present case to determine the ultimate rights of the plaintiff, or the mode of their enforcement, appears in the statement, where it is set forth that a receiver for the corporation was appointed before this suit was begun. If the defendant's liability, under the statute, to the creditors of the corporation in which he is a stockholder, is contractual,—and it is only in that aspect that it will be enforced at all outside of Kansas,—then it was, like any other claim, an asset for the payment of the corporate debts, and as such the right to sue on it passed to the receiver. This is the general rule, so far as we are aware, and is so manifestly in accordance with justice, as well as convenience, that, in the absence of an express decision of the supreme court of Kansas to the contrary, we

to pay a subscription to stock is not recognized in Massachusetts.

A public local act providing that it should be lawful to sue for calls in any of the Queen's courts in Dublin was held to give a right to such remedy only in the Irish courts, and that an action could not be maintained against a stockholder in an English court. *Dundaik Western R. Co. v. Tapster*, 1 Q. B. 667. Lord Denman, Ch. J., said in this case: "The right and the remedy are both created by the legislature, and the company is bound to pursue the remedy provided by it."

But this case "had been somewhat doubted," said Willes, J., in *St. Pancras v. Batterbury*, 2 C. B. N. S. on page 455, 26 L. J. C. P. N. S. 243, 3 Jur. N. S. 1106.

And where a Canadian corporation sued to collect calls from a stockholder, in *Welland R. Co. v. Blake*, 6 Hurlst. & N. 410, 30 L. J. Exch. N. S. 161, 3 L. T. N. S. 678, 9 Week. Rep. 383, 7 Jur. N. S. 373, it seems to have been taken as a matter of course that such an action could be maintained.

So, an action in the name of the company against a shareholder of an English company, based on an order under the English companies acts of 1862, making a call on shareholders and directing a payment to one of two final liquidators, was brought 34 L. R. A.

in Canada, and the declaration sustained on demurrer in *Barnes's Bkg. Co. v. Reynolds*, 36 U. C. Q. B. 256. But afterwards the declaration was amended so as to charge the defendant as a past member of the company, and to this a demurrer was allowed in 40 U. C. Q. B. 435, on the ground that the liability of a past member was created by statute and "can only be enforced in the special manner which the statute directs." An appeal from this decision was allowed in 3 Ont. App. Rep. 371, holding that the declaration was good, but an appeal taken in turn from this decision was allowed by the supreme court of Canada February 2, 1890. This decision of the supreme court does not seem to be reported, but the conclusions are given in *Cassell's Digest of the Supreme Court of Canada reports*. The decision held that the declaration did not show any liability of the defendant as a past member of the company, but it seems to have been based more particularly on the failure to allege everything required by statute to fix the limited liability, and does not seem to constitute a direct decision on the right to bring such an action, since it says that, assuming that the action will lie, it is necessary to make further allegations.

The right of a receiver of a corporation to sue

must presume that such is the law in that state. No such decision has been brought to our notice. In *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415, it does appear that the corporation had made an assignment for the benefit of creditors; but the court took no notice of this fact, probably considering it unnecessary to do so, as the case was reversed solely on the points raised in the pleadings, as clearly appears by the reference in the opinion to the absence of a judgment against the corporation, which would seem to be a fatal objection, but which the court merely referred to by saying that it had not been discussed, and would not be decided. It is true that Mr. Cook, in his treatise on Stock and Stockholders, says, broadly, that the right to sue on the statute "is not to be numbered among the assets of the corporation. . . . A receiver has no power to enforce such a liability." § 218. But Mr. High, in his standard work on Receivers, says, more cautiously: "The authorities are not wholly reconcilable as to the right of a receiver of a corporation to maintain an action in behalf of its creditors, to recover of shareholders an individual liability, imposed by charter or statute upon shareholders for the protection of creditors." § 317a. The cases relied upon by Cook in support of his text are from Illinois and New York. The former appear to go to the extent claimed as it is said in *Arenz v. Weir*, 89 Ill. 25, that "this insurance company having passed to a receiver diminishes in no degree the liability of a stockholder to a creditor of the company. The creditor stands on an independent platform, above that of the receiver, having no concern with the corporation, and the stockholder is bound, under the law, to answer to him. The stockholder is not under the control or in the power of the receiver, but holds a fund, so to speak, out of

which the creditors of the company may be paid." I do not find that this doctrine has been changed by that court, but it is apparent that it rests on the particular wording of the statute involved, and not on general principles for in *Wincock v. Turpin*, 96 Ill. 135, three judges of the seven dissented on this point, and in *Munger v. Jacobson*, 99 Ill. 349, a similar liability was enforced in a bill by the receiver. The case of *Jacobson v. Allen*, 20 Blatchf. 525, 12 Fed. Rep. 454, was by the receiver of an Illinois corporation, and the decision was based on *Arenz v. Weir*, *supra*. The New York cases cited by Cook look the same way, but are less positive than those in Illinois, and it is equally clear that they rest on the special phraseology of the statutes. *Billings v. Robinson*, 94 N. Y. 415, was a suit by a receiver, and decided on the ground that the corporation had released the defendant before this suit was brought. The court said: "The receiver, who is plaintiff, is not shown to represent any creditor having any equities against Robinson [defendant]. . . . So far as the case shows, . . . the receiver represents in this action only the corporation which assented to the substitution of Marshall's liability for that of Robinson." And that in New York a receiver can recover, unless prevented by the language of the particular statute, appears to follow from the cases of *Story v. Furman*, 25 N. Y. 214, and *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272. In fact, in no case that I have seen are the inconveniences of separate actions by the creditors, and the advantages of one suit by a receiver in behalf of all, more forcibly set forth than by Folger, J., in *Pfohl v. Simpson*, 74 N. Y. 187. In *Patterson v. Stewart*, 41 Minn. 84, under an act making the directors of a corporation ordering or assenting to a violation of any of its provisions

in another state to recover of a stockholder an assessment made at the home of the corporation is sustained in *Cuykendall v. Miles*, 10 Fed. Rep. 342, distinguishing such a case from cases against officers of corporations made liable for neglect of duty.

The right of the receiver of a foreign corporation to collect an unpaid subscription to its stock is sustained in *Dayton v. Borst*, 31 N. Y. 436, without showing that any statute of the state in which he was appointed authorized such proceeding.

So, in *Pugh v. Hurtt*, 52 How. Pr. 22, it was held that a receiver appointed in another state may be allowed by comity to bring suit against a resident to enforce his liability as stockholder in an insolvent corporation.

A receiver of a foreign corporation was allowed to recover on a bill in chancery against an executrix of a deceased stockholder in the case of *Mann v. Cooke*, 20 Conn. 178. In this case the shares had been surrendered by the subscriber to the company after its insolvency, and besides this he had paid 50 per cent of his subscription, which by his agreement was all that the company required of him.

The statute of limitations of the state in which a corporation was domiciled governs an action in another state by a receiver of the company to enforce the liability of a stockholder under the statute of the former state. *Andrews v. Bacon*, 38 Fed. Rep. 777.

Assessments on members of a foreign benefit society which had become insolvent were collected 34 L. R. A.

In *Baldwin v. Rosmer*, 101 Mich. 119, 25 L. R. A. 739, by an ancillary receiver.

An action brought in the District of Columbia to recover an assessment upon stock under an order of a Virginia court was unsuccessful in *Glenn v. Marbury*, 145 U. S. 489, 38 L. ed. 790, but the jurisdiction was not questioned.

So, an action against a stockholder of a foreign corporation to recover the amount of an assessment made under decree of a court in another state is sustained also in *Morris v. Glenn*, 37 Ala. 623; also in *Sayre v. Glenn*, Id. 631.

As to conclusiveness of such assessments in another state as *res judicata*, see note to *Mutual F. Ins. Co. v. Phoenix Furniture Co.* in which are numerous cases of such suits.

An affidavit of defense by a person sued as stockholder by a foreign corporation stating that notice of assessments for which he is sued was not published in the newspapers as required by the statutes of the state of incorporation is insufficient, where a copy of the statutes referred to is not annexed and the court has no means of knowing, except by the mere opinion of the deponent, what provisions of such statutes may be mandatory and what may be merely directory. *Speller Electric Time Co. v. Geiger*, 147 Pa. 390.

An affidavit of defense by a person sued as stockholder by a foreign corporation, to the effect that the corporation was created in another state and that it has attempted to carry on business in the state of the forum without having complied with the statutory requirements, was held insufficient in

jointly and severally liable for all corporate debts subsequently contracted, it was held that the appointment of a receiver did not prevent an action by a single creditor against a director; but the decision was put upon the special provisions of the statutes (whose "chaotic condition" is referred to in the opinion by Mitchell, J.), and particularly on the fact that the liability was unlimited, and "what one creditor may collect will not reduce the amount which another may recover." And in *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 87, the same learned judge intimates that, as this point was not the principal one in that case, it may have to be reconsidered; and it was held that the statutory right to recover from stockholders capital which had been unlawfully refunded to them as dividends, without provision for the corporate debts, was an asset which vested in the receiver for the benefit of all the creditors. The case was put upon the broad ground of the receiver's rights and powers. "Everything becomes assets in his hands which were assets as to creditors, as well as what was assets as to the corporation."

These are all the cases we have been able to find on the subject, and in the absence of a controlling weight of authority, and, as already said, especially in the absence of an express decision of the supreme court of Kansas, we are not willing to depart from the settled general rule. The objections to doing so appear to us unanswerable. A receiver represents, not only the corporation, but all its creditors; and, as to the latter, it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be be-

yond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all, and common to all; and hence the receiver, who represents all alike, is the proper party to assert the common right and pursue the common remedy for the common benefit. We do not, of course, refer to pending suits already begun by creditors before the appointment of the receiver. As to them his power to interfere may be doubted. But as to others he is clearly the proper party. If any creditor or class of creditors have preferred claims, or, as argued here, special claims against special liabilities, that does not deprive the receiver of the right, or relieve him from the duty, to gather them all into his hands for proper distribution. In this manner the rights of all will be protected, and justice be done in a single proceeding, in which everyone will get what is his due, no one will be called upon to pay more than his fair proportion, and the expense, delay, inconvenience, and inevitable occasional injustice of separate actions by different creditors, against different stockholders, with their attendant legion of resulting actions for contribution, will be avoided. This is so consonant with convenience and natural justice, as well as with our own settled procedure in analogous cases, that we will not be easily moved to depart from it. We hold, therefore, that the right to sue, if there is any, is in the receiver, and that plaintiff cannot maintain the present action. The ultimate questions—whether the courts of this state will enforce the statutory liability under the law of Kansas at all, and, if so, whether against separate stockholders, or only in the form established by our own practice in similar cases—we leave to be decided when they arise.

Judgment reversed.

Signa Iron Co. v. Vandervort, 164 Pa. 572, because it did not show that defendant did not purchase his stock of a stockholder in the state of incorporation.

It was held in *Payson v. Withers*, 5 Bls. 269, that a subscription to a foreign corporation is not within the provisions of a state statute requiring a foreign company or its agents to conform to certain conditions before the company could carry on business in the state, so as to constitute a failure to comply with such conditions a defense to a suit against the stockholder by an assignee in bankruptcy appointed by a Federal court in another state.

The right of a foreign insurance company to recover premiums or assessments in a state in which it is not entitled to do business because it has failed to comply with the statutes is considered in notes to *Phoenix Ins. Co. v. Pennsylvania Co. (Ind.)* 20 L. R. A. on p. 407, and *Edison General Electric Co. v. Canadian P. Nav. Co. (Wash.)* 24 L. R. A. on page 318. See also *Seamans v. Temple Co. (Mich.)* 28 L. R. A. 420. But these decisions are based on the ground that the courts will not aid a transaction which is at variance with the statutes or policy of the state, and do not turn on the right to enforce remedies created by the laws of other states.

II. In action by creditor of corporation.

a. Remedy according to law of forum.

If any remedy can be had against stockholders of foreign corporations it is well established that the procedure in such cases as in others must be according to the law of the forum.

In reference to a statute of another state making

ing stockholders of corporations liable individually for its debts without prescribing the mode of enforcing the liability, it is said, in *Drinkwater v. Portland Marine R. Co.* 18 Me. 36: "Whether the courts of other states are bound to notice and give effect to this remedial provision, may be questionable. But if they are, the course of proceedings must be regulated by the law of the state where the remedy is sought to be pursued. This must necessarily be governed by the *lex fori*."

So, it is said in *MARSHALL v. SHERMAN* that if under any circumstances an action against stockholders of a foreign corporation could be maintained "it must be in such a form and by such modes of procedure as like liabilities created under our own statutes are enforced against our own citizens. There is no reason why the plaintiff should be permitted to enforce his debt in this jurisdiction against a citizen of this state in a form of action different from that which a creditor of a domestic corporation may prosecute against a domestic stockholder."

Again, in *Leucke v. Tredway*, 45 Mo. App. 507, it is said that what the remedy against stockholders of a foreign corporation would be in the state in which it was created is not important in determining the form of remedy to be followed in the state where the stockholders reside, but the remedy to be followed will be determined by the law of the forum.

The same rule is declared also in *First Nat Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 387, 6 L. R. A. 676; *Lowry v. Tuman*, 46 N. Y. 119; *RUSSELL v. PACIFIC R. CO.*

A joinder of stockholders of a foreign corpora-

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

J. Foster RHODES, *Plff. in Err.*,

v.

UNITED STATES NATIONAL BANK.

(24 U. S. App. 607.)

1. **A general finding of fact** in a case tried by a United States court without the intervention of a jury cannot be reviewed by an appellate court.
2. **The decision of the highest court of a state** upon the proper construction to be given to the constitutional and statutory provisions of that state are binding in Federal courts.
3. **The Kansas statute providing remedies by execution or action to enforce the personal liability of stockholders** which the state Constitution declares shall be secured, being construed by the state courts to create a personal liability against the stockholders severally in the nature of a contract obligation, the enforcement of such liability by action at law is not confined to the courts of that state, but may be had in a Federal court sitting in another state where a stockholder resides, when it has jurisdiction of the parties.

(February 23, 1896.)

ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of plaintiff in an action brought to enforce the alleged liability of defendant as a stockholder in an insolvent corporation for corporate debts. *Affirmed.*

The facts are stated in the opinion.

Before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

Mr. Anson B. Jenks for plaintiff in error.

Mr. W. W. Guthrie, with **Mr. E. A. Otis**, for defendant in error:

The finding of the court below being a general finding in favor of the plaintiff and against the defendant, the only questions which this court can consider are those which arose during the progress of the trial below, to which exceptions were duly preserved by the record;

tion as defendants in an action against the company for a debt is held to be proper in Minnesota in order to reach the amounts remaining due and unpaid on their stock so far as necessary to satisfy the judgment against the corporation. This is by virtue of the provisions of Minn. Gen. Stat. 1878, chap. 34, §§ 9, 10, 11, which provide such a remedy in case of corporations generally. *First Nat. Bank v. Gustin Minerva Consol. Min. Co. supra.*

An attachment of the private property of the stockholders of a foreign corporation before judgment was held unwarranted in *Drinkwater v. Portland Marine R. Co. supra*, because it was said the court found no such authority in any statute.

b. For unpaid subscriptions to stock.

1. In general.

The mere fact of incorporation in another state does not defeat an action by a foreign corporation on a subscription to stock. *Tablier v. Anglo-American Assn.* 17 Ky. L. Rep. 815.

An attempt to compel the holder of stock in a foreign corporation issued to a person as a gratuity without any promise on his part to pay for it 34 L. R. A.

and all questions both of law and fact are absolutely concluded by it, except so far as questions of law only are saved by exceptions which the party has taken to the rulings of the court on the trial of the cause.

Norris v. Jackson, 76 U. S. 9 Wall. 125, 19 L. ed. 608; *Brooklyn L. Ins. Co. v. Miller* ("Miller v. Life Ins. Co."), 79 U. S. 12 Wall. 285, 20 L. ed. 398; *Dirst v. Morris*, 81 U. S. 14 Wall. 484, 20 L. ed. 722; *Cooper v. Omokundro*, 86 U. S. 19 Wall. 65, 23 L. ed. 47; *British Queen Min. Co. v. Baker Silver Min. Co.* 130 U. S. 222, 35 L. ed. 147; *Martinton v. Fairbanks*, 112 U. S. 870, 28 L. ed. 862; *Lloyd v. McWilliams*, 187 U. S. 576, 34 L. ed. 788.

The liability of a shareholder in a Kansas corporation is firmly established by the Constitution and laws of that state.

The effect of a provision in the Constitution and laws of a sister state must be determined by the construction given to it by the supreme court of that state.

Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544.

While it may perhaps be true that the supreme court of Kansas has not decided in terms that said constitutional provision is self-executing, it has fully recognized, and in effect held, that stockholders of corporations under the Constitution and foregoing statutes of that state are individually liable to creditors of such corporation to an amount equal to the stock owned by each of them.

Fowler v. Lamson, 146 Ill. 478; *Hentig v. James*, 22 Kan. 826; *Valley Bank & Sav. Inst. v. Ladies' Cong. Sewing Soc.* 38 Kan. 428; *Hewell v. Manglesdorf*, 38 Kan. 194; *Wells v. Robb*, 43 Kan. 201; *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415.

The remedy given by statute to the creditor of a Kansas corporation under the last clause of § 32 of the statute in question, upon which this action is brought, is not local in its character nor confined to the state which enacted the law, but is general in its nature, arising upon contract, and may be enforced by a direct suit in favor of any creditor against any

proved fruitless in *Christensen v. Eno*, 106 N. Y. 37, 60 Am. Rep. 459, on the ground that no liability existed.

In Massachusetts, where a mere subscription for stock in a corporation without any express agreement to pay for it is held not to create any personal liability, the court refused to enforce against stockholders in a foreign corporation an implied liability to pay for the stock, although such implied liability may exist under the laws of the state of incorporation. The court says: "It does not seem advisable that we should seek to enforce a liability thus differing from any which would have been incurred if the defendants had subscribed for shares of stock in a corporation formed in this state." *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349.

The court further says that such a law varies so much from that which ordinarily obtains in regard to similar liabilities, and also in the enforcement of contracts, that it will be left to local administration. *Ibid.*

But the right of a judgment creditor of a foreign corporation against a stockholder rests in contract merely, and is not created by statute, and therefore

shareholder, in any jurisdiction where such shareholder can be found and served with process.

Flash v. Conn., 109 U. S. 371, 27 L. ed. 966; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439.

Bunn, District Judge, delivered the opinion of the court:

This is an action of assumpsit, brought by the United States National Bank, a Kansas corporation, against J. Foster Rhodes, a citizen of Illinois, to enforce a stock liability under the Constitution and laws of Kansas upon stockholders of insolvent corporations created under the laws of that state. The declaration charges that a corporation known as the United States Building Company was incorporated on the 21st of December, 1886, under and pursuant to the provisions of chapter 28 of the General Statutes of the state of Kansas of 1868 (Comp. Laws 1885, Dassler's ed.), and afterwards became indebted to the defendant in error (the plaintiff below) in the sum of \$22,000, on which a judgment was recovered in the state court for the proper district in Kansas on December 9, 1890; that execution was issued upon said judgment, and returned unsatisfied; that Rhodes was a stockholder in the building company to the extent of seventy-five shares, of the par value of \$100 each, amounting in all to \$7,500; that the building company is insolvent, and has no property or means of paying its debts, except the stock liability of its stockholders; and claims judgment for the amount of \$7,500. The declaration also contains the usual common counts in assumpsit. The defendant pleaded the general issue, and also specially that the plaintiff was itself a stockholder in the building company, and liable with the other stockholders for its debts; and that he, the defendant, was not a stockholder, and so not responsible for its debts. A general replication was put in to the several pleas, a jury trial waived, the cause tried by the court, and a general finding of facts upon all the issues in the case, and a judgment for the plaintiff for the amount claimed. A general exception only was taken to the finding

of the court. There was no special finding, and no request to find specially upon the facts, and no exception taken by the defendant that no special finding was made. There was a bill of exceptions signed in the case and made a part of the record containing the evidence, but it is clear that this court cannot review the facts, but must take the finding of facts made by the court, general as it is, for the facts upon which to apply the law. The court has, moreover, had some difficulty in reaching the main question of law argued by counsel and relied upon by the plaintiff in error as to the liability of the defendant in an action at law brought outside the limits of the state of Kansas under the Constitution and laws of that state, relating to the subject of the personal liability of stockholders in such a case, because of the state of the record as before set forth, the exceptions taken on trial, and the assignments of error not being properly framed for the purpose. Without looking into the evidence, it is difficult to see how the court can say that the judgment is based upon any particular count or cause of action in the declaration, upon the first count setting forth defendant's liability as a stockholder, or upon one or other of the common counts. The finding is general, and covers all the issues in the case. A finding by the court takes the place of a verdict of a jury, and a general exception to such finding is of no more avail than a general exception to a verdict. See Rev. Stat. § 649, which provides that "issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury. . . . The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

And § 700 provides that "when an issue of facts in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to § 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the deter-

it is held to be a right which is enforceable everywhere. *Leouke v. Tredway*, 45 Mo. App. 507.

Even in Massachusetts the courts will enforce an express promise of a stockholder in a foreign corporation, and it is held that a provision in a statute of another state in which a corporation was created, that if a member fails to pay any assessment upon a deposit note in a mutual insurance company he may be compelled to pay the whole note, and that any balance that may remain after paying the losses and expenses shall be returned to him, does not constitute a penal statute, but the liability may be enforced in the state where he resides. *Jones v. Sisson*, 6 Gray, 288.

2. By creditors' bill.

A creditors' bill by a judgment creditor of a foreign corporation against stockholders to reach what is due on their stock subscriptions is held in Missouri to be a proper remedy. *Leouke v. Tredway*, 45 Mo. App. 507; *Shickle v. Watts*, 94 Mo. 410. In the latter case the court, after holding that such was the proper remedy, added that the defendant had failed to plead that there was a remedy at law.

84 L. R. A.

A suit in equity to reach unpaid subscriptions of alleged stockholders of a foreign corporation who had made an alleged colorable transfer of their stock without having first obtained any judgment against them or against the corporation in the state although a judgment had been obtained against the corporation in the state of its domicile, is held not to be sustainable in *Patterson v. Lynde*, 112 Ill. 196.

But *Young v. Farwell*, 139 Ill. 328, goes still further and holds that even after judgment against the corporation has been obtained in the state where the stockholders reside, a creditors' bill against stockholders of a foreign corporation cannot be sustained, to reach unpaid stock subscriptions, but the creditors must first seek a remedy in the state of incorporation, and there have an authoritative determination of the respective relations of creditors and stockholders toward the corporation and toward each other, after which, if it shall be necessary, their rights may be enforced in the courts of the state where the stockholders reside.

To similar effect as to actions to enforce statutory liability, see *TITTLE v. NATIONAL BANK OF THE REPUBLIC*.

mination of the sufficiency of the facts found to support the judgment."

This statute was first given a construction by the Supreme Court in *Norris v. Jackson*, 76 U. S. 9 Wall. 125, 19 L. ed. 603, where the court in an opinion by Mr. Justice Miller says: "The first thing to be observed in the enactment made by the 4th section of the act of the 3d of March, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is that it provides for two kinds of findings in regard to the facts, to wit, general and special. This is in perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict. This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. The next thing to be observed is, that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law. In the case of a special verdict the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record. If there was such special verdict here, we could examine its sufficiency to sustain the judgment. But there is none. The bill of exceptions, while professing to detail all the evidence, is no special finding of facts. The judgment of the court, then, must be affirmed unless the bill of exceptions presents some erroneous ruling of the court in the progress of the trial."

This construction has always been adhered to in subsequent cases in the same court. *Brooklyn L. Ins. Co. v. Miller* ("Miller v. Life Ins. Co."), 79 U. S. 12 Wall. 285, 20 L. ed. 393; *Dorst v. Morris*, 81 U. S. 14 Wall. 434, 20 L. ed. 722; *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S. 18 Wall. 237, 21 L. ed. 827; *Cooper v. Omohundro*, 86 U. S. 19 Wall. 65, 22 L. ed. 47; *British Queen Min. Co. v. Baker Sitter Min. Co.*, 139 U. S. 222, 35 L. ed. 147.

In *Brooklyn L. Ins. Co. v. Miller* ("Miller v. Life Ins. Co.") the court says: "The finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner."

In *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S. 18 Wall. 237, 21 L. ed. 827, the court says: "Where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. . . . Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

In *Cooper v. Omohundro*, the court reaffirms the former rulings, and says: "Where issues of fact are submitted to the circuit court and the finding is general, nothing is open to review, . . . except the rulings of the circuit court in the progress of the trial, and that the phrase 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general findings."

In *Martinton v. Fairbanks*, 112 U. S. 670, 28 L. ed. 862, the cases are reviewed, and the same doctrine again asserted. The court says: "The proposition that the general finding of the court in this case is open to review is in direct opposition to the rulings of the court in the cases cited. The plaintiff in error seeks to make the question whether the evidence set out in the bill of exceptions justified the finding by the court for the plaintiff of the issue of fact raised by the pleadings. This is in defiance of the decision of this court that it cannot be done, an attempt upon a general finding to bring up the whole testimony for review by a bill of exceptions. The theory of the plain-

The right of creditors of a foreign corporation to proceed by way of garnishment and attachment to reach the unpaid stock subscriptions of resident stockholders is asserted in *Turner Bros. v. Alabama Min. & Mfg. Co.* 25 Ill. App. 144, as a ground of denying the remedy of a creditors' bill, without judgment against the corporation in the state, although service on the corporation could not be had because it never did any business or had any office or agent in the state, and had now ceased to do any or to have any office, officer, agent, employee, stockholders, or debtors, or any books, papers, or property of any kind in the state in which it was created. This case is not mentioned in *Young v. Farwell*, *supra*.

A suit against subscribers to the capital stock of a foreign corporation to reach any sums which they would be liable to pay in the state of the incorporation was expressly authorized by N. Y. Laws 1845, chap. 234, p. 256, after judgment against the corporation and the return of an execution against it unsatisfied in whole or in part. *Seymour v. Sturgess*, 26 N. Y. 124; *McDonough v. Phelps*, 15 How. Pr. 372, 34 L. R. A.

But it was held that the right to sue under this statute was conditioned on the existence of a right of action in the state of incorporation against the defendants without joining additional parties. So it must appear that a forfeiture of the stock is not the only remedy against stockholders in the state of incorporation. *McDonough v. Phelps*, *supra*.

The New York Act of 1845, chap. 234, providing a remedy against stockholders of foreign corporations, was perhaps limited to the recovery of unpaid stock subscriptions, although the language is not entirely free from uncertainty on this point. By its terms the remedy was "to compel the payment of any sum or sums of money not paid in or remaining due upon each share of the capital stock," although a later clause said the plaintiff might recover any sums which such defendant "could be liable to pay in any event in the state or government where such corporation is located." Construing the clauses together, it seems to be limited to the recovery of stock subscriptions. But this statute was repealed by N. Y. Act of 1877, chap. 417, § 1, § 119.

An action against a single stockholder of a for-

tiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that, by excepting to the general finding, he excepts to such conclusions of law as the general finding implies. But § 649, Rev. Stat., provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. A general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. . . . But the plaintiff in error has taken no such exception. By excepting to the general finding of the court it is in the same position as if it had submitted its case to the jury, and, without any exceptions taken during the course of the trial, had upon the return of the general verdict for the plaintiff, embodied in a bill of exceptions all the evidence, and then excepted to the verdict because the evidence did not support it."

We have on several occasions followed these rulings of the supreme court, and declared the like doctrine. *Jenks v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, 52 Fed. Rep. 641; *Farwell v. Sturges*, 9 U. S. App. 405, 6 C. C. A. 118, 56 Fed. Rep. 782; *Skinner v. Franklin Co.* 9 U. S. App. 676, 6 C. C. A. 118, 56 Fed. Rep. 783.

The situation of the plaintiff in error in the case now before the court is accurately described by the above language of the supreme court. He has embodied the evidence to support the allegations of his pleas in a bill of exceptions, and excepts to the finding of the court because the evidence does not support such finding. The court, by the general finding, for instance, has found that the plaintiff in error (defendant below) was the owner of stock in the United States Building Company, as is alleged in the declaration, and that the plaintiff bank was not the owner of stock in that company. This the plaintiff in error seeks to dispute, but the question is foreclosed by the finding. The plaintiff is in almost, if not quite, as bad a situation in regard to the conclusion of law implied in the finding to the effect that upon the facts alleged in the declaration, and found by the court, there was a

personal liability at law on the part of the defendant to the plaintiff on account of his ownership of stock in the insolvent corporation, which might be enforced by action in the United States circuit court sitting in Illinois, there being no exception or assignment of error upon which the question properly arises. But, as this question, by common consent, has been argued by counsel, and submitted to the judgment of this court, the court having jurisdiction of the case, we shall not decline to consider it. It is not a difficult question under the authorities.

The Constitution of Kansas provides that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations nor corporations for religious or charitable purposes." Pursuant to this constitutional provision, the legislature, by § 32 of chapter 28 of the General Statutes of the state of Kansas of 1888 (Kan. Gen. Stat. 1889, ¶ 1192), provided as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there can be found no property whereon to levy such execution, then execution may be issued against any of the shareholders to an extent equal in amount to the amount of stock by him or her owned together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the court in which such action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

There have been several decisions by the supreme court in Kansas giving construction to these provisions, which are binding upon this court. It is contended by the plaintiff in

error corporation who has not paid in full for stock under a statute of another state requiring him to pay such share of the balance as may be required to satisfy the debts of the company cannot be maintained by a judgment creditor, since the remedy against him must be in equity bringing in other stockholders, when they are in a like predicament with him. *Griffith v. Mangam*, 73 N. Y. 611.

But the right of a judgment creditor of a foreign corporation after the return of an execution unsatisfied to sue a stockholder indebted to the corporation for unpaid subscription to stock is sustained, at least when there is no demurrer for defect of parties, in *Persch v. Simmons*, 3 N. Y. Supp. 783, under N. Y. Code Civ. Proc. § 1871, which in general terms authorizes an action by a judgment creditor to compel a discovery of any thing in action or other property belonging to the judgment debtor, or any money, thing in action, or other property due to him after the return of an execution unsatisfied. The court says: "Such an action is expressly authorized by § 1871 of the Code, and is sustained by the decision of the commission of appeals in *Bartlett v. Drew*, 57 N. Y. 583." But it 34 L. R. A.

should be said that the case of *Bartlett v. Drew* was substantially different, since it was based on the fact that the defendant had received the proceeds of property of the corporation which had been sold, and not upon his liability to pay any unpaid balance of his subscription to stock as in the present case.

The case of *Persch v. Simmons*, *supra*, attempts to distinguish *Griffith v. Mangam*, *supra*, on the ground that in that case the statute of New Jersey required each stockholder to pay for the satisfaction of creditors only the sum necessary to complete the amount of his shares as fixed by the charter, or such proportion of that sum as shall be required to satisfy the debts; but it does not show what the statute may be which governs the corporation in the later case, but it states that the corporation is shown by the return of the execution to have no property within the state that can be levied upon and that consequently the plaintiff is without remedy unless he can maintain the action against the stockholder.

A bill in equity by a creditor of a corporation to reach unpaid stock subscriptions was denied in

error that they create no liability whatever, but that the statute merely provides a remedy which cannot be enforced outside of that state, or if there be any liability, it can only be enforced in equity. This contention cannot be maintained if regard is to be paid either to the decisions of the supreme court of Kansas or to the ruling of the United States Supreme Court under similar enactments of other states. The effect of the decisions in Kansas is that the statute creates and enforces a personal liability upon every stockholder to an amount equal to the amount of stock owned by him, that such liability is several and not joint, that it exists in favor of each creditor of the corporation severally against each shareholder, and that the obligation is by contract in the nature of a guaranty, and may be enforced by action in any tribunal where proper service can be had. The matter came before the court in *Hentig v. James*, 22 Kan. 326. In that case the court says: "Under this statute the judgment creditor of the corporation has two modes of procedure against a stockholder upon the return of his execution against the corporation *nulla bona*. He may obtain by motion, after reasonable notice, the issuance of an execution from the court in which the action is brought against the stockholder; or he may proceed by action to charge the stockholders with the amount of his judgment. The former is a summary proceeding; the latter is a more formal one." The court, on page 329, uses the following language: "The concluding provision of said § 82 plainly prescribes that if the creditor wishes to make the stockholder a judgment debtor with all that term implies, he may proceed by action, and charge the stockholder with the amount of his judgment against the corporation."

Afterwards, in *Howell v. Mangelsdorf*, 33 Kan. 194, after quoting the above statutory provision, the court says: "It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the court where the judgment was rendered against the corporation; in the other by

an ordinary action, to be instituted wherever personal jurisdiction of the stockholders can be acquired. Before the summary proceeding by motion can be maintained, notice to the stockholder must be given, in order that he may appear, and make such defense as can be made, and as is necessary to protect his interest. . . . His liability to the creditors of the corporation is in the nature of a guaranty; the action or proceeding to enforce the same does not accrue until the execution upon the judgment against the principal is returned unsatisfied. We think that the proceeding against the stockholder, whatever remedy may be employed, is an independent one."

And in *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415, the court holds that "the liability of stockholders to the creditors of a corporation is several and not joint, and each must be sued separately," and that judgment against several shareholders in one proceeding must be reversed. In this case the court further says: "The nature of this liability is peculiar. It seems to have been created for the exclusive benefit of corporate creditors. The liability rests upon the stockholders of a corporation to respond to the creditors for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves in their own right and for their own benefit. *Cook, Stock & Stockholders*, ¶ 216."

And in *Howell v. Mangelsdorf*, above quoted, which was a proceeding for a summary remedy under the statute without action brought the court says, on page 199, 33 Kan. : "This ruling does not deprive a creditor of an insolvent corporation of a remedy against the stockholder residing in another state and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. *Flash v. Conn*, 109 U. S. 871, 27 L. ed. 966; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *McDonough v. Phelps*, 15

Bank of Virginia v. Adams, 1 Pars. Sol. Eq. Cas. 534, although plaintiff alleged that he could not get judgment at law in the state of incorporation because there was no person there on whom service could be made. The court said that if the court of Virginia in which the corporation existed should appoint a receiver to collect assets he could undoubtedly sue all the defaulting stockholders in Pennsylvania and recover the unpaid instalments the same as the company could have done.

But a creditor of an insolvent foreign corporation is allowed in Minnesota to maintain against the stockholders of whom the court has jurisdiction an action in the nature of a creditor's bill to obtain payment of his claim against such corporation from the unpaid balances of subscriptions to its capital stock. The remedy provided by §§ 2800-2802, Gen. Stat. 1894, in case of domestic corporations, is held inapplicable to the foreign corporations. *Rule v. Omega Stove & G. Co. (Minn.)*, 67 N. W. 60.

Judgment against the corporation and a return of execution unsatisfied within the state must be had before a creditor's bill can be maintained against stockholders to reach their unpaid stock 34 L. R. A.

subscriptions, unless it is shown that it was impossible to comply with this condition. *Ibid*.

Allegations that a foreign corporation has ceased to do business and has disposed of all its assets and has no property, and that the plaintiff has obtained a judgment against it in the state of incorporation and had an execution against it returned unsatisfied, are sufficient to show that it is practically impossible to obtain a personal judgment against the corporation within the state. *Ibid*.

A provision in the charter of a corporation granted by a foreign government to the effect that a stockholder shall not be liable personally until a valid judgment has been obtained against the corporation and an execution thereon returned unsatisfied is held to create a condition precedent to a suit in Massachusetts against a stockholder of such foreign company to reach unpaid subscriptions to stock even when by dissolution of the corporation it was impossible to obtain a judgment against it. *E. Remington & Sons v. Samana Bay Co.* 140 Mass. 494.

Also, in *Turner Bros. v. Alabama Min. & Mfg. Co.* *supra*, a domestic judgment and unsatisfied execu-

How. Pr. 372; *Seymour v. Sturges*, 26 N. Y. 134."

As this is a question of the proper construction to be given to a constitutional and statutory provision of a state, the decisions of the highest court of that state are binding upon this court. *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544. But, if still higher authority were necessary, it will not be found wanting. A similar statute of the state of New York was before the United States Supreme Court in *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, in a suit brought against a stockholder of a New York corporation in the United States circuit court for the northern district of Florida, where the supreme court held that "the liability created by a provision in a general act of the state of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified, is a contract and not a penalty; and can be enforced by an action sounding in contract against a stockholder found in another state."

It was declared also that, the courts of New York having held that a liability of a stockholder to creditors arising under one of its general statutes for forming corporations was a contract, when the attempt was made to enforce it in New York, the supreme court would follow that interpretation in a suit to enforce such a liability in another state, and that the liability may be enforced by an action at law, without resort to a court of equity. This case is an authority upon the case at bar, and answers all the contentions made upon the question of liability except such as are founded upon the evidence, which this court cannot review. A case similar to the one at bar arose, and was heard on demurrer by the United States circuit court for the southern district of California, in 1893, under the same provisions of the Kansas statute and Constitution, and the same ruling was made, the court following the decisions of the supreme court of Kansas. *Bank of North America v. Rindge*, 57 Fed. Rep. 279.

The judgment of the Circuit Court is affirmed.

CALIFORNIA SUPREME COURT (In Banc).

Edward W. RUSSELL

v.
PACIFIC RAILWAY COMPANY et al.,
Repts.

S. B. COBB et al., Interveners, *Appts.*

(113 Cal. 258.)

The courts of another state cannot enforce the stockholders' liability for unpaid subscriptions provided by the Illinois act of 1871-72, p. 299, § 8, as that is not a general-contract liability but is to be enforced by the remedy corresponding to garnishment provided in that section.

tion thereon exhausting the remedy at law is declared to be a prerequisite to a creditor's bill to reach indebtedness on a subscription for stock to a foreign corporation.

Judgment and unsatisfied execution in another state in an action against a corporation is held insufficient in *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338, to comply with the condition precedent under the New York act of 1848 before bringing action against the stockholder, but this was the case of a domestic corporation.

In *Sturges v. Vanderbilt*, 73 N. Y. 384, it was held that a creditor of a New Jersey corporation who sought to reach money that the stockholders had received must first exhaust his remedies against the property of the corporation.

a. For statutory liability after stock is fully paid for.

1. In general.

The general doctrine as stated in *RUSSELL v. PACIFIC R. Co.* is said to be well established to the following effect: "Where a statute creates a right and prescribes a remedy for its enforcement, that 34 L. R. A.

(June 8, 1895.)

APPEAL by interveners from a judgment of the Superior Court for Los Angeles County and from an order refusing a new trial in a proceeding instituted to enforce the individual liability of stockholders for debts of the defendant corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. Walker, W. P. Gardiner, and Allen, Cowrey, & Miller for Russell.

Messrs. S. C. Hubbell and T. Z. Blake-man for interveners.

Messrs. Chapman & Hendrick, J. D. Bicknell, and Bicknell & Trask for respondents.

remedy is exclusive. Where a liability is created which is not penal, and no remedy is prescribed, the liability may be enforced wherever the person is found. The procedure will, however, be entirely governed by the law of the forum. If the law creating the liability provides for a particular mode of enforcing it, the mode limits the liability." These particular statements are more fully considered under the other subdivisions.

But the only practical mode of dealing with a corporation and its members when seeking to charge the latter upon their statute liability is said, in *Erickson v. Nesmith*, 4 Allen, 233, to be to proceed in the manner prescribed by the statute creating such liability and in the local jurisdiction where the corporation was established and carried on its business and by whose local statutes alone the liability exists.

These two cases indicate the existing conflict in the decisions as to remedies against stockholders of foreign corporations which is more fully developed in succeeding paragraphs.

The opinion of the court in *MARSHALL v. SHEP-MAN* says: "The courts of Massachusetts have uni-

Temple, J., delivered the opinion of the court:

The plaintiff brings this action as a judgment creditor of the Pacific Railway Company, in his own behalf and for other creditors of the corporate defendant and of the Los Angeles Cable-Railway Company, for the appointment of a receiver, for the sale of its property, and that the sum due from stockholders of the Pacific Railway Company on their stock, so far as necessary, may be called in. Numerous stockholders resident in California are made defendants. A complaint in intervention was filed in behalf of numerous persons who claim to be creditors of the Pacific Railway Company in various amounts. These creditors have no joint or common interests whatever, but claim the right to thus join under the provisions of a statute of the state of Illinois, which was proved at the trial. February 10, 1891, Charles H. Morse in the superior court of Cook county, Illinois, recovered a judgment against the Pacific Railway Company for a sum of money, and caused an execution to be issued on said judgment, which was afterwards returned *nulla bona*. Afterwards, upon the averment of the insolvency of the corporation, said Morse caused a receiver to be appointed for said corporation, by the said Illinois court. On the 20th day of January, 1891, plaintiff recovered a judgment in the superior court of Los Angeles county against the Pacific Railway Company for the sum of \$1,058. 48, and thereafter commenced this action, and has procured a receiver to be appointed to impound the assets of the Pacific Railway Company. It is averred, and practically found, that the corporation is utterly insolvent. Judgment was entered for the defendants, and the interveners, having made a fruitless application for a new trial, now appeal both from the order refusing a new trial and from the judgment.

One reason urged by the respondents why the appeal should not be sustained is that, as they contend, an action of this character cannot be maintained in this state; that is to say, it is a special remedy given by the statute of Illinois, and can be enforced nowhere else. The law of the state of Illinois, as found by the court, is as follows: By the 8th section of

the act under which the Pacific Railway was incorporated it was provided that "each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stocks shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee until the said stock be fully paid. Whenever any action is brought to recover against the corporation, it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment. Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon to the extent and in the same manner as if he had been the original subscriber." Laws 1871-72, p. 299. By § 25 of the same statute it is further provided that under certain circumstances a creditor who has obtained a judgment against the corporation, and whose execution has been returned *nulla bona*, may bring suits by joining the corporation against the persons who were stockholders at the time or in any way liable for the debts of the corporation, to compel each stockholder to pay his *pro rata* share of such debts, or liabilities to the extent of the unpaid portion of the stock after exhausting the assets of the corporation. Further, it authorized courts of equity, on good cause shown, to dissolve the corporation, and close up the corporate business, and to appoint a receiver, who shall in all cases be a resident of the state of Illinois. Counsel for appellants admit that the proceedings provided for in the 25th section can be taken only in the state of Illinois. It is a special remedy, providing for contribution among the stockholders, and a possible dissolution of the corporation and a winding up of its business. They contend, however, that the 8th section merely creates a liability, which is in the nature of a contract liability, and which is enforceable wherever the stockholder can be found. The general rule upon this subject is very well established. Where a statute creates a right and prescribes a remedy for its en-

formly refused to entertain actions of this character, either upon the ground that to enforce the foreign law would be injurious to its own citizens, or that complete justice could not be administered in its courts under its special and peculiar provisions;" citing *Erickson v. Nesmith*, *supra*; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349; *Poet v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 66; and *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 66. Respecting these cases it says: "The arguments of the court in these cases upon which the conclusion was based deserve the highest respect."

But the New York case is clearly distinguishable from some at least of these Massachusetts cases which are characterized by Judge Thompson in his Commentaries on Law of Corporations, vol. 3, § 3037, as based upon "a seemingly narrow and tribal judicial policy." Of the Massachusetts doctrine Judge Thompson further remarks in § 3069: "This doctrine which screens her citizens from the liability imposed upon the coadventurers in such corporations who happen to be residents of other

states is grossly unjust, and it is none the less unjust because it is declared in a series of decisions of a court of great learning and reputation and attempted to be bolstered up by legal theories and reasons." He adds that "under it, all that a stockholder of a failing foreign corporation will have to do to escape his liability will be to move with his property into Massachusetts; and Massachusetts will thus become the White Friars of dishonest stockholders."

But the latest Massachusetts decision on the subject sustains the right of action to enforce the liability of Kansas stockholders on demurrer to a declaration which averred, in substance, that the Kansas statute as interpreted by the supreme court of that state made the stockholder's liability contractual arising upon his subscription, and that he thereby guaranteed payment to the creditors of an amount equal to the par value of his stock, which should be payable to the judgment creditors of the corporation who first pursued their remedy under the statute, and that an action to enforce said liability is transitory and may be brought in any

forcement, that remedy is exclusive. Where a liability is created which is not penal, and no remedy is prescribed, the liability may be enforced wherever the person is found. The procedure will, however, be entirely governed by the law of the forum. If the law creating the liability provides for a particular mode of enforcing it, the mode limits the liability. If it be a contract, the parties here contracted with the understanding that they can be held liable in no other way. *Fourth Nat. Bank v. Franchlyn*, 120 U. S. 747, 80 L. ed. 825. And such a liability cannot be enforced in another state. *Young v. Harrell*, 139 Ill. 326; *Bank of North America v. Rindge*, 154 Mass. 203, 18 L. R. A. 56; *Fowler v. Lamson*, 146 Ill. 472; *Jeanup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Erickson v. Nesmith*, 4 Allen, 233. By the 8th section of the Illinois statute, above quoted, a special remedy is provided, and, not only so, but plainly it was intended that it should be the only remedy. By the first clause, apparently, an absolute liability is imposed upon the stockholder for the debts of the corporation to the extent of the amount unpaid upon his stock. If this were all, the liability would be primary, and could be enforced without suing the corporation, and without reference to its solency. In fact nowhere in this section is it made of any consequence whether the corporation is solvent or insolvent, or whether or not it has assets which could be reached by ordinary writ. The next clause, however, expressly limits the collection of the debt to the mode prescribed, which is by garnishment. And this may be done whether the amount unpaid has been called in or not. Whether this can be done after the assets have been impounded by the appointment of a receiver for the purpose of liquidation will depend upon the laws of Illinois. It is said that it has been there held that it can be done by what is called "equitable garnishment." It would not be so here. The unpaid subscription would, with other assets, pass to the receiver, to be collected and disbursed under the direction of the court. The Illinois remedy cannot be imported here.

I think the question has been passed upon by the courts of Illinois in *Pease v. Underwriters Union*, 1 Ill. App. 287, which was a proceed-

ing under the 8th section. The court said: "It will be seen that by the terms of this statute a new remedy is provided for the creditors of corporations by providing that 'whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time, . . . as in case of garnishment.' There has been some discussion between counsel in the case as to the proper form of procedure by the use, Miller, to avail himself of the benefit of this new remedy. There has been no judicial construction of this statute that we are aware of, and we are left to determine just what the mode of proceeding contemplated by the legislature was. We think the language employed in the statute is unambiguous, and, fairly interpreted, means that a creditor of a corporation may bring suit in any of the usual forms of action for any indebtedness due to him from such corporation, and, upon suing out summons, may, by virtue of this statute, sue out at the same time a garnishee summons, directed to any of the stockholders of such corporation whose subscription to the capital stock thereof is wholly or in part unpaid; and by the service of such garnishee summons upon such stockholder prevent his further payment of such stock to the corporation, but hold the same in abeyance, to await the result of the trial of the original cause; and when a recovery is had (if at all) the garnishee may be then compelled to respond to such judgment creditor instead of paying his said indebtedness to the corporation. This is briefly and substantially the proceeding which we think the statute authorizes at the instance of a creditor of a corporation." This language is unambiguous, and shows the construction given to the statute by the courts of Illinois. Independently of this ruling we should have no difficulty in reaching the conclusion that the Illinois statute does not create a liability which can be enforced here. The interveners, therefore, have no standing as litigants in the case, and the order and judgment are affirmed.

We concur: **Harrison, J.; Garoutte, J.; Van Fleet, J.; McFarland, J.; Henshaw, J.**

court of general jurisdiction in the state where personal service can be made upon the stockholders. The Massachusetts court accordingly holds that it has jurisdiction to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. In deciding the demurrer the court could only look at the averments of the declaration, and could not take judicial notice of the Kansas statutes or of their interpretation by the courts of that state. *Hancock Nat. Bank v. Ellis*, 106 Mass. 414. This decision, it will be seen, places the Massachusetts court squarely in favor of the right to enforce a stockholder's liability under the statutes of another state when that liability is to be regarded as contractual and enforceable in a transitory action without being limited by provisions for a special remedy. It materially limits the general language of *Erickson v. Nesmith*, *supra*, although it does not refer to that case.

The fact that a foreign corporation is in the hands of receivers does not prevent a creditor from maintaining an action against its stockholders if the statute makes the latter directly lia-

ble to the creditors. *Hancock Nat. Bank v. Ellis supra*.

Assuming that such a remedy may be had under the statute of another state, it must appear, in order to state a cause of action against a stockholder under it in favor of a creditor of the corporation, that the corporation was formed subsequent to the adoption of the statute, or that the stockholders were at the time of its passage liable under some former statute, if the statute on which the action is based is limited to cases of this kind. *Barnes v. Wheaton*, 80 Hun, 8.

The termination of the existence of the corporation in another state was set up in one case as a defense. Thus, an affidavit of defense by a stockholder of a Kansas corporation, which avers that before the indebtedness of the corporation for which he is sued it had ceased to be a corporation in Kansas or under its laws, was held insufficient in *Sykes v. Anderson*, 14 Pa. Co. Ct. 329. The court does not decide in this case that the fact, if established, of the termination of the corporate existence under the Kansas charter would not have been

ILLINOIS SUPREME COURT.

Sidney TUTTLE, *Appt.*,
v.
NATIONAL BANK OF THE REPUBLIC,
of St. Louis.

(161 Ill. 497.)

1. The provision of Kan. Const. art. 12, § 2, that dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such "other means as shall be provided by law," is not self-executing.
2. The courts of one state will adopt its own methods of construction of a constitutional provision of another state, where the courts of the latter state have not construed it.
3. A special remedy against stockholders of a corporation, provided by the laws of the state where the corporation is domiciled, will not, on the ground of comity, be enforced in the courts of another state which has a different and inconsistent method of procedure, where it will result in injustice to the citizens of the latter state.
4. The courts of a state of the domicile of an insolvent corporation must, by an appropriate proceeding, determine the relation of the corporation and its creditors and stockholders and the proportionate share of the corporate indebtedness to be borne by each solvent stockholder before relief can be had against a stockholder in the courts of another state.

(*Baker, Magruder, and Cartwright, JJ., dissent.*)

(March 30, 1896.)

APPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for McLean County in favor of plaintiff in an action brought to enforce the liability of defendant as a stockholder in a Kansas corporation which had become insolvent. *Reversed.*

The facts are stated in the opinion.

material, but holds that the affidavit does not show how or by what means it ceased to be a Kansas corporation or from what source or sources information of this fact was obtained, and that the deponent does not make the averment of his own knowledge, or even allege his own belief therein.

An action in case to enforce liability of stockholders in a foreign corporation was not sustained in *Bond v. Appleton*, 8 Mass. 472, 5 Am. Dec. 111, but this was on the ground that there was no liability established.

2. Nature of the liability.

Many of the cases have turned on the question whether the statutory liability of stockholders in corporations of other states was to be considered as contractual or penal, and in most of them the liability has been held to be in the nature of a contractual rather than of a penal liability. But it will be seen that the case of *MARSHALL v. SHERMAN*, while holding that the liability is contractual, refused to regard that as a sufficient reason for enforcing it.

In a suit against a stockholder of a foreign corporation, it is said, in *Lowry v. Inman*, 46 N. Y. 119: "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in 34 L. R. A.

Mr. A. E. De Mange, for appellant:

Special remedies having been provided for the enforcement of the individual liability of stockholders created by the laws of Kansas, those special remedies alone can be pursued to enforce that liability.

Fowler v. Lamson, 146 Ill. 479; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 80 L. ed. 825; *Thompson, Liability of Stockholders*, § 56; *Cook, Stock & Stockholders*, § 219; *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Young v. Farrell*, 189 Ill. 326; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56.

The remedy in such cases as this, if any there be, must be sought in equity, and not at law by a single creditor alone for his own benefit.

Low v. Buchanan, 94 Ill. 76; *Harper v. Union Mfg. Co.* 100 Ill. 225; *Rounds v. McCormick*, 114 Ill. 252; *Queenan v. Palmer*, 117 Ill. 626; *Richardson v. Akin*, 87 Ill. 138; *Eames v. Doris*, 102 Ill. 850; *Robertson v. Noeninger*, 20 Ill. App. 227.

Messrs. Kerrick, Lucas, & Spencer, for appellee:

The supreme court of Kansas is the final and only arbiter as to the true meaning and proper interpretation of the Constitution and the statutes of Kansas.

Elmendorf v. Taylor, 23 U. S. 10 Wheat. 152, 6 L. ed. 289; *Shelby v. Guy*, 24 U. S. 11 Wheat. 367, 6 L. ed. 496; *Christy v. Pridgeon*, 71 U. S. 4 Wall. 196, 18 L. ed. 322; *South Ottawa v. Perkins*, 94 U. S. 267, 24 L. ed. 157; *Chase v. Curtis*, 118 U. S. 452, 28 L. ed. 1038; *Jean v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Boyt v. Thompson*, 3 Sandf. 421; *Union Nat. Bank v. Bank of Kansas*, 138 U. S. 233, 34 L. ed. 341; *St. Louis San. Asso. v. O'Brien*, 51 Hun, 45; *Lane v. Watson*, 51 N. J. L. 186; *Cook, Stock & Stockholders*, 243, note 1; *Howe v. Welch*, 14 Daly, 80.

the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute."

That a stockholder's liability for his proportion of the debts of the corporation is contractual, is also decided in *Dennis v. Los Angeles County Super. Ct.* 91 Cal. 548, where the question arose in respect to a justice's jurisdiction.

On the ground that the liability of a shareholder arose out of his contract, it was held, in *Manville v. Edgar*, 8 Mo. App. 324, that an action would lie against the estate of a deceased stockholder in a foreign corporation, although the debt accrued after his death.

The double liability of stockholders under the Kansas statutes is held to be contractual and not penal, and therefore such liability can be enforced against stockholders in other states. *Bagley v. Tyler*, 43 Mo. App. 195.

The statutory liability of a stockholder is said in *Howell v. Mangiesdorf*, 33 Kan. 194, to arise upon a contract of subscription to the stock, and an action to enforce the same is declared to be transitory so that it can be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. This case, however, was not a case of an action against stockholders in a foreign corporation, but the above declaration

When a person becomes a stockholder in a corporation organized under the laws of a foreign state he contracts with reference to the laws of that state, and his liability as a stockholder is to be determined with reference to the laws of that state.

Flash v. Conn, 109 U. S. 871, 27 L. ed. 966; *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 265; *Howell v. Mangleford*, 83 Kan. 194; *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 416; *Perry v. Turner*, 55 Mo. 418; *Aultman's Appeal*, 98 Pa. 505; *Shafer v. Moriarty*, 46 Ind. 9; *Hill v. Beach*, 12 N. J. Eq. 81; *Crease v. Babcock*, 10 Met. 525; *Seymour v. Sturgess*, 26 N. Y. 134; *Payson v. Withers*, 5 Biss. 269; *Ohio Life Ins. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 38; *Lowry v. Inman*, 46 N. Y. 119; *First Nat. Bank v. Guatin Minerva Consol. Min. Co.* 42 Minn. 827, 6 L. R. A. 676; *Pettibone v. McGraw*, 6 Mich. 441; 2 Morawetz, Priv. Corp. §§ 874, 902.

In the absence of legislation to the contrary the proper way of enforcing such liability is by an action at law.

Corwith v. Culver, 69 Ill. 502; *Fuller v. Ledden*, 87 Ill. 310; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 88; *Hull v. Burtis*, 90 Ill. 218; *Eames v. Doris*, 102 Ill. 350; *Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 108 Ill. 359; *Thebus v. Smiley*, 110 Ill. 316; *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558; *Schalucky v. Field*, 124 Ill. 620; *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 416.

A refusal to grant a remedy in a case of this kind would not be a refusal to enforce a foreign law, but simply denial of justice.

Morawetz, Priv. Corp. § 875.

Stockholders with respect to their personal liability under such a provision are in effect partners and are liable to the creditors of the corporation to an amount equal to the amount of stock held by them respectively.

Fuller v. Ledden, *Thompson v. Meisser*, and *Schalucky v. Field*, *supra*.

The Kansas statute is no more than declaration of the common law.

Cook, Stock & Stockholders, § 227; *Beach*, Priv. Corp. § 141; Morawetz, Priv. Corp.

§ 314; *Pom. Eq. Jur.* § 418; *Story, Eq. Jur.* 494; *Davies v. Humphreys*, 6 Mees. & W. 167; *Dering v. Earl Winchelsea*, 1 Cox., Ch. Cas. 821; *Craythorne v. Swinburne*, 14 Ves. Jr. 169; *Craig v. Ankeney*, 4 Gill, 225; *Byers v. Alcorn*, 6 Ill. App. 44; *Stoo v. Pool*, 15 Ill. 47.

Such an action as this was a proper common-law remedy.

Corwith v. Culver, 69 Ill. 502; *Fuller v. Ledden*, 87 Ill. 310; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 88; *Hull v. Burtis*, 90 Ill. 218; *Eames v. Davis*, 102 Ill. 350; *Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 108 Ill. 359; *Thebus v. Smiley*, 110 Ill. 316; *Root v. Sinnock*, 120 Ill. 350, 60 Am. Rep. 558; *Schalucky v. Field*, 124 Ill. 620; Morawetz, Priv. Corp. § 895; Cook, Stock & Stockholders, § 221; *Flash v. Conn*, 109 J. S. 380, 27 L. ed. 970.

Phillips, J., delivered the opinion of the court:

The National Bank of the Republic of St. Louis, Missouri, appellee, recovered a judgment against Sidney Tuttle, appellant, by reason of his being a stockholder in the Edwards County Bank of Kansas, which became insolvent owing appellee.

Section 2 of article 12 of the Constitution of the state of Kansas provides: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but said individual liability shall not apply to railroad corporations, nor corporations for religious and charitable purposes."

A right of action against a stockholder of a corporation ordinarily exists only by virtue of some statutory enactment. It did not exist at common law. It is of importance to determine, at the threshold of this case, whether this provision of the Constitution of the state of Kansas is self-executing. When it was declared by that instrument that "dues from corporations shall be secured by individual liability of stockholders to an additional

was made in explaining a decision denying jurisdiction of the state court to award execution against the property of a nonresident stockholder who has not been served with notice within the state.

The individual liability of stockholders under the Constitution of Ohio, and a statute providing that they shall be liable to an amount equal to their stock subscribed in addition to said stock, for the purpose of securing the creditors of the company, constitutes a contract, express or implied, to pay, not only for the stock owned or subscribed, but so much in addition as would be necessary for the purpose of securing the creditors of the company, and this contract can be enforced in any state if the defendants are amenable to the process of the court. *Aultman's Appeal*, 98 Pa. 505.

So, the liability of stockholders under the Ohio Constitution and statutes, providing that they shall be liable, in addition to their stock in an amount equal to the stock, to the creditors of the corporation to secure the payment of its debts and liabilities, was held, in *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184, to arise out of the implied promise of the stockholders, and not to be in the nature of a penalty or forfeiture.

34 L. R. A.

A complaint by a creditor of a foreign corporation against a stockholder, alleging that defendant is such stockholder, and that under the laws of the state of incorporation he is liable, without averring that such law was in force at the time that the debt was contracted, and without showing that the liability is founded on a contract and not on a special provision in the nature of a penalty, is held to be insufficient to create a cause of action. *Winter v. Baker*, 50 Barb. 422, S. C. *Patterson v. Baker*, 34 How. Pr. 180.

The stockholders' liability to be enforced in *Cuykendall v. Miles*, 10 Fed. Rep. 342, was under a statute making all stockholders liable to an amount equal to their stock until the whole of the capital stock is paid in and a certificate thereof filed. This statute is held not to be penal. It did not appear whether the actual default was in the shareholders for nonpayment of capital, or in the officers who had not certified the payment.

So, where the failure to file such a certificate was averred, as the ground of liability without (as it seems) averring nonpayment by the shareholders, it was held that the individual liability of stockholders provided for by the New York act of 1848 making them liable until the whole amount of cap-

amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." it is apparent legislation was contemplated as necessary to provide a means of enforcing the liability and determining the manner by which "such other means as shall be provided by law" should be made effectual as securing dues from corporations. That provision seemed to impose on the legislature the duty of securing dues from corporations, but limited the power and discretion of that body as to the extent to which it could make stockholders liable. It is only in exceptional cases that constitutional provisions enforce themselves. Usually they must be supplemented by legislation, to become operative. The intention of the instrument must ordinarily prevail, and in its ascertainment we must look at the consequences of a particular construction. Constitutional provisions, like statutes and private instruments, must be construed, if possible, so as to give effect and some force to each of their provisions. By legal intentment each and every clause has been inserted for some purpose which, when rightly understood, may have some practical result. There may, in construction, be transposition of sections, paragraphs, and sentences, the words may be restricted or enlarged; but it is unauthorized to take a part of a paragraph or section and construe that without reference to another part of the same paragraph or sentence. Where it is apparent that a particular provision of the organic law shall go into immediate effect without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject, and the language is free from ambiguity, then it becomes the imperative duty of judicial tribunals to declare it self-executing; and where the provision is unambiguous, and the purpose of the provision would be frustrated unless it be given immediate effect, it will be held self-executing.

In determining the purpose of this provision of the Constitution of the state of Kansas, it is obvious the central idea and purpose were

the protection of creditors or corporations other, than railroads, or those designated as religious or charitable corporations. To secure this, a liability was declared against stockholders to an additional amount equal to the stock owned by such stockholders, "and such other means as shall be provided by law." If this provision is to be treated and construed as self-operating, then the clause, "and such other means as may be provided by law," must be rejected as meaningless and held without force or effect. The creditor must be confined to the security of the individual liability of stockholders to an amount equal to the stock owned by such stockholders. In the attempt to give construction to this clause of the Constitution of the state of Kansas in the absence of legislation, we are confronted with a serious difficulty and much ambiguity. What stockholders are liable for dues to corporations? When are they liable? Is it the holder of the stock at the time the indebtedness is created, or at the time the indebtedness became due, or at the time suit is instituted to recover the dues owing by the corporation? All these questions arise in each case, and will not down without an answer. The instrument itself gives no light to determine these questions. Different tribunals of that state would doubtless be in a maze of doubt on attempting to answer the questions, and doubtless would reach different conclusions. To treat the provision as self-operating would do violence to two leading principles of construction: by rejecting a clause of the instrument and giving it no force and effect; and holding an ambiguous clause self-executing when that clause is of the most doubtful construction. It is apparent from a consideration of the provision itself, legislation was contemplated as necessary to carry it into effect and enable the remedy to be applied and give the intended security to the creditor, and the clause cannot be treated or construed as self-operative. *May v. Black*, 77 Wis. 101; *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *Morley v. Thayer*, 8 Fed. Rep. 737; *Fuss v. Spaunhorst*,

ital stock was paid in and a certificate to that effect filed is not in the nature of a penalty, but is founded upon a contract between the stockholders and the creditors of the company, and may be enforced in any court sitting beyond the limits of the state, if it has jurisdiction of the subject-matter and of the parties. *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966. To the same effect, see *Flash v. Conn*, 15 Fla. 428, 28 Am. Rep. 721.

But a liability of stockholders of a foreign corporation which results from the failure of officers to make and file a certificate of the fact that the stock is fully paid, where it appears that such payment had in fact been made, is treated in *Woods v. Wicks*, 7 Lea, 40, as a forfeiture or penalty which cannot be enforced in another state.

So, in *Bayles v. Brown*, 40 Fed. Rep. 8, stockholders' liability under a state statute making them jointly and severally liable for all debts and contracts of the company until the whole amount of capital stock has been paid in and a certificate thereof filed, is held to be contractual; but the liability of stockholders under another provision of the statute making them jointly and severally liable for debts in case they fail to file an annual certificate is held to be penal, and therefore not en-

forceable in a suit against foreign stockholders in a Federal court sitting in another state.

In regard to the liability of stockholders in Kansas corporations, it is said by Mitchell, J., in *CUSHING v. PEROT*, in writing the opinion of the court: "My individual opinion is that, by the weight both of reason and authority, the liability created by it is contractual, and should be enforced by any court having jurisdiction of the parties." But he adds that for reasons mentioned the court is not required to enter into the discussion of that question.

While it is expressly declared that the cause of action is not for a penalty, it is said in *MARSHALL v. SHERMAN*, in refusing to sustain an action at law in New York against stockholders of a Kansas corporation, that the action belongs to a class of cases in which there is no obligation, under any well-recognized principle of the law of comity, to enforce a claim founded upon such a statute.

In assumption for money loaned, where defendants plead nonassumpsit and a special plea that the loan was to a corporation of another state in which they were stockholders, a replication attempting to hold them individually liable as stockholders under the laws of the state of incorporation because the full amount of stock had not been paid for, a certifi-

67 Mo. 256; *French v. Teaschemaker*, 24 Cal. 518; *Larrabee v. Baldwin*, 85 Cal. 156; *Marshall v. Sherman*, 148 N. Y. 9, post, 757.

In the case last cited the identical provision of the Constitution of the state of Kansas, and the legislation thereunder, were before that court for consideration, and the provision of the Constitution was held not self-operating, and it was also held the special remedies provided by the legislature of the state of Kansas could not be applied in another jurisdiction, but when resort was had to the courts of another state, the remedy there provided and the practice and procedure of its courts must be resorted to. That case is directly in point on the question presented in this record. We are referred to no case in which the provision has been held self-executing by the highest court in that state, and in the absence of such decision by such court any other method of interpretation would do violence to recognized rules of construction adopted by this court. Where the courts of that state have not construed the provisions of their Constitution, when the question is presented to us we have the right to adopt our own methods of construction.

The legislature of the state of Kansas has not adopted any statute declaratory of the question as to the extent of the security of dues from corporations, and as to the time a stockholder's liability attaches with reference to the time of contracting the indebtedness,—whether the time is when the debt became due, or when suit is brought by the creditor. The legislature of that state, by such legislation as has been enacted, has only attempted to declare the remedy, and has adopted two statutory provisions, the first of which is as follows: "If any corporation created under any statute of the state of Kansas, except railroad and charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may

sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of such stockholders, respectively; and if any number of the stockholders, defendants in the case, shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders and collections made accordingly, deducting from the amount a sum in proportion to the amount owned by the plaintiff at the time the corporation dissolved." And the other of said statutes reads thus: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

In determining the construction of these provisions of the statute of the state of Kansas, and considering the remedies provided, and bearing in mind there is neither a constitutional nor statutory liability effectively declared in that state, we must construe these statutes, with reference to the remedy, in the light of such rules and upon such principles as the courts of this state apply in the construction of such enactments. The remedy provided by the 2d clause of the 1st section quoted, and

cate of the fact filed was held bad as an entire departure from the declaration, and in reaching this conclusion it is said that the personal liability of stockholders is a creature of statute. *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52.

The liability of stockholders of a corporation for debts due to laborers, servants, etc., under a provision of the statutes of New York in which the corporation was formed, seems to be regarded as penal, so that it cannot be enforced in Massachusetts against stockholders of a New York corporation, although it is carrying on business in Massachusetts, but the remedy is treated as a part of the statute system of another state incapable of execution *alieno foro*. *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157.

But a declaration against stockholders of a foreign corporation averring that their liability is contractual under the statutes which govern it is held good against demurrer in *Hancock Nat. Bank v. Ellis*, 166 Mass. 414.

Cases as to the statutory liability of the officers of a corporation for its debts when they sign and record a false certificate of the amount of its capital stock, such as *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, Reversing 70 Md. 191, 2 L. R. A. 779, are clearly distinguishable from those relating

to stockholders, and it is not the intent to include them here.

3. Liability absolute or distinct from statutory remedy.

It has been laid down as a general rule on the subject that if the legislature creating a foreign corporation has declared that stockholders shall be individually liable, and pointed out no mode in which that liability may be made available, such liability may be enforced in another state. *RUSSELL v. PACIFIC R. CO.*; *Lowry v. Inman*, 46 N. Y. 119.

There is no case which directly denies this rule, while its correctness is assumed or implied in nearly all the cases on this subject, yet it may be doubted whether on this point the case of *Lowry v. Inman*, 46 N. Y. 119, is not impliedly overruled, without mentioning it, by *MARSHALL v. SHERMAN*. As to this, see further, *infra*.

A complaint alleging that defendants are stockholders in a corporation created by another state under the laws of which they are individually responsible for its debts to the amount of their stock was held sufficient on demurrer in *Perkins v. Church*, 31 Barb. 84, to make them liable to the plaintiff as a creditor of the corporation without

by the 2d section of the above-quoted legislation, is a remedy unknown to the common law, and it is a remedy existing only by force of the statute of the state of Kansas. The principle is uniformly recognized that the relation of a stockholder to the corporation is determined by the laws of the state of the creation of the corporate body, and where the law of the domicile of the corporation creates a special remedy that remedy cannot be enforced except within the jurisdiction of the domicile of the artificial body. *Erickson v. Nesmith*, 4 Allen, 233; *Morgan v. Neville*, 74 Pa. 52; *Waldron v. Ritchings*, 3 Daly, 288; *Siegel v. Robinson*, 56 Pa. 19, 98 Am. Dec. 775; *Ludlow v. Van Rensselaer*, 1 Johns. 95; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86; *Bank of North America v. Rindge*, 154 Mass. 208, 13 L. R. A. 56; *Marshall v. Sherman*, *supra*.

In this case the right to recover rests on the statute of the state of Kansas alone, as the constitutional provision is not self-enforceable, and the liability is only attempted to be made resultant from legislation providing a special remedy and by the construction placed on that legislation by the courts of that state. The statutes of the state of Kansas have no force and effect in another state, and the enforcement of a remedy in this action in this state depends upon our express or tacit assent, which is usually expressed as the comity between states. The extent to which this principle of comity may proceed is subject to qualifications and restrictions which, in almost all cases, are

to be determined by the particular sovereignty. A remedy special to a particular foreign state is not, by any principle of comity, enforceable here, and must be applied within the jurisdiction of the domicile of the corporation. *Fowler v. Lamson*, 146 Ill. 472; *Young v. Farwell*, 139 Ill. 326; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *National Bank v. Dillingham*, 147 N. Y. 603; *Lowry v. Inman*, 46 N. Y. 119.

Under the entire provisions of the statutes quoted, it becomes of material importance to inquire whether the proposed remedy therein provided is enforceable here. This presents a question of much interest and importance. It is of the highest moment that full faith and credit be given by each state to the judicial proceedings of sister states. This may be done without giving extraterritorial effect to the legislation of sister states. Each state determines its method of procedure in its courts, and their jurisdictions. In this there is neither injustice nor hostility to a sister state. But it would be hostile to every principle of sovereignty to be compelled to import into this state the peculiar remedies and various special methods of procedure invented by the legislation of the various states. This principle has been generally recognized. *Young v. Farwell*, *supra*; *Patterson v. Lynde*, 112 Ill. 196; *May v. Black*, 77 Wis. 101; *Nimick v. Mingo Iron Works Co.* 25 Va. 184; *Allen v. Walsh*, 25 Minn. 543; *Peck v. Miller*, 39 Mich. 594; *Barrick v. Gifford*, 47 Ohio St. 181; *Smith v. Huckabee*, 58 Ala. 191; *Terry v. Little*, 101 U.

any allegation that the corporation was insolvent or that the remedies against it had been exhausted. The theory of this decision seems to be that the complaint alleged an unlimited and unconditional liability of the stockholders to the amount of their stock for any debts of the corporation.

A provision of an Illinois statute that stockholders of a bank shall be individually responsible for an amount equal to the amount of stock held by them respectively whenever default shall be made in the payment of any debt or liability contracted by the corporation, and that such liability shall continue until three months after an assignment on publication of notice thereof, is held to create a liability which can be enforced against a Missouri stockholder by an action in Missouri. *Hodgson v. Cheever*, 8 Mo. App. 318.

The Minnesota statute making stockholders of a bank liable for its debts while they are stockholders, and for one year thereafter to double the amount of their stock, was enforced in Connecticut in the case of *Paine v. Stewart*, 38 Conn. 518, on the ground that the liability is independent and absolute, and does not wait for the insolvency of the company before it accrues, although the statute further provides that the stockholders' property cannot be levied upon while corporate property can be found with which to satisfy the claim.

Liability of a stockholder in a California corporation under the laws of that state being personal and individual for such proportion of the debts of the corporation as his stock bears to the whole subscribed capital stock and enforceable by any creditor in a several action, it is held that such liability may be enforced against a stockholder in Oregon on the ground that his liability is primary and original and in no way dependent or contingent upon a recovery against the corporation and enforceable in an ordinary action at law. *Aldrich v. Anchor Coal & D. Co.* 24 Or. 22.
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The right to recover against stockholders of a foreign corporation for debts due to laborers for services under a provision of the statute of incorporation making them liable for such debts is regarded as a liability which can be enforced in another state, in *Woods v. Wicks*, 7 Lea. 40; but the statute governing the case is there construed to require a prior judgment and return of execution unsatisfied.

In a suit against stockholders of a foreign corporation organized to carry on business in the place where the suit was brought an allegation on information and belief that stockholders by the laws of the state of incorporation were liable for all debts due from the company to its laborers was held insufficient in a suit by a laborer, where there was nothing to show what kind of a remedy was provided in the state of incorporation. The court said: "I do not think comity requires us, in the exercise of a judicial discretion, to give effect to the foreign statutes here. Being without information as to the remedy afforded in Ohio, it might happen that we should afford a remedy here which is denied to persons in that jurisdiction." *Rice v. Merrimack Hosiery Co.* 56 N. H. 129.

As to a claim that the liability was entirely unknown to the common law, and therefore no action would lie outside of the state in which it was created, the court refused to make a decision. *Ibid*.

The Massachusetts court, in *Halsey v. McLean*, 15 Allen, 438, 90 Am. Dec. 157, refused to enforce the statutory liability of stockholders in a New York corporation to one who had worked for it as a quarry superintendent, on the ground, among others, that liability of stockholders to laborers for the corporation could be enforced only in New York. This case therefore seems not to recognize the general doctrine on which most of the above cases are based, but the decision was based also on other grounds, such as the failure to bring an action

S. 216, 25 L. ed. 864; *National Tube Works Co. v. Ballou*, 146 U. S. 517, 36 L. ed. 1070.

This proceeding in our courts is, in brief, an application to the courts of this state for a recognition of a special remedy provided by the statutes of another state, on the ground of comity, which would be in contradiction of methods of procedure and practice adopted under our judicial remedies in such cases, and would work an injustice toward our own citizens. The Kansas statute gives a creditor of a corporation certain remedies against a stockholder, and gives such stockholder certain rights against other stockholders for contributions, etc. By the first clause of the quoted statute it at first blush seems to recognize that an action at law against an individual stockholder may be had without the jurisdiction of the courts of Kansas. It does not, in the same action, secure the rights of the creditor, the corporation, and the stockholder. It recognizes the right of the stockholder to bring in other stockholders for contribution in the same proceeding, and is therefore a special remedy.

The important question to be here determined is, whether the courts of this state will, in any form, take jurisdiction of a question arising as to the respective relations of creditors and stockholders of a corporation of another state, where a special remedy is provided by statute, before there is a determination by the courts of such state of the just proportion of the corporate indebtedness to be borne by solvent stockholders of such corporation. No decree of the courts of this state could result

in taking an account and dissolving a corporation of another state. It is for the courts of that state to enter a decree stating the account, winding up the affairs of the corporation, and determining the relation of the stockholders, creditors, and corporation to each other. When that question has been determined by the courts of that state, then, if it becomes necessary, the creditors, stockholders, and the corporation, or its representative, may, as against stockholders who are domiciled here, appeal to the courts of this state, and have, as against such domiciled stockholders, adequate relief. *Young v. Farwell*, *supra*, and cases cited; *Fowler v. Lamson*, *supra*.

It only, then, becomes necessary to determine whether such determination has been had by the courts of Kansas. This plaintiff had become a creditor of the Edwards County Bank, in which the defendant was a stockholder, which bank was dissolved and a receiver appointed therefor. The plaintiff brought suit against the bank and receiver and recovered a judgment, on which execution was issued and was returned no property found. This suit was then instituted. Here the relations to each other of the various creditors, stockholders, and corporation had not been determined. Yet the supreme court of that state has held, under the foregoing statutes a stockholder is individually liable to creditors of the corporation to an additional amount equal to the stock owned by him. *Hentig v. James*, 22 Kan. 326; *Howell v. Mangelsdorf*, 38 Kan. 194; *Valley Bank & Sav. Inst. v. Ladies' Cong. Sewing Soc.* 28 Kan. 428; *Abbey v. W. B. Grimes*

against the corporation within the time required by New York statutes.

4. Constitutional Liability.

The question whether or not the provision of the Kansas Constitution declaring that "dues from corporations shall be secured by individual liability of the stockholders and an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law" is self-executing, has been considered in a number of cases. In *Flower v. Lamson*, 146 Ill. 472, the court said the decisions of the supreme court of Kansas must be first looked to, and their ruling would be adopted if they had made any upon the subject, and afterwards said: "While it is, perhaps, true that the supreme court of Kansas has not decided, in terms, that such constitutional provision is self-executing, it is fully recognized, and in effect held, that stockholders of corporations organized under the Constitution and foregoing statutes of that state are individually liable to creditors of such corporations to an additional amount equal to the stock owned by each of them."

But that the Kansas Constitution is not self-executing in this matter is directly decided in *TUTTLE v. NATIONAL BANK OF THE REPUBLIC*, and *MARSHALL v. SHERMAN*.

The provision of the Ohio Constitution that "dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law, but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock," is not self-executing so as to create a right of action in another state against a stockholder in an Ohio corporation. *Barnes v. Wheaton*, 80 Hun, 8.

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A plaintiff basing his action against a stockholder in a foreign corporation upon a statutory liability by allegations in his complaint is bound thereby, and cannot claim that the Constitution of the state creates such liability. *Ibid*.

A provision of the Michigan Constitution that "the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association," being held by the courts of that state to create a collateral and not a primary liability which cannot be enforced without the aid of statutes, will not create a right of action in another state against a stockholder of a Michigan corporation. *May v. Black*, 77 Wis. 101.

5. Exclusiveness of statutory remedy provided in state of incorporation.

It is quite generally agreed that when a charter makes stockholders liable only to an amount equal to their stock upon prescribed conditions and by specific process the remedy of the creditor must be sought according to the terms and by the means provided by the charter, and it is necessarily confined to the state of incorporation, and cannot be enforced by a foreign tribunal. *Lowry v. Inman*, 46 N. Y. 119.

"The statutory remedy is, of course, not available in this state," said the court in *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, in speaking of the Missouri statute, which provides for execution against a stockholder after judgment and unsatisfied execution against the corporation.

Under a charter which declares that no one but citizens of a state shall own stock, and prescribes the conditions of their liability, with a mode of enforcing it by execution upon a judgment against the corporation, and a provision to secure equity between the stockholders, with a ratable contribu-

Dry Goods Co. 44 Kan. 415. Each of these cases, however, was with reference to the special remedies provided by that state. Such special remedies for the enforcement of the liability thereunder can only be resorted to within the jurisdiction of that state, and can have no effect here. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 80 L. ed. 825; *Fowler v. Lamson*, *supra*.

Under § 14, chapter 83, of the laws of Kansas relating to insurance companies, this constitutional provision was attempted to be enacted into a statute, and in *Grund v. Tucker*, 5 Kan. 70, the supreme court of that state substantially held, with reference to that provision, that where a statute confers a right and prescribes a remedy, that remedy only can be pursued; and further held the stockholder was primarily liable, and if he ought to have contribution he may bring the other stockholders before the court in the same proceeding. The very statement of this proposition is sufficient to show such remedy could not be applied, under the practice in this state, in an action at law. This suit at law cannot be maintained in the courts of this state under the facts appearing in the record.

The judgments of the Appellate Court for the Third District, and of the Circuit Court of McLean County, must each be reversed, and the cause remanded.

Baker, J., dissenting:

I am unable to concur in this decision. I think the judgments of the circuit and appellate courts should be affirmed. The provision

in the Constitution of the state of Kansas, that "dues from a corporation shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," as interpreted by the legislature and by the supreme court of that state, is self-executing, and that interpretation should be adopted and followed. While the liability is statutory, it is one which arises upon the contract of subscription, and an action to enforce it is transitory. The liability is not to the corporation, nor to the creditors of the corporation as a class, but to each individual creditor as security for "dues from the corporation." It is not a joint liability of the stockholders, but a several liability of each stockholder. The rule is, that a liability arising out of contract, though created by a Constitution or statute, and such Constitution or statute providing no remedy, may be enforced by an appropriate common-law action in any court having jurisdiction of the subject-matter and the parties. The liability, though secondary to that of the corporation and in the nature of a guaranty, is at the same time an original and independent liability, that exists as between the stockholder in his individual capacity and the creditor in his individual capacity, and that is created by the contract of subscription. It is not a right or equity that must be worked out through the corporation itself, and therefore this case is not governed by the decisions in *Patterson v. Lynde*, 112 Ill. 196; *Young v. Farrell*, 139 Ill. 326, and other like cases. The view I have taken is supported by *Howell v. Mangelsdorf*, 33 Kan.

tion from all, a stockholder of that state cannot be sued in another state by an independent action, since he would not be liable to an independent action in his own state where the corporation exists. *Lowry v. Inman*, *supra*.

As the stockholders' liability for unpaid subscriptions provided by Ill. act of 1871-72, p. 299, § 8, is held not to be a general contract liability, but is to be enforced by the remedy corresponding to garnishment provided in that statute, it is held in *RUSSELL v. PACIFIC R. Co.* that it cannot be enforced in another state.

A remedy provided by a statute of a state in which a corporation is created consisting of a joint action against all the holders or owners of the stock of the corporation for the benefit of all the creditors and against all persons liable as stockholders (Ohio Rev. Stat. § 8260) precludes an independent action in that state against one stockholder alone, and therefore such an action cannot be maintained against one stockholder of the corporation in another state. *Barnes v. Wheaton*, 80 Hun, 8.

So it is held in *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184, that Ohio Rev. Stat. § 8260, giving a joint action against stockholders and the corporation for the benefit of all the creditors, and against all persons liable as stockholders, provides the exclusive remedy, and that this could be enforced only in Ohio. Consequently, it is held that a bill in equity to determine the extent of the individual liability of stockholders of an Ohio corporation could not be sustained in the courts of West Virginia.

A bill to enforce a stockholder's liability under the Constitution and statutes of Missouri was brought in the circuit court of the United States in Massachusetts in the case of *Morley v. Thayer*, 3 Fed. Rep. 737, and was dismissed. But the dis-

missal was on the ground that the Missouri statute provided a particular remedy which was at law, and therefore that a suit in equity could not lie. The court held that the remedy provided by statute was exclusive. See further, *infra*, II. 14, as to remedies in Federal courts.

The right of an individual creditor of an insolvent corporation to sue any stockholder for the amount of the par value of his stock, given by 1 Wag. Stat. (Mo.) chap. 37, art. 1, § 22, which provides a remedy in equity for the stockholder to secure contribution and indemnity from other stockholders, may be enforced against a stockholder in another state, since the Missouri courts have construed the statute as giving a right to sue a stockholder by suit in the nature of an action at common law. But it was conceded in this case that the remedy under § 18 of the same statute, by execution against stockholders on a judgment against the corporation, could not be enforced outside of the state. *St. Louis Sav. Assn. v. O'Brien*, 61 Hun, 45.

A remedy against stockholders of a corporation, provided by the Michigan statutes by suit against the stockholders and corporation jointly, but providing that no levy upon the property of stockholders shall be made until the property of the corporation has been exhausted, with a further provision that personal actions against corporations must be brought in a certain county, is exclusive of all other remedies, and cannot be enforced in another state. *May v. Black*, 77 Wis. 101.

The remedies provided by Kansas statutes against stockholders, which are, first, by way of execution against stockholders on judgments against the corporation after execution against it returned unsatisfied, and second, a suit against any of the stockholders without joining the corporation, with a provision giving the stockholder

194; *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415; *Cooley, Const. Lim.* 6th ed. 99; *Pol-lard v. Bailey*, 87 U. S. 20 Wall. 520, 22 L. ed. 376; *Flash v. Conn.* 109 U. S. 371, 37 L. ed. 966; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 489; *Fairfield v. Gallatin County*,

100 U. S. 47, 25 L. ed. 544; *Wincock v. Tur-pin*, 96 Ill. 183; *Schalucky v. Field*, 124 Ill. 617; *Schertz v. First Nat. Bank*, 47 Ill. App. 124, and numerous other authorities.

I am authorized by Justices Magruder and Cartwright to say that they concur in the views I have expressed.

NEW YORK COURT OF APPEALS.

Edward MARSHALL, *Rept.*,

v.

George R. SHERMAN, *Appt.*

(148 N. Y. 2.)

1. A constitutional provision that debts from corporations shall be secured by individual liability of the stockholders and such other means as shall be provided by law is not self-executing.
2. The statutory liability of stockholders in foreign corporations cannot be enforced except at the domicile of the corporation when the law of the domicile provides the remedy.
3. Particular provisions of a statute providing for the individual liability of stockholders in a foreign corporation will not be detached and given effect outside of the domicile of the corporation, if it would be impos-

sible to enforce all the provisions of the statute there, and its whole scope indicates that it was intended to be enforced only where passed.

4. The statutory liability of a stockholder in an insolvent bank is not primary and contractual so as to be enforceable in any jurisdiction where the stockholder may be found.

5. If, under any circumstances, an action to enforce a statutory liability against a stockholder of a foreign corporation could be enforced outside of the state of its creation, it must be by such modes of procedure as like liabilities created by the state where the suit is brought are enforced against its citizens.

(December 19, 1895.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of a

sued a special remedy against other stockholders, are considered in *Fowler v. Lamson*, 148 Ill. 472, in which it is held that these special remedies having been provided they alone can be pursued to enforce the stockholders' liability.

This decision is followed in *TUTTLE v. NATIONAL BANK OF THE REPUBLIC*, in which it is said that the Kansas statute recognizes the right of the stockholder who is sued to bring in other stockholders for contribution in the same proceeding and is therefore a special remedy.

It is said in *TUTTLE v. NATIONAL BANK OF THE REPUBLIC* that the proper proceeding in such case is for the courts of the state in which a corporation existed to state an account, wind up its affairs, and determine the relation of the stockholders, creditor, and corporation to each other before attempting to enforce the liability of stockholders in other states, and said that when that had been done, "if it becomes necessary, or its representative, may, as against stockholders who are domiciled here, appeal to the courts of this state, and have, as against such domiciled stockholders, adequate relief."

So, a resident of another state was not allowed to maintain an action in Massachusetts against a resident of a third state to establish the latter's liability as a stockholder for a debt of a foreign corporation which had no place of business in the state, but was organized under the laws of Kansas, which provide for a special and limited liability on the part of a stockholder when no judicial proceedings have been had in Kansas to establish the liability of the stockholder. *Bank of North America v. Bindge*, 154 Mass. 203, 13 L. R. A. 966. The court limits the decision to the facts of that particular case, but calls attention to the difficulty of enforcing a liability of this nature in other states than

that where the corporation is established in such a way as to secure substantial justice.

So, an action at law will not lie if the remedy prescribed in the state of incorporation is by suit in equity. *Erickson v. Nesmith*, 15 Gray, 221; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864.

6. Conditions prescribed by statutes in state of incorporation.

The conditions of stockholder's liability prescribed by the statutes of a state which creates a corporation are properly regarded as essential, and the liability arises only when those conditions are met. So any prescribed conditions of the remedy in that state are usually regarded as conditions precedent to an enforcement of the remedy in any jurisdiction.

Thus, failure to bring action against the corporation within the time required by the statutes of the state in which it is created in order to give a remedy against the stockholders will be fatal to an action against such stockholders in another state, even if the courts of the latter state would otherwise assume jurisdiction to administer the remedy conferred by a statute of another state, as comity would not require nor justice permit that it should be administered there in a case in which by plaintiff's own neglect his remedy had ceased to exist in the state of incorporation. *Halsey v. McLean*, 12 Allen, 483, 90 Am. Dec. 157.

A provision in the statutes of a state in which a corporation is organized that stockholders cannot be held personally liable while there is corporate property which can be found to satisfy corporate debts, and that a judgment against the corporation and execution thereon must precede recovery against the stockholder, will make it necessary to exhaust the remedies against the corporation before suit can be brought against the stockholder

Special Term for Clinton County overruling a demurrer to the complaint in an action brought to enforce defendant's alleged statutory liability for the debts of a corporation of which he was a stockholder. *Reversed.*

The facts are stated in the opinion.

Messrs. McLaughlin & Rowe, for appellant:

The defendant is liable, if at all, solely by reason of the provisions of the Constitution and the statutes of the state of Kansas set forth in the complaint.

Our courts do not take judicial notice of the Constitution or statutes of another state.

Salt Lake City Nat. Bank v. Hendrickson, 40 N. J. L. 52; *Seymour v. Sturges*, 26 N. Y. 184; *Deberiois v. New York, L. E. & W. R. Co.* 98 N. Y. 877, 50 Am. Rep. 688; *Pagan v. Strong*, 17 N. Y. Civ. Proc. Rep. 438; *Throop v. Hatch*, 3 Abb. Pr. 23.

The statute which imposes upon the stockholders of a corporation a personal liability for the corporate debts must be strictly construed.

Chase v. Lord, 77 N. Y. 1; *Barnes v. Wheaton*, 80 Hun, 16.

The provision of the Constitution of the state of Kansas set out in the complaint does not create any liability against the defendant.

Until this provision of the Constitution is supplemented by a statute, it is inoperative.

Morley v. Thayer, 3 Fed. Rep. 787; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *French v. Techemaker*, 24 Cal. 518; *Fuss v. Spaunhorst*, 67 Mo. 256; *May v. Black*, 77 Wis. 101; *Barnes v. Wheaton*, 80 Hun, 8.

This action cannot be maintained in the courts of this state because the remedy afforded by the statutes pleaded is purely statutory, and can be availed of only within the state of Kansas.

Cook, Stock & Stockholders, 8d ed. chap. 12; *Barnes v. Wheaton*, *supra*; *Fowler v. Lamson*, 146 Ill. 472; *Bank of North America v. Rindge*, 154 Mass. 208, 18 L. R. A. 56; *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Ene*, 106 N. Y. 103, 60 Am. Rep. 429; *Fourth Nat Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825; *May v. Black*, *Morley v. Thayer*, and *Nimick v. Mingo Iron Works Co.* *supra*; *Patterson v. Lynde*, 112 Ill. 196; *Pollard v. Bailey*, 87 U. S. 526, 23 L. ed. 878; *Erickson v. NeSmith*, 4 Allen, 283; *Mann v. Pentz*, 3 N. Y. 415; *Griffith v. Mangam*, 78 N. Y. 611.

The action cannot be maintained because there is manifest defect of parties defendant. The presence of all of the stockholders of the Miltonvale State Bank are necessary in order to bring the case within the requirements of the statutes pleaded.

The action cannot be maintained because there is no allegation in the complaint that judgment has been obtained and execution issued against the Miltonvale State Bank in this state, or that the receiver has not sufficient property to pay the claim in full.

Walser v. Seigman, 13 Fed. Rep. 415; *National Tube Works Co. v. Ballou*, 146 U. S. 517, 36 L. ed. 1070; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 342; *Cook, Stock & Stockholders*, § 223; *McElmoyle v. Cohen*, 88 U. S. 18 Pet. 812, 10 L. ed. 177.

in another state. *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643.

So, a provision of a Michigan statute that no suit shall be brought against any stockholder for any debt of the company until judgment against the corporation and execution thereon unsatisfied in whole or in part makes the recovery of such judgment and the issue of such execution in the state of Michigan a condition precedent to any action against the stockholder in another state. *Viele v. Wells*, 9 Abb. N. C. 277.

Yet proof of a judgment and unsatisfied execution against a foreign corporation is held, in *Palme v. Stewart*, 33 Conn. 516, to be unnecessary to precede an action against stockholders where it appears that the corporation had become insolvent and gone into the hands of a receiver, although the statute of the state of its incorporation provides that stockholders' property cannot be levied upon as long as corporate property can be found to satisfy the claim.

7. Action at law.

It has been often held that an action at law will lie to enforce the statutory liability of stockholders of a corporation created by the laws of another state if that is a general and absolute liability enforceable in an ordinary action at law in the state of incorporation. *St. Louis Sav. Assn. v. O'Brien*, 51 Hun, 45; *Lowry v. Inman*, 46 N. Y. 119; *Perkins v. Church*, 31 Barb. 84; *Hodgson v. Cheever*, 8 Mo. App. 318; *Paine v. Stewart*, 33 Conn. 516; *Aldrich v. Anchor Coal & D. Co.* 24 Or. 82; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414.

An action at law is declared to be the proper remedy for enforcing the liability of a Missouri stockholder in a Kansas corporation to its creditors. *Bagley v. Tyler*, 43 Mo. App. 195. But in this case it is said that the facts were set out so as to consti-

tute a good petition, whether in law or equity, and the case was tried, by consent of parties, by a judge who was at all events the proper tribunal to settle the controversy.

But it is decided in *TUTTLE v. NATIONAL BANK OF THE REPUBLIC*, that an action at law cannot be maintained in Illinois against a stockholder of a Kansas corporation.

The same is held in New York as to actions at law against stockholders of Kansas corporations in that state. *MARSHALL v. SHERMAN*.

In denying the right to maintain an action at law against stockholders of a Kansas corporation in New York state, it is said in *MARSHALL v. SHERMAN*: "The stockholders of this Kansas bank are not equitably liable for any greater sum than may be necessary to discharge the debts after the corporate property has been applied. All of them that are solvent should contribute in proportion to the amount of their holdings of stock. We are not informed by the complaint how many stockholders there are, or even the amount of capital stock. Nor are we informed whether any of the stockholders are insolvent. It is quite evident, therefore, that the equitable proportion of the corporate debts which this defendant should pay cannot be ascertained or determined in this action."

There does not seem to be any material difference between the Missouri statute, the liability under which is enforced in *St. Louis Sav. Assn. v. O'Brien*, *supra*, and the Kansas statute, the liability under which is held not to be enforceable in *MARSHALL v. SHERMAN*. While it may be too much to say that the latter case impliedly overrules the former, as well as *Lowry v. Inman*, and *Perkins v. Church*, *supra*, without mentioning that fact, such seems to be the result.

When the laws of the state of incorporation provided that the remedy against a stockholder in such

An action at law cannot be maintained by a judgment creditor of an insolvent corporation organized under the statutes of Kansas against a single stockholder to recover the personal liability therein provided.

Terry v. Little, 101 U. S. 216, 25 L. ed. 864; *Pollard v. Bailey*, 87 U. S. 20 Wall. 520, 22 L. ed. 376; *Hornor v. Henning*, 98 U. S. 228, 23 L. ed. 879; *Patterson v. Lynde*, 106 U. S. 520, 27 L. ed. 266; *Stone v. Chisolm*, 113 U. S. 302, 28 L. ed. 991; *Griffith v. Mangam*, 73 N. Y. 611; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Mann v. Pentz*, 3 N. Y. 416; *Third Nat. Bank v. Gregory*, N. Y. L. J. Dec. 8, 1890; *Morgan v. New York & A. R. Co.* 10 Paige, 290, 40 Am. Dec. 244; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Coleman v. White*, 14 Wis. 701, 80 Am. Dec. 797; *Smith v. Huckabee*, 53 Ala. 191; *Friend v. Powers*, 93 Ala. 114; *Barrick v. Gifford*, 47 Ohio St. 181; *Allen v. Walsh*, 25 Minn. 548; *National German-American Bank v. St. Anthony Park N. R. E. Improv. Co.* 61 Minn. 359; *Cook, Stock & Stockholders*, § 222; *Thompson, Corp.* §§ 8431, 8432.

Messrs. Caldwell & Ellis and Frank N. Hagar, with Messrs. Riley & Cantwell, for respondent:

This action, being a legal action, must be brought against a single stockholder, and the courts of Kansas have so held.

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Kan. 415; *Valley Bank & Sav. Inst. v. Ladies' Cong. Sewing Soc.* 28 Kan. 423; *Hentig v. James*, 23 Kan. 326; *Howell v. Manglesdorf*, 33 Kan. 194; *Weeks v. Love*, 50 N. Y. 568; *Wheeler v. Millar*, 90 N. Y. 353; *Mathes v. Neidig*, 73 N. Y. 100; *Farnsworth v. Wood*, 91 N. Y. 308; *Mason v. New York Silk Mfg. Co.* 27 Hun, 807; *Billings v. Trask*, 30 Hun, 814; *Gibbs v. Davis*, 27 Fla. 581; *Aldrich v. Anchor Coal & D. Co.* 24 Or. 32; *Perry v. Turner*, 55 Mo. 418; *Cook, Stock & Stockholders*, 8d ed. § 211.

Judgment against the Miltonvale State Bank in this state is not necessary.

Walton v. Coe, 110 N. Y. 109; 1 *Cook, Stock & Stockholders*, § 219; 2 *Morawetz, Priv. Corp.* § 888; *Shellington v. Howland*, 53 N. Y. 371; *Hardman v. Sage*, 124 N. Y. 35; *Hirshfield v. Bopp*, 145 N. Y. 84; 23 *Am. & Eng. Enc. Law*, p. 887; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 842.

In no respect is a judgment against the corporation necessary, either in Kansas or elsewhere.

23 *Am. & Eng. Enc. Law*, p. 888; *National Park Bank v. Remsen*, 23 Jones & S. 144.

The statutes as to the stockholder's liability, set forth in the complaint upon which this action is based, have, as to the defendant's liability in similar suits, been uniformly sustained by the supreme and highest court of the state of Kansas.

Valley Bank & Sav. Inst. v. Ladies' Cong. Sewing Soc. 28 Kan. 423; *Hentig v. James*, 23 Kan. 326; *Howell v. Manglesdorf*, 33 Kan. 194; *Abbey v. W. B. Grimes Dry Goods Co.* 44 Kan. 415.

case shall be by bill in chancery and not otherwise an action at law to enforce the personal liability of a stockholder of a foreign corporation for its debt cannot be maintained because the remedy prescribed by the law of the state of incorporation is exclusive. As to this see *supra*, II. c. 5.

As to actions at law in Federal courts to enforce liabilities of this kind see *infra*, II. d. 8. It will be seen that the Federal court sitting in New York sustains an action such as that which the New York court of appeals refused to sustain.

8. Suit in equity.

The right of the creditor of a foreign corporation to sue in equity to reach unpaid stock subscriptions has been considered in a preceding division (*supra*, II. b).

As to a bill to reach the stockholder's statutory liability and not his debt to the corporation for stock, the decisions are not very numerous.

It is expressly decided in Massachusetts that a bill in equity cannot be maintained to enforce against stockholders in that state a statutory liability for the debt of a foreign corporation which is not a party and which has no assets in the state, although in the state in which the corporation was created the statutes provided for a bill in equity to enforce the liability of stockholders. *Erickson v. Nesmith*, 4 Allen, 233.

Stockholders of a bank incorporated in another state under a statute which makes them liable for bills or notes issued by it in proportion to the amount of their stock were sued in *Johnston v. South Western Railroad Bank*, 3 Strobb. Eq. 263, in equity, and the complainant failed because he was held not to be a bill holder. It seems to have been assumed that the remedy was a proper one if the complainant had been entitled to recover as a bill holder.

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A bill in equity against a South Carolina stockholder of a New York corporation who by the laws of New York was liable for the amount of stock held for debts of the company was maintained in *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225, where it was averred that the only other stockholders known to the complainant had already paid the full amount for which they were liable. But in this case the stockholder was a married woman and her estate was in the hands of trustees under a marriage settlement which could only be reached by proceedings in equity.

Jurisdiction is assumed as a matter of course in a proceeding in the nature of a creditors' bill by a judgment creditor of a corporation against its directors and stockholders to charge them in proportion to the amount of their stock with payment of the judgment, where property of the corporation consisting of vessels had been transferred to the defendants by an alleged sale without any payment to the corporation. The court said: "The action is in the nature of a creditors' bill to reach the property of the corporation, which is in the possession of the defendants, and liable for its debts." *Hastings v. Drew*, 76 N. Y. 9. This case is distinguished in *Griffith v. Mangam*, 73 N. Y. 611, from actions against stockholders as such on the ground that it seeks to enforce a liability which exists at common law and is not created by statute.

Almost identical with the case of *Hastings v. Drew*, *supra*, is that of *Bartlett v. Drew*, 67 N. Y. 587, in which the president of a foreign corporation against which an unsatisfied judgment existed was sued on the ground that he had received more than the amount of the judgment as the proceeds of steamboats belonging to the company which had been sold, and there was no property of the corporation in the state that could be taken on execution. The court said: "Defendant, Drew, is found

The construction placed upon the statutes of another state by the courts of that state is as a general rule controlling, and will be followed by the courts of this state.

St. Louis Sav. Assn. v. O'Brien, 51 Hun, 45; *Molson's Bank v. Boardman*, 47 Hun, 186; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643.

The Constitution is enforceable as is a statute, and "differs from a statute in its paramount force in cases of conflict." It is generally construed the same as statutes.

Endlich, *Interpretation of Statutes*, p. 711, notes 1 and 2, cases cited.

Only such provisions of the Constitution as simply empower the legislature, or which from their nature require some further act to make them definite, or prescribe a legislative remedy, are not self-executing.

23 Am. & Eng. Enc. Law, p. 870; *Willis v. Mabon*, 48 Minn. 140, 16 L. R. A. 281 (1892); *Dodge v. Minnesota P. State Roofing Co.* 16 Minn. 378; *Allen v. Walsh*, 25 Minn. 543; *State, Clapp, v. Minnesota Thresher Mfg. Co.* 40 Minn. 218, 8 L. R. A. 510; *Mohr v. Minnesota Elevator Co.* 40 Minn. 343; *Arthur v. Willis*, 44 Minn. 409; *Densmore v. Shepard*, 46 Minn. 54; *State, Roberts, v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *Reynolds v. Taylor*, 48 Ala. 420; *Miller v. Marx*, 55 Ala. 332; *People v. Hoge*, 55 Cal. 612.

Section 44 alone, without any constitutional provision at all, seems to be a sufficient basis for this action.

St. Louis Sav. Assn. v. O'Brien, 51 Hun, 45; *Gibbs v. Davis*, 27 Fla. 531.

This being an action at law and not in equity, rulings exclusive to cases in equity do not apply.

23 Am. & Eng. Enc. Law, p. 892.

The Kansas statutes are enforceable in this state so as to maintain the present action.

Seymour v. Stuges, 26 N. Y. 134; *Ex parte Van Riper*, 20 Wend. 614; *Drinkwater v. Portland Marine R. Co.* 18 Me. 35; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966; *Windham President Inst. for Sav. v. Sprague*, 43 Vt. 502; *Pollard v. Bailey*, 87 U. S. 20 Wall. 520, 22 L. ed. 376; *Groce v. Hilt*, 36 Me. 22; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Cook, Stock & Stockholders*, §§ 220, 223, 353; 2 Morawetz, Priv. Corp. § 376; *Hodgson v. Cheever*, 8 Mo. App. 818; *Bagley v. Tyler*, 48 Mo. App. 195; *St. Louis Sav. Assn. v. O'Brien*, 51 Hun, 45; *Christensen v. Eno*, 106 N. Y. 103, 60 Am. Rep. 429; *Lowry v. Luman*, 46 N. Y. 119; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Hathorn v. Calef*, 69 U. S. 2 Wall. 10, 17 L. ed. 776.

The statutes of Kansas do not provide a special and exclusive remedy.

Howell v. Mangledorf, 33 Kan. 199; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184.

The creditor has nothing whatever to do with the rights of the stockholders as between themselves.

Abbey v. W. B. Grimes Dry Goods Co. 44 Kan. 419.

That part of § 44 of the Kansas corporation act which relates to the right of stockholders.

to be in possession of assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it."

But until he has exhausted his remedies at law against the corporation a mere creditor at large of a foreign corporation is denied the right to proceed against its stockholders, although the corporation has divided its property and capital among the stockholders, closed its operations, and gone out of existence by the expiration of its charter. *Andrew v. Vanderbilt*, 37 Hun, 483.

Where the principal stockholder of a foreign corporation which had become insolvent and had been dissolved by the court of the state in which it was organized was charged with having fraudulently abstracted the assets of the corporation, and it was alleged that the plaintiff had obtained a judgment and was the only creditor of the corporation, the court entertained an action by the creditor against such stockholder on the ground that the creditor had a lien on the assets for the payment of his debt. *Tinkham v. Borst*, 31 Barb. 407.

A bill charging fraud and misapplication of the assets of a foreign corporation seeking a discovery and account was maintained against the stockholders of the corporation as well as its directors and the corporation itself, in *Bank of St. Marys v. St. John*, 25 Ala. 566.

A bill in equity by the sole creditor of a corporation was sustained in *Aultman's Appeal*, 96 Pa. 506, against the corporation and its stockholders, where it was alleged that the property of the corporation had all been sold, and that the defendants constituted all the stockholders and resided within the jurisdiction and had been served with process, so that the court had a full grasp of the whole case.

In *Woods v. Wicks*, 7 Lea, 40, a bill in equity was

entertained but without questioning the propriety of the remedy in equity to enforce statutory liability of stockholders.

A bill in equity to discover the names of the stockholders of a foreign corporation and the number of shares held by them was held, in *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86, to be maintainable in Massachusetts on the ground that all the officers reside in Massachusetts and have the books of the corporation there, so that the information cannot be obtained in the state of incorporation.

It will be seen that most of the cases in which a remedy in equity has been sustained involved something more than a mere statutory liability, as where the stockholders had received assets of the corporation.

Some cases deny the remedy in equity because of a different remedy at the domicile of the corporation.

Thus, a suit in equity against stockholders of a foreign corporation for a labor debt of the corporation will not lie where, by the laws of the place of incorporation, the only remedy against stockholders is under a statute providing for an action of assumpsit to be brought jointly against stockholders and corporation in a specified county of the state, and providing that execution shall not issue against stockholders until the property of the corporation has been exhausted. The fact that the corporation is insolvent and its property sold can make no difference with this result where the statute makes no such exception. *May v. Black*, 77 Wis. 101.

So, the attempt to enforce a judgment against a foreign corporation obtained at the domicile of non-resident stockholders by a suit in equity against them was unsuccessful in *Fowler v. Lamson*, 146 Ill. 472, in which case it is said to be well settled that

who are sued and judgment recovered against them and execution satisfied to sue and recover from their fellow stockholders, does not conflict in any way with the rights or remedies of sureties or guarantors against their co-sureties or co-guarantors for contribution.

Brandt, Suretyship, § 252; *Cook, Stock & Stockholders*, § 229; *Beach, Priv. Corp.* § 141; *Morawetz, Priv. Corp.* § 814; *Pom. Eq. Jur.* § 418; *Judson v. Rossie Galena Co.* 9 Paige, 603, 38 Am. Dec. 569.

It cannot be the law that because the statute of Kansas gives a stockholder a right to sue a fellow stockholder a creditor cannot go into another state to enforce the statutory liability against a stockholder.

Nimick v. Mingo Iron Works Co. 25 W. Va. 204; *Knowlton v. Ackley*, 8 Cush. 97; *Thompson, Liability of Stockholders*, § 83; *McDonough v. Phelps*, 15 How. Pr. 872; *Ex parte Van Riper*, 20 Wend. 614; *Tuttle v. National Bank of The Republic*, 48 Ill. App. 481.

O'Brien, J., delivered the opinion of the court:

This action was brought by a creditor of the Miltonvale State Bank, a corporation organized under the laws of Kansas for banking purposes, against the defendant, a stockholder, residing in this state. The questions in the case arise upon the defendant's demurrer as to the sufficiency of the complaint and the necessary parties to the action. The complaint avers that the bank was incorporated under the laws of Kansas on or about the 8th of July, 1886; that it continued to transact a banking business in that

state until the 12th of July, 1891, when proceedings were instituted against it in the district court of the county of that state where it was located, which resulted in the appointment of a receiver to wind up its affairs, and that it has not since that date transacted any business, before the commencement of this action was dissolved, leaving debts unpaid; that since the 7th day of October, 1889, the defendant has been the owner of thirty shares of the capital stock of the bank, the par value of which is stated to be \$3,000; that at the time of the appointment of the receiver the bank was indebted to the plaintiff, as a depositor, in the sum of \$191.84. It is then stated that the plaintiff is the owner, by assignment or transfer, of the claims of fifteen other depositors to whom the bank was indebted at the time of the appointment of the receiver in various small sums, upon which, together with the claim held by the plaintiff in his own right, judgment was recovered in the courts of Kansas for the sum of \$1,804 damages and \$19.15 costs on the 5th of September, 1891; that the plaintiff caused execution to be issued upon this judgment against the property of the bank, which was returned unsatisfied; that the corporation is insolvent; and that \$880.41 has since been paid to the plaintiff on this judgment by the receiver. Judgment against the defendant as a stockholder is demanded for the balance unpaid, with interest from the date of the rendition of the judgment. The complaint sets forth certain provisions of the Constitution of the state of Kansas, and the statutes of that state, which, it is claimed, impose a legal lia-

as special remedies had been provided by the laws of the state in which the corporation was created for the enforcement of the individual statutory liability of stockholders, they alone could be pursued to enforce that liability.

So, in *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184, the remedy prescribed by Ohio statutes was held to exclude a bill in equity to enforce the liability of stockholders in West Virginia.

As to remedies in Federal courts, see *infra*, II. d, 2.

d. Remedies in Federal courts.

1. In general.

Suits are entertained in Federal courts at the residence of stockholders to enforce their liability as stockholders of corporations in other states. *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790; *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 265; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825; *National Tube Works Co. v. Ballou*, 145 U. S. 517, 36 L. ed. 1070, *Affirming* 42 Fed. Rep. 749; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Payson v. Withers*, 5 Bias. 299; *Morley v. Thayer*, 3 Fed. Rep. 737; *Walsen v. Seligman*, 13 Fed. Rep. 415; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Glenn v. Springs*, 26 Fed. Rep. 494; *Sayles v. Brown*, 40 Fed. Rep. 8; *Stuts v. Handley*, 41 Fed. Rep. 531; *Globe Rolling-Mill Co. v. Ballou*, 42 Fed. Rep. 749; *Newberry v. Robinson*, 36 Fed. Rep. 841; *Bank of North America v. Rindge*, 57 Fed. Rep. 279; *McVickar v. Jones*, 70 Fed. Rep. 754; *RHODES v. UNITED STATES NAT. BANK*.

A Federal court cannot be considered a foreign court in the state in which it is sitting, and therefore the right to enforce a statutory liability of stockholders in a corporation by suit in a Federal court in the state in which the corporation exists, when there are grounds of jurisdiction, such as di-

verse citizenship of parties, can hardly be questioned. Such suits have been maintained in numerous cases without questioning the jurisdiction, as in *Hatch v. Burroughs*, 1 Woods, 439.

Assessments made by a Federal court in bankruptcy on stockholders of a corporation for the unpaid balance of their subscriptions are enforced in the Federal court in *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Upton v. Hansbrough*, 3 Bias. 423.

There are probably other similar cases in addition to those here cited which have been entertained in Federal courts as a matter of course without any contention against the jurisdiction.

An action under an order or judgment of a state court awarding execution against a nonresident stockholder under Mo. Rev. Stat. 1879, § 736, upon a judgment against the corporation was brought in a Federal court in *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, but no question as to the jurisdiction of the court was raised, and the failure of the action was due to lack of personal service on the defendant.

It was assumed, rather than decided, in *Morley v. Thayer*, 3 Fed. Rep. 737, that a Federal court in another state could enforce the same remedies, and only the same remedies, as the court of the state of incorporation.

2. In equity.

A creditors' bill by a judgment creditor of a foreign corporation after an execution unsatisfied against the corporation was held maintainable in the circuit court of the United States in New York against stockholders of an Ohio corporation to enforce their statutory liability, as the Ohio statute provided such a remedy in a case of that kind. *Newberry v. Robinson*, 36 Fed. Rep. 841.

See also *Fourth Nat. Bank v. Franklyn*, in next division, *infra*.

bility upon the defendant in the courts of this state for the payment of the money still due upon the judgment. The provision of the Constitution of that state which is the foundation of the alleged liability reads as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corporations for religious and charitable purposes." Article 12, § 3.

The statutes for the enforcement of this liability enacted by that state and set forth in the complaint are embraced in two sections of the law with respect to the liability of stockholders in corporations. They are as follows:

"Sec. 44. If any corporation created under this, or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property

of each stockholder respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company was dissolved."

The other enactment is § 32, and is set forth in the complaint as follows: "Execution against stockholder; Action.—That if any execution shall have been issued against the property or effects of a corporation, except a railway, or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

A temporary injunction in favor of a stockholder against an action at law in a Federal court was granted by that court in *Sumner v. Marcy*, 3 Woodb. & M. 106, where the action at law was based on a judgment rendered against the corporation in another state on an invalid cause of action without actual notice to the corporation, though its president made an appearance, but the defense was abandoned.

A bill by creditors and stockholders of a corporation organized under the laws of certain states when brought in a Federal court in another state to enforce the liability of holders of unpaid stock was dismissed, in *Waiser v. Seligman*, 18 Fed. Rep. 418, on the ground that the remedy at law had not been exhausted, but the right to maintain the bill in case the legal remedy had been exhausted is not expressly passed upon.

In *National Tube Works Co. v. Ballou*, 146 U. S. 517, 36 L. ed. 1070, Affirming 42 Fed. Rep. 749, and *Globe Rolling-Mill Co. v. Ballou*, 42 Fed. Rep. 749, bills in equity in the nature of a creditor's bill brought in a Federal court against stockholders of a corporation to reach an unpaid balance due on stock are held not to be sustainable on the basis of judgments and unsatisfied executions in other states without any judgment against the corporation in the state where the bill is filed or any showing that it is impossible to obtain one.

A bill in equity against stockholders of a foreign corporation to reach unpaid balances on stock was upheld in *Holmes v. Sherwood*, 16 Fed. Rep. 725, by the Federal court in Iowa when brought by judgment creditors, although no assessment in Illinois, which was the state of incorporation, was shown. The court said: "If there are other stockholders not within the jurisdiction, or not made parties defendants herein, these defendants must look to them for contribution; and it is not necessary that all such stockholders be made defendants."

3. At law.

An independent action at law brought against a
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stockholder of a foreign corporation in a circuit court of the United States to enforce a statutory liability cannot be maintained when the laws of the state of the incorporation provide no remedies against stockholders except a bill in equity or an action upon a judgment against the corporation. The liability can be enforced only in the mode prescribed by the statutes of that state. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825.

An action at law by one or more creditors to enforce the statutory liability of stockholders in a foreign corporation to double the amount of their shares on behalf of the plaintiffs alone was held not sustainable in *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864, on the ground that the suit must be in equity by or for all the creditors since the peculiar terms of the statute in effect provided for a proportionate liability of stockholders, and must therefore be enforced in equity by or for all the creditors.

An action of debt against a stockholder in a foreign corporation, brought in a circuit court of the United States to enforce a charter liability for debts of the corporation, was entertained in *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294, where the stockholders' liability was created by the charter of the corporation and a judgment against it had been taken in the state where it was domiciled, and the state courts held the liability to be enforceable in such a case by separate action brought by the creditor.

An action at law against a stockholder of a foreign corporation to recover an unpaid balance upon his stock subscription brought in a Federal court was dismissed in *Patterson v. Lynde*, 106 U. S. 519, 27 L. ed. 255, on the ground that in the state of incorporation the remedy was by bill in equity. The court also seems to consider that as a matter of correct practice generally the remedy should be in equity.

But an action at law brought in the Federal court in California by a creditor of a Kansas corporation against a stockholder to enforce his liability under the Kansas statute was held to be

The defendant demurred to the complaint upon the grounds, among others, that it appears upon its face that there is a defect of parties defendant, in that all the stockholders of the bank were not made defendants; and, second, that the complaint does not state facts sufficient to constitute a cause of action.

The complaint contains no allegation as to the meaning or effect of these statutes, or of the provision of the Constitution quoted, under the adjudications of the courts of Kansas, nor any allegation that any judgment has been obtained against the defendant in the courts of that state upon his liability as a stockholder, under these provisions of the local law. We are therefore obliged to construe them ourselves, with the aid of such rules and upon such principles as the courts of this state apply in the construction of such enactments here. A right of action against the stockholders of a corporation does not exist at common law, and ordinarily exists only by virtue of some statutory enactment. In this case the right of action is founded upon the Constitution and statutes of another state. We think it quite clear that the provision of the Constitution referred to is not self-executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. It was intended simply to confer authority upon the legislature of that state to legislate upon the subject, and perhaps it imposed upon that body the duty of securing the debts of corporations by imposing upon the stockholders an individual liability, and by

such other means as in its discretion it should deem proper, always limiting such power and discretion by the provision that each stockholder should be made liable to an amount equal to the stock held by him. The legislature did enact such statutes, and it is these enactments, and not the Constitution itself, which is sought to be enforced in this action. *Groves v. Slaughter*, 40 U. S. 15 Pet. 449, 10 L. ed. 800; *Morley v. Thayer*, 8 Fed. Rep. 737; *May v. Black*, 77 Wis. 101; *Fuss v. Spaunhorst*, 67 Mo. 256; *French v. Teeschemaker*, 24 Cal. 518. The question is thus presented whether a right of action unknown to the common law, and existing only by force of the statutes of another state, can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. The defendant's relation to the corporation is governed by the laws of the state of its creation, and the general rule is that the statutory liability of stockholders in foreign corporations cannot be enforced except at the domicile of the corporation when the law of the domicile provides the remedy. In *Erickson v. Nesmith*, 4 Allen, 233, the court said: "There seems to be no practicable mode of dealing with such corporation and its members, when seeking to charge the latter upon their statute liability, but to proceed in the manner prescribed by the statute creating such liability, and in the local jurisdiction where the corporation was established and carries on its business, and by whose local statutes alone the responsibility exists." We think that

a proper remedy in Bank of North America v. Rindge, 57 Fed. Rep. 279, although the complaint was held bad on demurrer for a technical objection but leave given to amend it. The court said: "The Kansas statute upon which the suit is based, as construed by the supreme court of that state, provides two remedies for enforcing the individual liability of stockholders, one of which is by an ordinary action at law, to be instituted wherever personal jurisdiction of them can be acquired. That remedy is pursued in the present action, and is therefore a proper remedy."

This case is followed in *RHODES v. UNITED STATES NAT. BANK* by the United States circuit court of appeals holding that as the Kansas statute is construed by the Kansas courts to create a personal liability against the stockholders severally in the nature of a contract obligation, the enforcement thereof by an action at law is not confined to the courts of that state but may be had in a Federal court sitting in another state at the residence of a stockholder when it has jurisdiction of the parties.

So, an action of debt against a foreign stockholder of a Kansas corporation brought in a Federal court in New Hampshire is held to be a proper remedy to enforce his individual liability created by the Kansas Constitution and statutes, and a Kansas judgment against the corporation. *McVicker v. Jones*, 70 Fed. Rep. 754.

Other stockholders within the jurisdiction need not be joined in an action against a foreign stockholder of a Kansas corporation brought in a Federal court. *Ibid*.

Notwithstanding the fact that the decisions in New York and in several other states had refused to sustain actions at law by a creditor of a Kansas corporation against stockholders in another state, the circuit court of the United States sitting in New York in *National Bank v. Whitman*, 76 Fed. Rep. 607, subsequent to the decision in *MARSHALL* 31 L. R. A.

v. SHERMAN, sustained such an action against a New York stockholder of a Kansas corporation, and says: "It is said that the jurisdiction of this court is concurrent, and so only coextensive, with that of the courts of New York, and that this court here should not take cognizance of cases that those courts would not. The declining of jurisdiction by those courts cannot, however, take from this court that which properly belongs to it; and the decision of what belongs to this, at least, must ultimately be determined by the Supreme Court of the United States. The decisions of that court must be followed here, as understood." The court in this case considers that the Kansas court has construed the Kansas statute as authorizing transitory action instead of a merely local remedy.

III. Contribution between stockholders of foreign corporations.

The right of contribution from foreign stockholders by stockholders who have been compelled to pay debts of the corporation at their domicile by the issue of execution against them allowed by the local law is maintainable upon common principles of equity. The fact that the liability under the statutes of the state in which the corporation existed could not be enforced in other states does not preclude such a suit for contribution by stockholders who have been compelled to pay. *Allen v. Fairbanks*, 45 Fed. Rep. 445.

The amount which a foreign stockholder must pay by way of contribution to domestic stockholders who have paid at their domicile obligations of the company on execution against them is in proportion to the amount of his stock, if it does not appear that any of the stockholders are unable to pay. *Ibid*.

A bill by the stockholders who have paid such obligations for contribution is not multifarious because their claims are distinct. *Ibid*.

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when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a special and peculiar remedy against the stockholders of a corporation created under the laws of that state. From their whole structure and scope it is apparent that they were intended to operate and be enforced only within that jurisdiction. It is quite clear that as to some of their provisions, at least, it would be impossible to enforce them in this state; and they should be construed as enactments *in pari materia*, and as a whole. If it appears that they cannot, as a whole scheme, be given full effect in this state we ought not to detach some particular provision from the general context, with a view of ascertaining whether that is or is not enforceable beyond the local jurisdiction. But, without reference to the special and peculiar provisions of these statutes, we think that the general current of authority is to the effect that such enactments are to be enforced only within the jurisdiction of the sovereignty where they exist. Some of the authorities will be referred to hereafter.

The judgment of the learned court below seems to have proceeded principally upon the ground that the liability of the defendant as a stockholder of the insolvent bank in another state is primary and contractual. It is quite doubtful, at least, whether any such relation exists between the stockholders of the corporation and its creditors after the capital stock has been paid in, and the organization of the corporation completed, so as to give it legal capacity to make contracts and incur obligations for itself. The statutes of this state, as construed by judicial decisions, seem to recognize that relation only in cases of liability before the capital stock is paid in. Up to that time the liability of stockholders has been likened to that of partners engaged in a joint enterprise, which, however, disappears upon the perfection of the corporate organization. We have had occasion recently to examine that question in the case of *National Bank v. Dillingham*, 147 N. Y. 603, and we adhere to the views there expressed with reference to this question, as well as other questions there decided, and which seem to be involved in this case. It is true that the liability sought to be enforced in that case differed in its nature from that involved in the case at bar, since it was not an action to enforce a stockholder's liability, but that of trustees, for disregard of an express statute. The liability in that case was penal in its nature. Here it is not, and yet it cannot be said that it arises upon contract in the general sense, as it would not exist but for the terms of the statute. The voluntary purchase of the stock by defendant would not of itself create any liability. *Jessup v. Carnegie*, 80 N. Y. 441, 38 Am. Rep. 643. The complaint does not disclose any other contractual relations between the plaintiff and the defendant. The debt which the plaintiff is seeking to enforce is not the debt of the defendant, but that of the bank. The only liability that, in law, is imposed upon the defendant to pay this debt, or any part of it, is created by the statutes of the state where the corporation is domiciled. The principle adopted, generally, by the more recent cases in this state, is that such

a liability is not strictly based upon contract, but is created by statute. It is not primary, but secondary, and conditional upon the failure of the corporation itself, which owes the debt, to pay it. A liability is imposed by statute upon the defendant to pay the corporate debts to a limited extent, under certain circumstances and upon certain conditions. It is not a general liability, but special, and conditioned upon the failure of the corporation itself to pay. This peculiar liability has been held by our courts to place the stockholders of the corporation in the relation of sureties or guarantors of the corporate debts; and the obligation is limited, in the first place, by the defendant's holdings in the corporation, and, in the second place, by the deficiency existing after the application of all the property of the corporation to the payment of its debts. It does not appear from the statements of the complaint that the corporate property which passed into the hands of the receiver has yet been marshaled or appropriated for the benefit of creditors. It does appear that a part of it has, but as to how much, if any, still remains in the hands of the receiver applicable to the discharge of the obligations held by creditors, the complaint is silent. True, there is the allegation that the corporation is insolvent, and has not sufficient property to discharge its debts. But, until all the property of the corporation in the hands of the receiver has been appropriated to that purpose, it cannot be known what the deficiency is which the stockholders are required to make up. If the defendant should pay the plaintiff's debt in this action, for aught that appears, someone may still be entitled to a dividend from the receiver on account of it; and until it has been definitely ascertained by some proceeding, legal or equitable, either in the courts of the state where the corporation was domiciled or here, what the deficiency is, it is impossible to say with any degree of accuracy how much the defendant ought to pay. The relations of the defendant as a stockholder of the corporation are fixed and governed by the laws of the state in which the corporation is domiciled and under which it was created. If those laws created a liability against the defendant upon certain conditions and under certain circumstances, they also provided a special and peculiar remedy; and the general trend of authority is to the effect that the remedy thus provided must be followed, and the proceedings for its enforcement must be within the local jurisdiction and by the judicial department of the sovereignty which enacted the law and created the corporation; and this would be so whether the liability is penal in its nature or arises from the implied obligation of defendant by the purchase of stock.

But if, under any circumstances, the action could be maintained in this jurisdiction, it must be in such a form and by such modes of procedure as like liabilities created under our own statutes are enforced against our own citizens. There is no reason why the plaintiff should be permitted to enforce his debt in this jurisdiction against a citizen of this state in a form of action different from that which a creditor of a domestic corporation may prosecute against a domestic stockholder. It is quite well established that in a case like this an action at law

By a single creditor against a single stockholder for the recovery of a specific sum of money cannot be maintained in our courts, under our statutes declaring the liability of stockholders. In such cases the liability must be enforced in equity in a suit brought by or in behalf of all the creditors against all the stockholders, wherein the amount of the liability and all the equities can be ascertained and adjusted. The stockholders of this Kansas bank are not equitably liable for any greater sum than may be necessary to discharge the debts after the corporate property has been applied. All of them that are solvent should contribute in proportion to the amount of their holdings of stock. We are not informed by the complaint how many stockholders there are, or even the amount of the capital stock. Nor are we informed whether any of the stockholders are insolvent. It is quite evident, therefore, that no equitable proportion of the corporate debts which this defendant should pay cannot be ascertained or determined in this action. The liability of the stockholders is a fund to which all the creditors are entitled to resort after the corporate property has been applied upon the debts. If this action can be maintained, it is quite apparent that one creditor may collect his debt in full, and another creditor may not be paid anything except what he is able to collect from the corporation. The statutes upon which this action is based provide, among other things, that when judgment is obtained against a stockholder, and it is satisfied by collection or payment, he may, in turn, maintain an action against all the other stockholders, who are such at the time of dissolution, for the recovery of the portion of the debt for which they were liable; and, if any stockholder thus sued shall not have property enough to satisfy his portion of the claim, the deficiency shall be divided equally among the remaining stockholders, and collected accordingly. It is quite apparent that the purpose of the law cannot be carried out, except by a proceeding in equity for an accounting, to which all the stockholders are made parties. If the plaintiff can maintain this action, and collect his debt from the defendant, how can the defendant proceed against his fellow stockholders to reimburse himself for that part of the debt which they should have paid? It would be manifestly unjust and unfair to compel him to pay this claim, and turn him over to another action, perhaps in another state or in many states, in order to obtain the contribution which the law evidently contemplates. All these questions should be settled in one proceeding or in one action, and that at the domicile of the corporation. The statute contemplates that each stockholder shall pay his just proportion of any sum that may be required to discharge the outstanding obligations of the corporation. The form of the action should be one, therefore, adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of contribution. The liability is not to any individual creditor, but for contribution to the fund out of which all creditors are to be paid alike. Hence, the appropriate remedy is by suit in equity to enforce the contribution, and not by one creditor alone to appropriate to his own use that which

belongs to others equally with himself. *National Bank v. Dillingham, supra; Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Flornor v. Henning*, 93 U. S. 228, 23 L. ed. 879. It is impossible to conceal from ourselves that such are the scope and real purpose of the action, and hence we are asked to enforce a remedy under a foreign law where it is perfectly apparent that complete justice cannot be done, and where it is plain that an equitable result can be accomplished only by the courts of the jurisdiction where the corporation was created.

The case has thus far been considered with reference to the discovery of some practical method of applying in this jurisdiction the peculiar local remedy for the enforcement of the statutory liability, created by the law of the domicile. There is still another aspect of the question which deserves attention, and it must be viewed in the light of notorious facts, which, though not appearing in the record, are matters of current history and common knowledge, to which we cannot shut our eyes. Within recent years numerous business enterprises have been promoted in some of the Western states, the money for the prosecution of which has been to a large extent borrowed here, either in the form of direct loans upon some kind of security, or by inducing many of our citizens to purchase stock in corporations organized for the purpose under local laws. Much of these investments, amounting to a vast sum in the aggregate, has been lost. This result is in some degree to be attributed to financial depression, and the consequent derangement of business, but in a much greater degree to the gross mismanagement and dishonesty of the managers and promoters. The funds thus procured have been used largely in furtherance of local and private interests, and in disregard of every prudent safeguard for the protection of the investors, and sometimes in defiance of every principle of common honesty. In some cases, when the managers well knew they were hopelessly involved, they continued to transact business, borrowing recklessly, and pledging the assets in their possession or under their control. When the crash came, these assets were sold by the pledgees, and, of course, sacrificed in many cases, leaving large deficiencies, which honest and prudent management could have converted into a surplus. A careful investigation of some of the disastrous failures of loan, investment, trust, land, and mortgage companies, as well as banks and other corporations, will reveal this condition of things. It will not be difficult for speculators to purchase large claims against these defunct corporations at a very low price, if they can be readily enforced here against stockholders who have made and lost investments in the stock. These considerations are not, of course, pertinent in a case where a party is seeking to enforce a clear legal right, whatever may have been the circumstances of its origin, but they serve to stimulate a careful inquiry as to the principles and reasons upon which the courts of this state are required to aid in the enforcement of claims of this character.

In the case at bar the plaintiff's right of action has no other legal or moral basis than the

flat of a legislature of another state. It is a principle of universal application, recognized in all civilized states, that the statutes of another state have, *ex proprio vigore*, no force or effect in another. The enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent. The consent is given only by virtue of the adoption of the doctrine of comity as part of our municipal law. That doctrine has many limitations and qualifications, and generally each sovereignty has the right to determine for itself their true scope and extent. The courts of this state are open to all suitors to enforce rights of action, transitory in their nature, recognized by the common law, or founded in natural justice, and when no law of the forum or any principle of public policy interferes. There is, however, a large class of foreign laws and statutes which, under the doctrine of comity, have no force in this jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without at the same time, neglecting the duty that it owes to its own citizens or subjects. It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local statute of frauds and statutes authorizing distress and sale for nonpayment of rent, are not recognized in another jurisdiction under the principles of comity. *Morgan v. Neville*, 74 Pa. 52; *Waldron v. Ritchings*, 3 Daly, 288; *Siegel v. Robinson*, 56 Pa. 19, 93 Am. Dec. 775; *Kelly v. Davenport*, 1 Browne (Pa.) 231; *Ross v. Wigg*, 34 Hun, 192; *Ludlow v. Van Rensselaer*, 1 Johns. 95; *Skinner v. Tinker*, 34 Barb. 383. It is well understood, also, that the statutes of one state giving a right of action to recover a penalty have no force in another. *Huntington v. Aittrill*, 146 U. S. 657, 36 L. ed. 1128. So, also, rights of action arising under foreign bankrupt, insolvent, or assignment laws are not recognized here when prejudicial to the interests of our own citizens. *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Re Waite*, 99 N. Y. 433; *Barth v. Backus*, 140 N. Y. 230, 23 L. R. A. 47; *Douglass v. Phenix Ins. Co.* 188 N. Y. 209, 20 L. R. A. 118. There is another class of cases where the right to enforce the foreign statute is conditioned upon the existence of a law substantially similar here. *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 458. Statutes giving a right of action for negligence resulting in death belong to that class. *Whitford v. Panama R. Co.* 23 N. Y. 465. There are many other classes of foreign statutes affecting public and private interests which courts have uniformly held can have no extraterritorial force or effect. From the general trend of judicial decisions in this country, and the consensus of authority on the question, it may be safely asserted that rights of action such as are set forth in the complaint in this action are not enforceable in another jurisdiction upon any obligations of comity. It has been held that an action by a New York creditor of a corporation organized under the manufacturing act of this state against a New Jersey trustee in the courts of that state, for neglect to file the annual report,

could not be maintained. The opinions of the several members of the court in that case contain a clear and interesting discussion of the law applicable to the question. *Derrickson v. Smith*, 27 N. J. L. 166. The courts of Massachusetts have uniformly refused to entertain actions of this character, either upon the ground that to enforce the foreign law would be injurious to its own citizens, or that complete justice could not be administered in its courts under its special and peculiar provisions. *Erickson v. Nesmith*, *supra*; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 849; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56. The arguments of the court in these cases upon which the conclusion was based deserve the highest respect, and it is worthy of notice that, in the case last cited, the statute sought to be enforced was the identical one now under consideration in the case at bar.

The highest court of Illinois has also refused to enforce this same statute and provision of the Kansas Constitution, on the ground that the remedy was special, and must be pursued in the state where the corporation exists. *Fowler v. Lamson*, 146 Ill. 472. In another case (*Young v. Farwell*, 139 Ill. 326) it held that it could not enforce by action at law a statute of Oregon for the collection of unpaid subscriptions, for the reason that a complete settlement of the controversy required a bill in equity, where all the parties interested were before the court, so that complete justice could be meted out to all, and conflicting rights and equities finally adjusted. *Patterson v. Lynde*, 112 Ill. 196; *Id.* 106 U. S. 519, 27 L. ed. 265. By the Constitution and laws of Michigan, stockholders of corporations of that state are individually liable for certain debts to be enforced by action of assumpsit; and the highest court of Wisconsin has held that the remedy was exclusive; that the corporation itself was a necessary party; and that the liability could be enforced only in the courts of Michigan. *May v. Black*, 77 Wis. 101. It has been also held, after exhaustive consideration, that a creditor of an Ohio corporation could not enforce the statutory liability of a stockholder in the courts of West Virginia. *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184. There are numerous other decisions in the state and Federal courts that hold, in effect, either that such a liability cannot be enforced at all beyond the local jurisdiction, or that such an action must be in equity after all remedies against the corporation have been exhausted, and that, too, in the state where the stockholder is sought to be charged; or, at least, the bill must show upon its face by proper allegations that such a proceeding was impossible or that all the corporate assets have been applied to the payment of the claims of creditors. *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *National Tube Works Co. v. Ballou*, 146 U. S. 517, 36 L. ed. 1070; *Pollard v. Bailey*, 87 U. S. 20 Wall. 520, 23 L. ed. 378; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825; *Peck v. Miller*, 39 Mich. 594; *Barrick v. Gifford*, 47 Ohio St. 181; *Allen v. Walsh*, 25 Minn. 543; *Smith v. Huckabee*, 53 Ala. 191. The decisions of our own courts are also to the effect that special remedies pro-

vided by foreign laws to enforce the liability of stockholders in foreign corporations must be applied by the courts of the state in the local jurisdiction, and where the corporation is domiciled. *Lovry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Barnes v. Wheaton*, 80 Hun, 8. The statutes in these cases were, it is true, different in some respects from that now under consideration; but when these cases are read with some of our more recent decisions as to the mode of enforcing the liability of stockholders in our own corporations, it becomes at once apparent that they apply to the statute in question. *National Bank v. Dillingham*, 147 N. Y. 608.

The objection to this action does not rest upon the principle that the plaintiff is seeking to enforce a statute for the recovery of a penalty, since the liability is not penal in any international sense, but arises upon the statute as an implied obligation which the defendant assumed when he purchased his stock. *Cochran v. Wiechers*, 119 N. Y. 899, 7 L. R. A. 553; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864. The case involves questions which open a broad field for investigation. It would take much time and labor to explore it thoroughly. It would, perhaps, be impossible to state the principle upon which the decision should rest without apparently coming in conflict with some of the numerous cases on the subject at some point. The great weight of authority, as will be seen, is against the right to maintain such an action. Sometimes the decision is put upon one ground, and sometimes upon another, but it is to be noticed that the party seeking to enforce such a statute in a foreign jurisdiction has been quite uniformly defeated. The statute in question, while creating a certain liability on the part of a stockholder to a creditor of a corporation, at the same time gives to the former certain rights as against his fellow stockholders for contribution. It should

be administered in such a way as to secure the rights of all in the same action. This is the interpretation which we have given to our own statutes enacted for a similar purpose. It is clear that this cannot be done in this action, since the theory of the plaintiff is that the defendant is liable in successive actions at law by creditors, suing separately, until he has paid a sum equal to his stock, and then he must resort to some other jurisdiction for contribution. This would be most unjust and oppressive, and it is safe to say that no well-considered case can be found that sanctions such a principle.

While this is not an action for a penalty yet we think that it belongs to a class of cases in which there is no obligation, under any well-recognized principle of the law of comity, to enforce a claim founded upon such a statute. Moreover, the right asserted and the remedy provided are of such a nature that they cannot be given any practical effect here without injustice to our own citizens. We are virtually asked to ignore our own rules of construction and methods of procedure in order to compel the defendant to pay to foreign creditors a sum equal to his holdings of stock, without any power to inquire into the necessity for it by an accounting or to secure to him any recourse against others equally liable. When the courts of this state are asked to administer the statutes of Kansas, and we can see that the case is surrounded with such complications and the circumstances are such that it cannot be done without injustice to our own citizens, or that it will be impossible to do full and complete justice to all the parties in interest, it is reasonable and just to decline to administer them at all.

The judgment of the General and Special Terms should be reversed, with costs in all courts, and the demurrer sustained, with leave to the plaintiff to amend the complaint on payment of costs.

All concur.

INDIANA SUPREME COURT.

PITTSBURGH, CINCINNATI, CHICAGO,
& ST. LOUIS RAILROAD COMPANY,
Appt.,

v.
George REDDING.

(140 Ind. 101.)

1. **Trainmen are not guilty of wilful or wanton neglect of duty** in failing to stop a freight train running on a sharp upgrade at a speed of 8 miles an hour, to remove a boy eight years and five months old, who in violation of the statutes as well as of the orders of the engineer caught hold of and hung to one of the cars in the moving train,—especially where it does not appear that the train could be safely stopped at that place.

2. **A longhand manuscript of alleged evidence cannot be regarded as a bill of exceptions on appeal.**

(February 27, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Delaware County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Burchenal & Rupe for appellant.

Messrs. J. M. Morris and Brown & Brown for appellee.

NOTE.—For cases somewhat akin to the above, see *Pianz v. Boston & A.R. Co.* (Mass.) 17 L. R. A. 835; *Farber v. Missouri P. R. Co.* (Mo.) 20 L. R. A. 350; 34 L. R. A.

Smith v. Louisville & N. R. Co. (Ky.) 22 L. R. A. 72; and *Houston, C. A. & N. R. Co. v. Bolling* (Ark.) 27 L. R. A. 190.

Howard, J., delivered the opinion of the court:

From the special verdict in this case it appears that on the 25th day of September, 1891, the appellant company ran a train of cars, in a southeasterly direction, through the city of New Castle, the train consisting of a locomotive engine, tender, twenty-seven loaded box cars, and a caboose. It was a through freight, passing through the town between 4 and 5 o'clock in the afternoon, and without making any stop at the depot. The appellee was at the time eight years and five months old, and lived in the town, with his father and mother. The father was on this day engaged at work as a carpenter at a point several miles distant from the town. The boy had been at school during the day, and returned home after dismissal of school, about half-past 3 o'clock. About 4 o'clock, his mother, who was engaged at her trade as seamstress, permitted him to go out and ride upon a wagon for a distance of a square and a half, with directions to then return home. Instead of returning as directed, appellee wandered on for some squares, until he crossed to the south side of the railroad track, where he stood as said freight train came along. As the engine approached and passed the place where appellee stood, the engineer noticed him, and said to him, "Go away from there." The special verdict then continues: "That the plaintiff, George Redding, then went to a point about 20 feet east of the east side of Byer street, on the south side of the track; and, as the fourth or fifth car of said train to the rear of the engine passed him, he seized hold of an iron attached on the side near the end of said car, and drew himself up, and rested his right knee on an iron loop or half ring attached to the sill of the car, and his left foot on the lid of the grease box of the truck, in which position he rode on said car a distance of 300 feet. At the time the plaintiff so seized hold of said car the said train was running at a speed of 8 miles an hour and on a sharp up grade. That at the time the plaintiff so seized hold and hung upon said car the fireman of said freight train, James R. Muckridge, was standing within 3 feet and in touching distance of the engineer, and saw plaintiff get upon said car and saw him hanging thereon, and ride thereon to the place where he fell off, and could easily have called the attention of the engineer to the situation and condition of the plaintiff. And during the time that the plaintiff was so upon said car, the said Muckridge made backward and forward motions with his right arm and hand toward and at the plaintiff, which frightened and caused the plaintiff to jump off the car, and whilst the car was so in motion as aforesaid; and in alighting the plaintiff fell under said car, with his left leg across the rail of said railroad, and the car wheels passed over it, and so crushed and mutilated it as to leave it hanging together with the shreds of flesh and the sinews. That amputation was made necessary, and soon thereafter, on said day, had. That said train could have been easily stopped within a distance of four or five car lengths before reaching the point of the accident, after the plaintiff was seen upon said train by said Muckridge. That the average

length of the cars of said train was 33 or 34 feet. That as soon as said Muckridge saw the accident he made the remark to the engineer, standing at his side, 'We have got him,' or 'We have killed him.' That no effort was made to stop or check the speed of said train whilst the plaintiff was so hanging upon said car. That at the time the plaintiff got upon said car he did not fully realize or appreciate the danger or peril of his act."

We do not think that this verdict finds facts sufficient to entitle appellee to judgment. It first appears that he was a trespasser upon appellant's train; not a technical trespasser simply, but a trespasser in direct violation of the order of the engineer, who saw him standing near the moving train, and said to him in warning, "Go away from there." He was also on the train in disobedience to his mother's command, since she told him to return home after his ride upon the wagon. His climbing upon a moving car was, moreover, a misdemeanor under the statutes of the state. Rev. Stat. 1894, § 2290 (Rev. Stat. 1881, § 2169). This is not like the case of *Louisville, N. A. & C. R. Co. v. Sears*, 11 Ind. App. 654, where a boy nearly eight years of age, playing upon the street, slipped, and without fault on his part was accidentally thrown upon the track, where he was run over, and his legs taken off by a passing train. The only question for decision in the case at bar, taking into consideration the tender years of the appellee, and the fact that he did not realize or appreciate the danger and peril of his act, is whether the appellant was or was not guilty of wilful or wanton neglect of duty in not stopping the train and removing the boy, when his danger was discovered. In *Cincinnati, H. & D. R. Co. v. Kassen*, 49 Ohio St. 230, 16 L. R. A. 674, a passenger fell off the rear of one train, and lay stunned upon the track, when a train following in an hour afterwards ran over and killed him. The employees of the first train, though informed that the man had fallen off, refused to stop the train, and take him up, or give notice to the crew of the following train so that they might not injure him; and for such wilful and inexcusable neglect of duty and disregard of the dictates of our common humanity the company was rightly held answerable in damages. In the case before us, however, it does not appear from the facts found that the boy was necessarily in danger. He had climbed upon the train, apparently at the same place provided for the use of employees in mounting the cars; and to the fireman, who saw him there, it may not have seemed so dangerous a situation as in fact it was. The fireman and the engineer, both of whom apparently knew of the presence of the boy clinging to the box car, may have thought that, as he had got there while the train was in motion, he might hold on there in safety, or that he might jump off with even greater ease and safety than he had jumped on. At least it does not seem clearly a case of criminal carelessness on the part of the train employees to have continued the train in motion on the "sharp up grade" on which it was then moving. It was not a suitable place to stop a loaded freight train. Besides, it may have been dangerous to do so. The verdict

shows that the train could have been stopped in a few car lengths, but it does not find that this might safely be done. A passenger train—as in the Ohio case which we have cited—might be closely following this freight, and, for all that appears, up this same steep grade. If that were so, the stopping of the freight train might be attended with great danger to passengers and to the crews of both trains. In addition, it is not clear that the stopping of the train might not have jerked the boy off even more quickly than he jumped off himself. It is found in the verdict that the forward and backward motion of the fireman's arm frightened the appellee, so that he jumped off. This, we think, must be regarded as a mere conclusion. Appellee was not frightened by the warning of the engineer, when told to keep away from the moving train. His mounting the train seems, at least, as dangerous an act as was the dismounting. The action in the last case may have been due quite as much to the boy's own consciousness of wrongdoing as to any fear caused by the motions of the fireman's arm. The motions, besides, may have been by way of caution quite as much as threat. They may have meant "hold on tight" quite as well as "jump off." Appellee, notwithstanding his tender years, was unquestionably quick, active, and unusually daring. The trainmen, accustomed themselves to take such risks as the boy was taking, may have honestly believed him to be in no great danger. He was a wrongdoer, and it is not clear that they were guilty of wilfully injuring him. If the facts are correctly found by the jury, we do not think the company is liable. See *Plans v. Boston & A. R. Co.* 157 Mass. 377, 17 L. R. A. 835.

Both appellant and appellee refer to the evidence in discussing the verdict, but the evidence is not in the record. The clerk does not show that a bill of exceptions containing the evidence was ever filed in his office. It is perhaps shown that a longhand manuscript of alleged evidence was filed in the clerk's office. But the longhand manuscript is not a bill of exceptions. It should, after filing in the clerk's office, be embodied in a bill of exceptions; and this bill of exceptions, with the longhand manuscript so embodied therein, should, after having been presented to and signed by the judge, within the time given, be filed in the clerk's office. All this, besides, should appear from the record, and over the certificate and seal of the clerk. We need not, perhaps, presume that a court stenographer knows how to make up a bill of exceptions. It is not his duty to do this. He is sworn simply to take down and transcribe the evidence, rulings, etc. However this may be, it is the duty of the appellant to bring a correct record to this court; and our decisions cannot be made up from an examination of papers which form no part of the record. We are of opinion that in this case justice may more certainly be attained by granting a new trial than in any other way.

The judgment is therefore reversed, with instructions to grant a new trial.

Monks, J., took no part in the decision of this case.

34 L. R. A.

Catherine DANTZER et al., Appts.,

INDIANAPOLIS UNION RAILWAY COMPANY

141 Ind. 604.)

1. A constitutional right to a remedy for injury to property does not include the right to recover for an injury not different in kind but only in degree from that suffered by the community in general from the vacation of a remote part of a street, though it causes depreciation in the value of property, but leaves ample means of access thereto.
2. Depreciation in the value of property by the added inconvenience of access thereto consequent on the vacation of a part of a street at a point some distance therefrom is an injury not different in kind, but only in degree, from that suffered by the community in general, and will not sustain a right of action for damages.
3. Whether a legal injury is pleaded by alleging the vacation of a part of a street at some distance from one's property is a question of law for the court, and not a question for the jury.

(McCabe, J., dissents.)

(December 21, 1894.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover damages for alleged wrongful interference with a street which was one of the means of access to plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Claypool & Claypool, W. A. Ketcham, Duncan & Smith, and A. Seidensticker for appellants.

Messrs. Baker & Daniels and F. Winter for appellee.

Hackney, J., delivered the opinion of the court:

Formerly, the appellee's station for the reception and discharge of passengers for all of the railways entering the city of Indianapolis was bounded on the north by Louisiana street, on the east by Meridian street, on the south by McNabb street, and on the west by Illinois street. McNabb street extended but to the intersections of Meridian and Illinois streets. One square south of McNabb street, and parallel with that street, was and is South street, extending east and west, and connecting with numerous streets of said city running north and south. Between McNabb and South streets, about midway, and on the west side of Illinois street, were, and ever since have been, the lots of the appellants, upon which was erected and maintained a public hotel. At that time Illinois street extended for miles north and south of appellants' property, which abutted upon it, and was free to public travel upon its surface, excepting as the appellee's railway tracks crossed the same. Beneath the surface of said Illinois street, and under said

NOTE.—As to damages to abutting owner by vacation of highway, see note to *People, Hart, v. Marin County (Cal.)* 25 L. R. A. 682; also *Chicago v. Burcky (Ill.)* 29 L. R. A. 569.

railway tracks, had been constructed and used a tunnel for public travel between Georgia street (the second street north of said station) and said South street. These conditions existing in June, 1886, the common council of said city vacated that part of Illinois street beginning 50 feet south of the north line of Louisiana street (the first street north of said station), and extending south for the distance of 210 feet, and also vacated a portion of McNabb street, that is to say, a strip 35 feet in width off of the north side of said street. Soon after so vacating said streets, the appellee tore down its station house and built anew, extending its car sheds and buildings over that part of Illinois street so vacated, and inclosing that part of said street, and guarding the former north line of McNabb street, with iron fences, and along the vacated portion of McNabb street, to within 1 foot of the center of said street, it constructed a grade above the old grade of the street, and placed thereon two railway tracks. The north line of the appellants' property is 96 feet south of any of the obstructions as added to Illinois street, and the south line thereof is 156 feet from any of such obstructions. The walls guarding the southern entrance to said tunnel occupy such part of Illinois street that on the west thereof there is a street bed of 19 feet to the sidewalk curb, on the east there is a street bed of 19 feet to the sidewalk curb, and on the north there is a street bed of 28 feet between the coping and the center line of McNabb street, thus leaving a passageway around the sides and ends of said tunnel. Since so closing Illinois street, the premises of appellants can be reached from the southern part of the city by the same streets and courses that formerly existed, and from the northern part of the city by the ways which existed formerly, excepting by the surface of Illinois street over said distance of 210 feet so vacated, and excepting that part of McNabb street so vacated. The appellant's property and the block in which it is situated are accessible from points on Illinois street north of the union station through said tunnel, or by cross streets, to Meridian street, thence south on Meridian street to McNabb street or South street, and thence west to Illinois street, south of the vacated portion thereof. The changes occasioned by vacating the streets named have required persons who might desire to reach the property of the appellants from North Illinois street, or in passing from said property to North Illinois street, to travel the more inconvenient route through the tunnel, or the more circuitous route by the way of Meridian and McNabb or South streets, and in traveling McNabb street to be limited to the south sidewalk, or to the street bed narrowed to 25 feet. The appellants, making these altered conditions the basis of their claim for damages, sued the appellee in the circuit court, and alleged a depreciation of the value of their property and property rights in the sum of \$30,000, and that in the proceedings for said vacation no damages had been assessed or tendered. The lower court sustained a demurrer to the several paragraphs of complaint, and that ruling is here assigned as error.

Under the Bill of Rights in the Constitution of Indiana (Rev. Stat. 1881, § 57; Rev. Stat. 1894, § 4 L. R. A.

§ 57), which guarantees that "every man for injury done him in his . . . property . . . shall have remedy by due course of law," and under the common law, the appellants insist upon a right of recovery. Though the obstructions complained of are remote from the lines of their property and do not encroach upon the street immediately in front of their property, and while they have ways of ingress and egress to and from their building and lots to and from the same directions formerly existing, it is contended that the appellants, by virtue of their ownership of said property, have a property right in the streets at the points of obstruction; that the right to use the streets for access to their building and lots is a property right not confined to the immediate front of their lots, and not dependent upon an ownership of the fee in the street in front of, or remote from, their lots; and that any destruction or impairment of that right is an injury for which they have a remedy. The appellee concedes that under said constitutional guaranty, and under the common law, even in the absence of that guaranty, there is a remedy for an injury to one's property. It is conceded, also, that the appellants held, in addition to their property in the soil of their lots, a property right in the street,—that is to say, the appendant right of access, or easement of access, in front of their lots; but it is maintained that under the facts in this case no legal injury exists, no property right of the appellants has been invaded, and, if any injury has been suffered it is *damnum absque injuria*. At least two cases in this state have defined the extent of that appendant property right of access. In *Haynes v. Thomas*, 7 Ind. 38, it is said: "These decisions establish the principle that besides the right of way which the public has of passage over a street in a town or city, there is a private right which passes to the purchaser of a lot upon the street, and as appurtenant to it, which he holds by implied covenant that the street in front of his lot shall forever be kept open to its full width." In the case of *Tate v. Ohio & M. R. Co.* 7 Ind. 479, the court quotes the above passage from the case of *Haynes v. Thomas*, and says, in application of the principle to the facts of the case, that "the person, whether natural or artificial, causing the obstruction, is liable to the owners of the adjoining lots for the injury. It is thus carefully limited to those owning lots fronting on the street at the point of obstruction. That is the case made in the record. Such owners only seem to sustain special injury." These cases, and probably others in this state, hold that this property right cannot be taken or obstructed, even with legislative sanction. We think we may safely assert, however, that the obstruction of the easement of access need not always be upon the immediate front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner, at the point where it abuts upon the street, the property right of the lot-owner is invaded and he may recover. To illustrate this proposition, if a street were fully obstructed on either side of one's lot, so that the lines of the lot could not be reached, access would be denied to the lotowner, though

the street in front of his lot had upon it no obstructions. The property rights of the lot-owner, as against the public, are coterminous with the lines of his lot, but that property right may be obstructed, and its uses defeated, by cutting off ingress and egress to and from such lines from points upon the street beyond such lines. In such case there should be, and is, a remedy. This conclusion is held in the case of *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, where the remote obstruction of an alley created a *cul de sac* which it was necessary to enter to gain access to the plaintiff's abutting lot, but from which there was no exit. The holding of the case cited finds support from the rule as to the character of interest of the lotowner in the street, as stated in *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225. And see *Buhl v. First Street Union Depot Co.* 98 Mich. 596-606, 28 L. R. A. 393. *Indianapolis v. Kingsbury*, 161 Ind. 200, 51 Am. Rep. 749, is cited by appellants as enlarging the property rights of a lotowner in the street beyond that stated by us, and as carrying it throughout the length of the street. In that case it was held that where one dedicates a street as part of an addition to a city, and sells a lot with reference to such street, his grantee takes, by implied grant, such an interest in the street so dedicated as that said grantor could not vacate the street, and thereby defeat that implied grant. No question is there made as to the rights of the public in such street, nor as to municipal control as against such grantee. The importance of a distinction between the two cases is manifested when we suggest that the appellants could not be reasonably held to possess property rights in Illinois street 3 miles north of the union station, the obstruction of which would entitle them to damages; nor could it be said that they might defeat, at that distant point, the construction of a viaduct, a tunnel, or an elevated railway, as an impairment of this easement. There is, however, this limitation upon every right of action of this class: that the plaintiff must suffer an injury different in kind, and not simply in degree, from that suffered by the community in general. *Decker v. Evansville, S. & N. R. Co.* 138 Ind. 493; *Fossion v. Landry*, 123 Ind. 136; *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 543, 59 Am. Rep. 225; *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 118; *Sohn v. Cambern*, 106 Ind. 302; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 153; *Pennsylvania Co. v. Stanley*, *supra*. This rule, with a definition of the phrase "community in general," was recently stated by this court in the case of *Decker v. Evansville, S. & N. R. Co.* *supra*, as follows: "Whether the owner of a lot abutting upon a street may maintain a common-law action, where a structure in the street imposes no new burden on the soil owned by him, depends upon whether or not the occupation of the street with such structure results in damage to his property peculiar and different in kind from that which is suffered by the community in general. . . . The community in general does not mean those who use the street, and yet reside at such a distance from the railroad, if such be the obstruction of which complaint is made, as to suffer none of the annoyances incident to its

construction and operation, but it means those who reside in the immediate vicinity of the railroad, and are subject to the inconveniences incident to such a structure. The location and operation of a railroad upon a public highway may occasion incidental inconvenience to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as the community in general. Injuries which result from the careful construction and operation of a railroad on the land of another are common to all those whose lands are in close proximity to such road, and for such injuries there can be no recovery in the absence of a statute entitling the owner to maintain such action. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 63, 31 Am. Rep. 306; *Chicago v. Union Bldg. Assn.* 102 Ill. 879, 40 Am. Rep. 598; *Rigney v. Chicago*, 102 Ill. 64; *Indiana, B. & W. R. Co. v. Eberle*, *supra*." The same statement of the rule and the same definition were given by the late Judge Mitchell of this court, in *Indiana, B. & W. R. Co. v. Eberle*, *supra*. The reason of the rule was stated in *Fossion v. Landry*, *supra*, by a quotation from Blackstone's Commentaries (book 3, p. 219), to the effect that only private ways have private remedies, while public ways are the subjects of indictment only, and that special injury not suffered in common with the public must appear before private remedy may be employed.

The inquiry arises upon the facts and rules of law as stated, Did the appellants sustain an injury substantially impairing or destroying access to their lots and building from the remote obstructions of Illinois and McNabb streets? If this inquiry were confined to McNabb street, and if the property of the appellants were upon the south side of that street, the decisions in this state would require us to answer this inquiry in the negative. *Dwenger v. Chicago & G. T. R. Co.*, *Terre Haute & L. R. Co. v. Bissell*, *Indiana, B. & N. R. Co. v. Eberle*, and *Decker v. Evansville, S. & N. R. Co.* *supra*. In the *Eberle Case* the facts were as above supposed, and after a full consideration of the question and of many authorities it was held that in the location and proper operation of a railroad upon that side of the highway remote from the plaintiff's lots there was no material interruption of the plaintiff's means of access; that "his injury and damage, while different in degree, are the same in kind as are those of the community at large;" and it is said: "All that is found is that the obstruction forces the travel over the highway nearer his lot, and makes access thereto more difficult and inconvenient. That, however, does not show that the erection of the embankment presents any substantial interference with his right of access over the highway as it was previously enjoyed and used, nor does it show any inconvenience of a kind different from that to which the community at large is subjected. The highway may be more difficult and inconvenient of passage at that point by all who use it, precisely as it is inconvenient as a means of access to the plaintiff's lot. That the plaintiff, on account of the proximity of his residence, and because he uses the highway

more frequently, may suffer inconvenience greater in degree than others, may be conceded. . . . Mere inconvenience or disadvantage, so long as the obstruction complained of does not in some substantial degree impair or deprive the plaintiff of the usual and ordinary means of access to his property, cannot give a right of action. *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Powell v. Bunger*, 91 Ind. 64; *Lenning v. Smith*, 8 Cow. 146." In *Terre Haute & L. E. Co. v. Bissell*, *supra*, a case like that above supposed with reference to McNabb street, it was said: "In the absence of any showing that the tracks of appellant's railroad were located, constructed, and used on and over that part of First street of which appellee claimed to be the owner in fee, the grievances whereof he complained, caused or occasioned by the occupation and use of First street for railroad purposes, were such incidental injuries merely as he sustained in common with the public, and not different in degree or character from those sustained by the public generally. For such injuries appellee cannot maintain an action against the appellant. *McCowan v. Whitesides*, 81 Ind. 235; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Matlock v. Hawkins*, 92 Ind. 225; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 153." It will be observed that in the cases cited the rule was extended, not only to the maintenance of an obstruction, but also to the not unlawful operation of a railway, while in the present case there is no allegation of improper operation of the railways; and the rule applies to the appellants with additional force when it is remembered that their lots and building do not abut upon McNabb street, and they are only affected by an inconvenience in traveling to and from their premises, an inconvenience suffered alike by all of the community.

By the cases cited, the rule that added inconvenience from such obstructions in the street upon the side of the center line of the street remote from the property, and not upon the property owner's fee, is *damnum absque injuria*, has become so firmly settled in this state that only legislative action can disturb it. It is therefore unnecessary to inquire as to the rule in other states or in England, as we are asked to do. The rules so found, in the absence of direct authority upon the question, would lead with unerring certainty to a decision of the remaining question, namely, the effect of the obstruction upon Illinois street. The easements of access, of light, and of air are all confined to the street in front of the lot, and, when it is ascertained that a remote obstruction does not affect these, there is no injury, in a legal sense, any more than in the cases above stated, of obstructions in front of the lot; and when it is established that a mere inconvenience of access, or a more circuitous route of access, does not constitute legal injury, no right of action exists. But we need not stop with the application of our own cases, since the direct question has been decided against the contention of the appellants in numerous cases from other states, involving like obstructions and like injury, and where all of the contentions made in this case were denied. *Buhl v. Fort Street Union Depot Co.* 98 Mich. 34 L. R. A.

596, 23 L. R. A. 392; *Stanwood v. Malden*, 137 Mass. 17, 16 L. R. A. 591; *McGee's Appeal*, 114 Pa. 470; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158; *Glasgow v. S. Louis*, 107 Mo. 198; *Smith v. Boston*, 7 Cush. 254; *Whitsett v. Union Depot & R. Co.* 10 Colo. 218; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 839; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Gerhard v. Seokong River Bridge Comrs.* 15 R. I. 534; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411; *Coster v. Albany*, 48 N. Y. 899; *Barr v. Okaloosa*, 45 Iowa, 275; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625. The last of these decisions is by Mr. Justice Brewer, and is perfectly clear in maintaining the proposition that one whose access is not cut off, and whose property rights in the immediate front of his lot are not invaded, and who suffers only from the loss of convenience of access, which of itself may turn the tide of travel from his premises, and occasion loss of business and depreciation in value of property, sustains damage of the same kind, but in greater degree, than that sustained by the public generally. We have not endeavored to collect all of the cases holding this view, but have included, as will be observed, the decisions of many states. We concede that the holding of some of the courts of this country are not in harmony with this, the great weight of authority; and it would seem that the English rule, urged by appellants' learned counsel, cannot be reconciled with the current of authority in this country, but that rule has met with frequent criticism in the cases we have cited, and is in some justified under acts of Parliament. However, we are constrained to hold with the best American authority, even if the conflict with the English rule were sharply drawn and free from distinction.

There is in this country a line of holdings which is sometimes thought to conflict with what we have said to be the current of authority, namely, those cases which include the holding of liability for obstructions by elevated railways. These, however, should be distinguished as not having relation to access, but to the easement of light or air, and as encroaching upon the immediate lot front. All of the cases we have cited to the question now under consideration involved the vacation of one or more of several avenues of access, and left other avenues which required a more circuitous course in reaching the property of the plaintiff. In several of the cases, provisions of the state Constitutions and statutes reserving damages for the taking of or injury to property were considered as not allowing damages where the injury was of the character suffered by the community in general. In some of the cases it was urged, as it has been in this case, that if, instead of vacating the street, the proceeding had been to establish a street, the appellants would have been subject to assessment for benefits therefrom, and for that reason they would be entitled to damages. It was held not to affect the question. *Buhl v. Fort Street Union Depot Co.*, *Stanwood v. Malden*, and *East St. Louis v. O'Flynn*, *supra*; *State, Kean, v. Elizabeth*, 54 N. J. L. 463; *Chicago v. Union Bldg. Assn.*

102 Ill. 379. 40 Am. Rep. 598. In the case of *State, Kean, v. Elizabeth, supra*, it was said in this connection: "It is assumed by counsel for prosecutrix that, because the prosecutrix was assessed for a benefit resulting from the opening of this street peculiar to herself, that she got a vested right in the continued existence of the street, of which she could not be stripped without compensation. But this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public. The privilege of using the street was shared by each member of the community. It may not have been of the same value to each member of the community but the right to use the street was in each citizen the same. It was exclusively a public right, put under the control of the representatives of the public. It was subject to alteration or abolition when, in the judgment of those to whom the public interests were confided, those interests demanded such action. The assessments of benefits is presumed to be based upon the recognized power of the state and its agencies to modify or destroy the improvement."

It has been suggested by counsel for the appellants that the question as to whether there has been an injury is one for the jury under proper instructions. The question has, with but few, if any, exceptions, arisen upon demurrer to the petition, as it does in this case. A statement of the facts submitted, and tested by the rules of pleading and principles of law, which otherwise would be given as charges to the jury, constitute the case, and call for judicial determination as a question of law. As to whether one whose access was not cut off by the vacation of a part of a street may recover has been expressly held to be a question of law. *East St. Louis v. O'Flynn*, and *Stanwood v. Malden, supra*. It should be conceded, of course, that, if legal injury is pleaded, the degree of that injury, in ascertaining the amount of recovery, may be submitted to the jury, but as to whether a legal injury is pleaded is a question of law for the court. In the absence of authority from other states, there could be no escape from the conclusion that our court has gone so far in the direction we have shown

as to deny a recovery by the appellants. They have ample means of access to their property, and the vacations complained of do not affect the access to their lot front, but are remote from it. If they have suffered in the depreciation of the value of their property by the inconvenience of the public travel to reach it, or of the appellants to reach other parts of the city, that inconvenience is suffered alike by all who may desire to go to the appellants' property, or from that property to other parts of the city. It is therefore an injury suffered in common by the appellants and the public in general, though the degree of appellants' injury may be, and probably is, the greater.

We conclude that the circuit court did not err in sustaining the appellee's demurrer to the complaint, and *the judgment is affirmed*.

Howard, J., concurring:

I am of opinion that the owner of real estate abutting upon a street or highway should be allowed such damages as he suffers for obstruction to the freedom of his access to his property, whether such obstruction is located immediately in front of his premises or not, and whether he is the owner of the fee in the street or not. I think, notwithstanding the decisions to the contrary, that such property owner suffers injury by such obstruction which is different in kind, as well as in degree, from that which is suffered by the general public. There can be no doubt, however, that the overwhelming weight of authority, at least in this state, is in favor of confining the award for such damages to those who are deprived, in whole or in part, of access to that section of the highway immediately abutting upon or in front of their own real estate. While, therefore, in this case, it is not a matter of doubt that appellants have suffered great damages on account of the obstruction complained of, yet, following the authorities, their damages constitute an injury which must be borne without compensation.

McCabe, J., dissenting:

I concur in the opinion as to McNabb street, but I do not concur as to the obstruction of Illinois street.

Rehearing denied June 14, 1895.

MARYLAND COURT OF APPEALS.

Elihu E. JACKSON *et al.*, *Appts.*,

v.

Sally JACKSON.

(82 Md. 17.)

1. A marriage valid in the state in which it is contracted will be recognized as valid in another state if it does not contravene

NOTE.—For conflict of laws as to validity of marriage, see also *Pennegar v. State* (Tenn.) 2 L. R. A. 703; *State v. Tutty* (C. C. S. D. Ga.) 7 L. R. A. 50; and *Com. v. Graham* (Mass.) 16 L. R. A. 578.

As to proof of foreign laws, see *State v. Behrman* (N. C.) 25 L. R. A. 440.

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the declared policy of the positive law of the latter, although it may have been made without the form or ceremony required in the latter state.

2. A lawyer of another state who declares that he is familiar with the law there may be allowed to prove such law as to the requisites of a valid marriage.

3. It cannot be assumed on appeal that answers of witnesses were prejudicial when they did not appear on the record.

4. A witness cannot testify to the general reputation of a woman for chastity while living with an alleged husband from whom she has since separated, in order to repudiate a presumption of marriage.

5. A divided reputation in the community as to the marriage of persons cannot be proved.

(November 15, 1895.)

APPPEAL by defendants from a judgment of the Circuit Court for Wicomico County in favor of plaintiff in an action brought to establish plaintiff's right to administration upon the estate of R. Watson Jackson, deceased, as his only child. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. James E. Ellegood and John R. Pattison*, for appellant:

The recognition of the laws of another state, in the administration of justice in this, is not a right *stricti juris*. It depends entirely upon comity, and in extending it courts are always careful that the statutes of their own state are not infringed to the injury of their own citizens.

Wilson v. Carson, 12 Md. 75; *Story*, Confli. L. 3d ed. § 106; *Gardner v. Lewis*, 7 Gill, 391.

The doctrine *lex loci contractus* is subject to the limitation of many exceptions, and also to the general principle that it must not be *contra bonos mores*, nor contrary to the settled policy and laws of the state, or to the best interest of the citizens of the state where they are to be enforced.

Story, Confli. L. §§ 87, 97, 98; *Doe, Birtwhistle, v. Vardill*, 5 Barn. & C. 488, 9 Bligh, N. R. 51; *Munro v. Saunders*, 6 Bligh, N. R. 468; *Brook v. Brook*, 9 H. L. Cas. 198.

The decisions in some of the states are so very loose as to admit the validity of a foreign marriage contracted in express violation of a divorce granted with a prohibition of marriage and also those in violation of an express statute.

Von Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; *Medway v. Needham*, 16 Mass. 159, 8 Am. Dec. 131.

But this is not the law of Maryland and some other states.

5 Am. & Eng. Enc. Law, *Divorce*, p. 941; *Elliott v. Elliott*, 38 Md. 868; *Kinney v. Com.* 30 Gratt. 868, 32 Am. Rep. 690; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 688.

In these cases the court holds that the form of entering into the contract of marriage is to be regulated by the *lex loci contractus*, but the essentials are to be regulated by the law of the country in which the parties are domiciled, or in which the matrimonial residence is.

Brook v. Brook, 9 H. L. Cas. 192; 8 Walt, Act. & Def. p. 634, § 11.

The policy and law of Maryland from its foundation as a state is that a marriage contract in the words of the present tense is not a marriage, and that cohabitation following such a contract is illicit.

Denison v. Denison, 85 Md. 861; *Redgrave v. Redgrave*, 38 Md. 98.

The statute of Pennsylvania, declares that "all marriages shall be solemnized by taking each other for husband and wife before twelve sufficient witnesses," and the "certificate of the marriage registered."

Hantz v. Sealy, 6 Binn. 407; *Com. v. Stump*, 53 Pa. 136, 91 Am. Dec. 198.

Such a contract of marriage could only be valid, if at all, in Maryland, as to such rights as inhere in, and are vested by, the contract itself, but not as to such rights and capacities as are incidental only to the contract.

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Decouche v. Savetier, 8 Johns. Ch. 180, 8 Am. Dec. 478; *Burge*, Colonial & Foreign Laws, 111; *Wrightman*, Law of Marriage & Legitimacy; *Somerville v. Lord Somerville*, 5 Ves. Jr. 754; *Story*, Confli. L. chap. 12.

The plaintiff undertook to prove a formal marriage with "religious ceremony" at Chester. Having undertaken to prove this, she could not prove nor submit to the jury to find that there might have been a marriage at some other time and place, or a marriage *per verba presentis*, of which there was absolutely no proof.

Barnum v. Barnum, 42 Md. 297; *Blackburn v. Crawford*, 70 U. S. 8 Wall. 175, 18 L. ed. 186; 14 Am. & Eng. Enc. Law, p. 590, § 13.

While, where the fact of the foreign marriage is proved, and the law not proved, it is sometimes presumed to be in conformance with the foreign law, yet there are cases which hold "that the special requirements of such law must be shown to have been complied with." 14 Am. & Eng. Enc. Law, § 14, p. 531; *Catherwood v. Caslon*, 18 Mees. & W. 261; *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121; *Reg. v. Smith*, 14 U. C. Q. B. 565.

The affirmative or positive reputation to sustain a marriage is different from that which rebuts the presumption. There can be no such presumption except on a reputation that is general and not divided, for "a divided reputation amounts to no evidence."

Barnum v. Barnum, 42 Md. 297; *Brinkley v. Brinkley*, 50 N. Y. 199.

There may be such a negative reputation, that is, there may be such general consensus of opinion of no marriage, as to make that general.

Boone v. Purnell, 28 Md. 629, 92 Am. Dec. 713.

But there is a middle or debatable ground between these two extremes, and if the opinion or reputation in the community be so divided as that the reputation is not general in a positive sense, then the general reputation fails and becomes no evidence.

White v. White, 82 Cal. 427, 7 L. R. A. 804.

Messrs. E. Stanley Toadvin, George W. Bell, and Alonso L. Miles, for appellee:

Evidence of a "reputation of a reputation" is inadmissible.

Sloan v. Edwards, 61 Md. 108.

The declarations of the deceased parents are admissible to prove marriage.

Jackson v. Jackson, 80 Md. 176.

Marriage may be proved by general reputation.

Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713; *Redgrave v. Redgrave*, 38 Md. 97; *Wilson v. Merryman*, 48 Md. 380.

McSherry, J., delivered the opinion of the court:

This case is now before us for the second time. The first appeal is reported in 80 Md. 176. The legal principles applicable to the controversy were then laid down, and, upon a reversal of the judgment, the cause was remanded for a new trial. A new trial was had, resulting in the same verdict and judgment that were recorded on the first trial, and the same parties have again appealed who

were the appellants on the former occasion. There was but a single issue involved, and that was whether the appellee is the legitimate daughter of Richard Watson Jackson, who died intestate some years ago. In passing on this issue, two juries in different counties have found by their verdicts that she is. The record now before us contains twelve bills of exception, but it will not be necessary to review them separately, because they form several distinct groups, presenting but few questions which require any discussion.

The alleged marriage of the appellee's mother and father, if it took place, as has been twice found by separate juries, took place in the state of Pennsylvania. The evidence relied on to establish this marriage was general reputation, cohabitation, and acknowledgment. The admissibility and sufficiency of such evidence to prove a marriage were fully considered on the former appeal, and we need not repeat here what was so recently decided there. There was no effort to prove as a distinct fact that the marriage had been performed with any religious ceremony. It is true that one of the witnesses, in giving the declarations of the parties, stated that they (the mother and father of the appellee) upon one occasion said they had been married by a minister of the gospel; but it must be borne in mind that the appellee, who was seeking to prove her legitimacy, did not set up a marriage of her parents at a particular place, by a particular form or ceremony. Had she done this, and failed, she would not have been at liberty to rely on general repute to establish the alleged marriage. *Barnum v. Barnum*, 42 Md. 251. Assuming there was no religious ceremony proved, or attempted to be proved, as there was not, it has been insisted with great zeal and earnestness that, even if the marriage found by the verdict of the jury to have been contracted and consummated in Pennsylvania were valid by the laws of that state, yet the legitimacy of the appellee, who was born in Pennsylvania, where her parents then lived, must be determined, not by the laws of that state, but by the laws of Maryland; and that if, therefore, the marriage were, by reason of the failure to show there had been some religious ceremony, one that would not, on that account, have been valid under the statutes of Maryland, the issue of such a marriage would in Maryland be illegitimate, even though the marriage of which that issue was the fruit were conceded to be perfectly valid in the state where it was contracted and consummated, and the case of *Doe, Birtwhistle, v. Vardill*, 5 Barn. & C. 488, was much pressed upon us to support that view. But that case, and others founded on the same settled principle, are clearly distinguishable from the case at bar. It is a maxim as old as the common law that *hæres legitimus est quem nuptiæ demonstrant*. A marriage, if valid where solemnized, is, in general, valid everywhere, and, of necessity, the offspring of that marriage would be treated as legitimate, wherever the marriage itself would be regarded as valid. But a local statute which makes an illegitimate child, or a child born out of wedlock, legitimate upon certain prescribed conditions, such as the subsequent marriage of the parents, and the recog-

nition of the child as theirs, can have no extraterritorial operation, and therefore cannot give to such child in another jurisdiction an inheritable status not accorded to it by the law of the latter jurisdiction. By the law of England, a child born out of wedlock was a bastard. By the law of Scotland, the subsequent marriage of the father and the mother, and their recognition of the child as theirs, legitimated the child. But that statute could not operate upon real estate in England, where the law gave to such a marriage no effect as legitimating prior born children. The same principle was decided in *Barnum v. Barnum*, 42 Md. 251, and *Smith v. Derr*, 84 Pa. 126, 75 Am. Dec. 641. We have said that in general a marriage valid where performed is valid everywhere. To this broad rule there are, however, exceptions. "These exceptions or modifications of the general rule may be classified as follows: First, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; second, marriages which the local law-making power has declared shall not be allowed any validity. . . . To the first class belong those which involve polygamy and incest; and in the sense in which the term 'incest' is used are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters. Thesecond class, *i. e.*, those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of 'valid where performed, valid everywhere.' To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society." *Pennegar v. State*, 87 Tenn. 244, s. c., with copious notes, 2 L. R. A. 703; *State v. Tutty*, 41 Fed. Rep. 758, 7 L. R. A. 50; *Brook v. Brook*, 9 H. L. Cas. 198; *Com. v. Graham*, 157 Mass. 78, 16 L. R. A. 578. It is obvious, then, as there is no statute in Maryland declaring that a marriage of whose existence there is no other proof than general reputation shall be void, and as, at most, the statutory provisions relative to the methods of solemnizing marriages in Maryland relate to form and ceremony only,—the courts of this state will recognize the Pennsylvania marriage as valid, if that marriage is valid by and under the laws of the latter commonwealth, and does not contravene the declared policy of our own positive law. We are not to be understood as speaking of marriages tolerated elsewhere,

but denounced by our own positive state policy as affecting the morals or good order of society. Such marriages, however regarded elsewhere, would not be treated as valid here. For instance, the statutes of Maryland peremptorily forbid the marriage of a white person and a negro, and declare all such marriages forever void. It is therefore the declared policy of this state to prohibit such marriages. Though these marriages may be valid elsewhere, they will be absolutely void here, so long as the statutory inhibition remains unchanged. But the question before us does not belong to such a category. At most, all that is asserted against the validity of the alleged marriage of the appellee's parents has reference to form or ceremony, and these, as we have seen, do not fall within any of the exceptions to the general rule that a marriage valid where performed is valid everywhere. These views, merely supplementing what we said in 80 Md., sufficiently answer the objection to, and the criticisms upon, the instructions granted by the court below at the instance of the appellee; and, without going into a further examination of these instructions, we content ourselves with saying there was no error committed in giving them.

The rejected prayers of the appellants were properly refused. The whole law of the case was fully, fairly, and clearly put before the jury in the instructions given at the instance of both parties. The hypothesis assumed in the appellants' second prayer, that the intercourse between the appellee's mother and father was illicit in the beginning, was not supported by a particle of evidence, and it would have been error to allow vague conjectures to be indulged in by the jury on that subject. The third prayer was faulty in submitting to the jury to find that the appellee undertook to prove that a marriage took place between her father and mother at Chester, Pennsylvania. The record does not show that she set up any such marriage. As already mentioned, there was some allusion by a witness to a statement made by the parents of the appellee as to the place where they were married; but the appellee never attempted to assert that a marriage was actually solemnized at Chester. These observations dispose of all the questions raised by the twelfth exception.

This brings us to the eleven exceptions involving the rulings of the court on questions of evidence. The first exception was taken to the ruling of the court allowing a witness to prove the law of Pennsylvania as to the requisites of a valid marriage in that state in the years 1872 and 1873. The witness was a lawyer of that state, and had deposed that he was familiar with the law there. We think, under repeated adjudications, he was competent to give evidence. *Jackson v. Jackson*, 80 Md. 176. With reference to the second, third, and sixth exceptions it is only necessary to say that the answers of the witnesses are not set forth in the record, and we are therefore unable to decide whether, even if the questions were conceded to be inadmissible, any injury was done to the appellants. Where the answers are not given, it cannot be assumed that they were prejudicial to the appellant. If not prejudicial, they could cause no injury, and,

unless injury and error both appear, there is no ground for reversal. The question objected to in the fourth exception was not competent. It appeared that, after the father and mother of the appellee had lived together several years, and after the birth of the appellee, they separated. In the fourth exception a witness was asked whether he knew the general reputation of the appellee's mother, after the separation, for chastity while she and Jackson were living together. While evidence of her general reputation for chastity before the alleged marriage, and during the period she lived with Jackson as his reputed wife, was admissible to rebut the presumption of marriage (*Jackson v. Jackson*, *supra*), it was manifestly irrelevant to adduce evidence of such a reputation after the parties had separated, and had ceased to live together. As offered, it would have been allowing evidence of a reputation that she had had a reputation for the want of chastity at some antecedent time. It was not evidence of a general reputation for unchasteness, but evidence of a reputation that she had had such a reputation. It was consequently not evidence of a reputation at all. For the same reason, there was no error in the ruling complained of in the eighth exception. The fifth exception was abandoned. The objection urged to the evidence set forth in the seventh and ninth exceptions goes to the value, and not to the admissibility, of the evidence. If admissible, as it was, its value was for the jury. The tenth and eleventh exceptions present the only question remaining to be considered. In the tenth a witness was asked: "Do you know of any reputation in the community of Salisbury on the subject of their marriage at the time they were living together? If yes, was that a general reputation, or a divided reputation?" In the eleventh the question objected to was: "Was there or not a divided reputation in the community of Salisbury as to the subject of their being married, while they lived together as man and wife?" Both of these questions were excluded. A reputation, to be a provable reputation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad. It cannot be intermediate,—that is, partly one, and partly the other; for that would not be general, and there would then be no general reputation either way. If it is generally good or generally bad, or, as applicable to the case at bar, if a man and woman are generally reputed to be married, or if the converse is generally asserted, a general reputation, one way or the other, exists; and of a general reputation, and none other, the law allows evidence to be given. But, if it be not general, then, obviously, it does not exist as a fact, and evidence cannot be received to show a partial, limited, or qualified reputation. When the courts employ the term "divided reputation," it is not meant that an individual can have such a thing as two opposite general reputations at the same time. A condition of that sort is an impossibility. A reputation cannot be general if it is not general, and no reputation of a marriage but a general reputation is competent evidence to establish marriage. General reputation, whether affirmative or negative, is a fact to be proved,

Like any other fact within the knowledge of witnesses, by the witnesses who knew it. If it exists at all, it exists as a fact. That which goes to make it up is hearsay, but that which the hearsay does make up is a fact. Now, when parties are generally reputed to be man and wife, the general reputation thus asserted is a fact. If the witness called to establish that fact does not know that such a general reputation prevails in the community, he does not know the party's general reputation on that subject, and of course he can give no evidence of it. Necessarily, the method to disprove such an asserted fact must be by witnesses equally competent to speak; and hence, unless the witness knows, or can say, that the particular person has no general reputation on that particular subject, he cannot testify that no general reputation exists. A divided reputation, which is but the result of conflicting evidence as to a general reputation, is not a distinct, substantive, provable fact, for it is a mere deduction from proved facts. The existence of a diversity of opinion is one of the means by which a witness may know there is no general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, and as a totally independent circumstance, is not the thing to be proved.

Hence to ask the witness whether there is a divided reputation is to ask him, not whether he knows a provable fact,—a general reputation, one way or the other,—but merely what is one source of knowledge, without reference to whether he possesses the knowledge itself. He may testify, if he can, that the parties were generally reputed not to be married, or, having equal means of knowing that they had a general reputation as other witnesses who have testified that the parties did have such a general reputation, he has never heard it discussed or spoken of. In the one instance he would testify to a fact, just as the witnesses who deposed in the opposite way; in the other instance, he would depose to facts which, if believed by the jury, would tend to discredit the evidence to establish a general reputation; but in neither instance could he be permitted to say that there was a divided reputation, for that is nothing more than the result of the witness's conclusion from his own comparison of conflicting opinions. There was therefore no error committed by the rulings in these exceptions. Finding no error in any of the rulings excepted to, they will be affirmed.

Rulings affirmed, with costs in this court, and cause remanded.

Rehearing denied.

MINNESOTA SUPREME COURT.

STATE, *ex rel.* H. W. CHILDS, Attorney General, *et al.*,

v.

John COPELAND.

(...Minn.....)

- *1. Held, a certain local option law granting charter powers to all the cities of a certain class, to take effect in each city only upon the adoption of the same by such city, contravenes §§ 33 and 34 of article 4 of the Constitution, prohibiting special legislation as to cities, and requiring all laws as to the same to be uniform in their operation throughout the state.
2. Held, further, a special law relating to cities cannot be partially repealed by a special law, and the same result cannot be accomplished by a local option law which has merely the same effect.
3. Held, accordingly, that chapter 228, Laws 1895, is unconstitutional.
4. The distinction noted between such a local option law, granting such charter powers, and a local option law granting power to adopt a mere by-law or ordinance, the provisions of which are prescribed by the legislature.

(November 25, 1895.)

PETITION for a writ of quo warranto to determine by what authority respondent claimed to hold the office of commissioner of public works. *Writ of ouster issued.*

*Headnotes by CANTY, J.

NOTE.—As to the power of the legislature to make a statute contingent on approval by vote of the people, see *note to Re Municipal Suffrage to Women (Mass.)* 23 L. R. A. 113.

34 L. R. A.

Messrs. H. W. CHILDS, Attorney General, and Eller, How, & Butler for relators.

Messrs. Walter L. Chapin and T. R. Palmer, for respondent.

Section 146 of chapter 228, *ex proprio vigore*, unqualifiedly repeals all general laws relating to the subject-matter of the act, as to all cities of 100,000 or more inhabitants.

Chapter 228, Laws 1895, stands alone as the only general law so far as its subject-matter extends, which is applicable to cities of 100,000 or more inhabitants.

It makes cities of that size a class by themselves for the purpose of the legislation embraced by the act. The formation of such a class is uniformly sustained as constitutional.

McCormick v. West Duluth, 47 Minn. 273; *Re Norton*, 61 Minn. 542; 15 Am. & Eng. Enc. Law, p. 981; *State v. Clayton*, 58 N. J. L. 277; *Mortland v. State*, *Christian*, 52 N. J. L. 521; *State v. Warner*, *v. Hoagland*, 51 N. J. L. 67; *Re Sewer Assessment for Pussau*, 54 N. J. L. 158; *Re Haynes*, Id. 6; *State, Atty. Gen., v. Miller*, 100 Mo. 439; *State. Maggard, v. Pond*, 93 Mo. 606; *Edmunds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 735; *State, Oblinger, v. Spaulde*, 37 Minn. 322; *State, Atty. Gen., v. Wall*, 47 Ohio St. 499; *State, Atty. Gen., v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729; *State, Courthouse & City Hall Comrs., v. Cooley*, 56 Minn. 540; *Tuttle v. Polk*, 92 Iowa, 433; *Hunzinger v. State*, 39 Neb. 635.

It is competent for the legislature to make the enforcement of a law relative to municipal affairs dependent on the will of the municipality.

State, Tuley, v. Simons, 32 Minn. 548; *State, Hahn, v. Young*, 29 Minn. 551; *Anderson v. Manchester Fire Assur. Co.* 59 Minn. 182;

State, Merrick, v. Hennepin County Dist. Ct. 38 Minn. 235; *State, Tracy, v. Cooley* (Minn.) 68 N. W. 66; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344; *Johnson v. Martin*, 75 Tex. 38; *State v. O'Neill*, 24 Wis. 149; *Orange County Law Library Trustees v. Orange County Supers.* 99 Cal. 571; *Haney v. Bartow County Comrs.* 91 Ga. 770; *Reading v. Savage*, 124 Pa. 328.

A law is general and valid, notwithstanding it is not mandatory, on cities preserving their charters or special laws, but allows those cities to retain their local charter laws until they choose to come under the general law.

Road in Cheltenham Twp. 140 Pa. 136; *Com., Klugh, v. Lyter*, 162 Pa. 50; *Evans v. Phillips*, 117 Pa. 226; *Com. v. Reynolds*, 137 Pa. 389.

The question is not, Does the fact that the law may be put into effect only in part of the cities of the class affect the right to refer the adoption of the law, generally considered? but, Does the result of such reference, otherwise rightful in itself, make the law special and obnoxious to the constitutional amendment of 1892?

It does not have that effect.

Reading v. Savage, 124 Pa. 328; *Re Cleveland*, 53 N. J. L. 188, 7 L. R. A. 431; *State, Maggard, v. Pond*, 93 Mo. 606; *Haney v. Bartow County Comrs.* 91 Ga. 770.

If the law is such that applying to all cities of a class it puts it within the power of such cities to come under uniform regulations as to the subject-matter in hand, it tends to uniformity, and is general in the constitutional sense. Such a construction leaves cities free to act under prior special legislation as to any particular matter, until they see fit to come within the general provisions of the new law.

Evans v. Phillips, 117 Pa. 226; *Vacation of Henry Street*, 123 Pa. 346; *Com. v. Reynolds*, 137 Pa. 389; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716.

Canty, J., delivered the opinion of the court:

Chapter 228, Laws 1895, is an act general in form, entitled "An Act to Provide for Departments of Public Works, and the Making of Public Improvements in Cities of Over 100,000 Inhabitants." It provides that such department shall consist of three branches: (1) An engineering department; (2) a commissioner of public works; and (3) a board of park commissioners. It provides that the head of the engineering department, or city engineer, shall be appointed by the mayor on the 2d Tuesday in June each even-numbered year, shall hold his office for two years, and shall appoint his assistants and the other employees under him. § 2. It also provides that the commissioner of public works shall be appointed by the mayor on the same Tuesday, and shall hold his office for two years. § 3. This commissioner is to have charge of all improvements which the city council may order. Under the provisions of the statute, he is a standing arbitrator or referee, to award all damages in condemnation proceedings instituted by him for the city and to assess a special tax on property specially benefited to pay such damages. The act provides for the condemnation of property for many different city uses, and provides the mode of procedure. It also provides for the collec-

tion of all taxes assessed for benefits which may become delinquent, by proceedings in the district court. §§ 4-183. It is also provided that the board of park commissioners shall consist of four members, to be appointed by the mayor, and whose term of office shall be four years, one to be appointed each year. This board is to have charge of the parks and parkways of the city, and the improvements thereon. §§ 115-145. Section 146 provides: "This act shall be enforced in any city whenever the common council of any such city embraced within its provisions shall adopt the same by a majority vote of all the members; . . . and all acts and parts of acts in any charter or special law relating to said city shall be thereby, as to said city, repealed in so far as the same relate to the subject-matter of this act. . . . All general acts and parts of acts relating to the subject-matter of this act, so far as they apply to any city affected by this act, are hereby repealed." The only two cities in this state having over 100,000 inhabitants have been operating under charters consisting of various special laws enacted before the amendments to the Constitution prohibiting special legislation were adopted. The city of St. Paul has for many years had a board of public works, provided for by some of these special laws, which board consisted of five members, whose duties were somewhat similar to those imposed upon the commissioner of public works by said chapter 228, Laws 1895. On July 27, 1895, the common council of St. Paul adopted this act, in the manner provided by § 146 thereof. The mayor appointed the respondent commissioner of public works under the act. But the members of the old board of public works (being all of the relators herein, except the attorney general) refused to surrender their offices. A writ of quo warranto was issued herein out of this court, to determine by what warrant the respondent claims the office of commissioner aforesaid.

It is claimed by relators that said chapter 228 is a special law, and contravenes the constitutional amendment of 1891 (§§ 33 and 34, art. 4), and is unconstitutional, for the reason that it applies only to such cities as adopt it, and may be adopted by some cities of the class, and not by others, and therefore may not be of uniform operation throughout the state, as required by said amendment. In order that the decision in this case may be fully understood, it is necessary to examine somewhat carefully the question of the constitutionality of local option laws. It is generally held that a law cannot be passed to take effect if the voters of the whole state so decide, and that such a law cannot be upheld on the theory that it is a law passed to take effect upon a condition. The passing of such a law is merely an attempt to delegate legislative power. *Cooley, Const. Law*, *120-124. See also *State, Hahn, v. Young*, 29 Minn. 552. But, except where it is held to be prohibited by constitutional provisions prohibiting special legislation, it is generally held that, where municipalities have a special or peculiar interest in the law, it may be passed to take effect in such a municipality when accepted by some authoritative body representing the municipality. *Cooley, Const. Law*, *118-120.

Said constitutional amendment of 1891 provides:

"Sec. 33. . . . The legislature shall pass no local or special law regulating the affairs of or incorporating, erecting, or changing the lines of any county, city, . . . : provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. The legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same.

"Sec. 34. The legislature shall provide general laws for the transaction of any business that may be prohibited by § 1 of this amendment, and all such laws shall be uniform in their operation throughout the state."

Under these constitutional provisions, is a local option law which gives to each of a class of cities the right to accept or reject certain charter powers constitutional? Is such a general local option law one having a uniform operation throughout the state? How can a law which goes into effect in one city, and does not go into effect in another city of the same class, have a uniform operation throughout the state? It seems to us that the legislature cannot bring about diverse charter powers in different cities by enacting any such local option law which may result in giving different cities different charter powers, unless the same result can be accomplished by a direct, unconditional law. The mere possibility that all the cities of the class may adopt the law will not save it. It must appear at the time the law is passed that it will have a uniform operation throughout the state; that is, that it will take effect in all cities of the class, and that the class is a proper one. The uniform operation of the law cannot be left to any future contingency.

Let us now consider the nature of local option legislation with reference to this constitutional amendment. There is a vast difference between delegating to some local body the power to adopt a charter and the power to adopt by-laws or ordinances. Suppose, for instance, that a law, general in form, was passed as the charter of the cities of a certain class; that this law created some local body in each city, and gave it generally a large number of designated powers (such as are usually given to such cities by their charters), and authorized this local body to exercise these powers as it saw fit, to designate such other officers as it saw fit, and to define their powers and manner of election or appointment, but provided nothing more in detail. Such a charter, even for the class of larger cities, might be written on four or five pages. But would such a nebulous, skeleton charter be constitutional? Would it not be likely to result in a greater diversity of local laws, be less uniform in its operation, and far less a limitation on the local authorities, than a law, or three or four laws, general in form, which provided three or four different kinds of charters, and left it to each local body to adopt which it saw fit? Yet it is universally conceded that the latter method of providing charters or charter powers is a most palpable evasion of the constitutional provisions prohibiting special legislation. Then,

if the latter method of providing city charters is unconstitutional, surely the former method must be. Certainly, the legislature delegates less to the local body when all the provisions of the charter or local law are prescribed, and the local body has only the power to accept or reject it, than when the whole subject is delegated generally to the local body. Then it is clear that, while the general power to adopt ordinances or by-laws may be delegated to such a local body, no general power to adopt a charter or charter provisions can be so delegated. It also follows that if the legislature can, by a general law, delegate to the local body the general power to adopt by-laws or ordinances on a particular subject, it may, by general law, limit that power by prescribing the provisions which the by-law shall contain, leaving to the local body merely the power to accept or reject the by-law. Then, whether or not it is constitutional to delegate, by a general local option law, the power to adopt or reject a prescribed charter or charter provision, it is clearly constitutional to delegate in this manner the power to adopt or reject a prescribed by-law or ordinance.

It is a well-established principle that the Constitution will be interpreted with reference to the laws and customs prevailing at the time of its adoption, and the distinction between what is a delegation of power to adopt a charter or charter provisions, and what is a delegation of power to adopt a by-law or ordinance, must be determined largely by ascertaining what had usually been the custom in this state up to and at the time this constitutional amendment was adopted. Undoubtedly, the line of this distinction is somewhat ill-defined. But, if there is a doubt as to the constitutionality of a law, that doubt must be resolved in favor of its constitutionality. Therefore, if, by reference to the practice heretofore prevailing, it is doubtful whether the delegation of power is one to adopt charter provisions, or one to adopt mere by-laws or ordinances, that doubt must be resolved in favor of holding the law delegating such power constitutional. There is another distinction to be considered, and that is the distinction between what the legislature can practically do and what it cannot. The main reason for the existence of ordinances and by-laws has always been that they regulated local subjects and matters of detail which the legislature could not directly or properly regulate by the passage of permanent laws, either general or special. This old principle must be applied to new instances which will continually arise under the constitutional amendments prohibiting special legislation. The regulation of such matters may always be delegated in general terms to local bodies, and it necessarily follows that more limited powers may be thus delegated by the passage of local option laws for the regulation of these matters. These are distinctions which have sometimes been overlooked in the decisions of those states having similar constitutional provisions. Let us notice some of these provisions, and the decisions under them.

The Constitution of New Jersey provides that "the legislature shall not pass private, local, or special laws regulating the internal

affairs of towns [held to include cities] and counties." Amend. art. 4, § 7, ¶ 11. It is held by the courts of that state that those restrictions were not intended to secure uniformity in the operation of laws, and that local option laws, otherwise general in form, giving to municipalities the right to accept or reject the provisions of the law, are constitutional. *State, Paul, v. Gloucester County Circuit Ct. Judge*, 50 N. J. L. 585, 1 L. R. A. 86; *State, Warner, v. Hoagland*, 51 N. J. L. 62, 72; *Re Cleveland*, 52 N. J. L. 188, 7 L. R. A. 431. The Constitution of Pennsylvania provides that "the general assembly shall not pass any local or special law . . . regulating the affairs of counties, cities, townships." Article 8, § 7. Under this provision, it is held unconstitutional to delegate to municipalities the right to accept or reject such a local option law. *Scranton School Dist's Appeal*, 113 Pa. 176; *Frost v. Cherry*, 122 Pa. 417; *Com. v. Denworth*, 145 Pa. 172. Neither the Constitution of Pennsylvania nor of New Jersey expressly requires that the law shall have a uniform operation throughout the state, but the Pennsylvania court regards the prohibition of special legislation as equivalent to a requirement of uniformity, while the New Jersey court does not. The Constitution of Florida provides: "The legislature shall not pass special or local laws in any of the following cases, . . . regulating county, township, and municipal business; regulating the election of county, township, and municipal officers." Article 3, § 20. "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Article 3, § 21. "The legislature shall establish a uniform system of county, township, and municipal government." Article 3, § 24. Under these provisions, the supreme court of that state has held repeatedly that a general local option law for the organization of cities is not a law of uniform operation throughout the state, and therefore unconstitutional. *McConihe v. State, McMurray*, 17 Fla. 288; *State, Haley, v. Stark*, 18 Fla. 255; *Ex parte Wells*, 21 Fla. 280. The Constitutions of Iowa and Indiana each prohibit special legislation as to certain matters, and provide that all laws relating to these matters "shall be general and of uniform operation throughout the state." Iowa Const. art. 3, § 30; Ind. Const. art. 4, § 119. In *Maize v. State*, 4 Ind. 342, it was held that, by reason of such constitutional provisions, a local option law which, by its terms, went into effect, and prohibited the sale of intoxicating liquor, in such townships as adopted it, is unconstitutional. This decision was approved in *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 228, 227. The supreme court of Iowa held likewise, under their constitutional prohibitions, in *Geebrick v. State*, 5 Iowa, 492. In *Dalby v. Wolf*, 14 Iowa, 228, the court sustained a law authorizing the people of the several counties to decide, by a majority vote, to restrain hogs and sheep from running at large. The court distinguishes the case from that in 5 Iowa, on the ground that "they [the voters] only determine whether a certain thing shall be done under the law, and not whether the law shall

take effect," as was provided by the law held invalid in 5 Iowa. From what has been said, it will appear that there is but little in the distinction.

The position of the Indiana and Iowa courts, that a law which can only take effect in each municipality on being adopted by the same contravenes these constitutional provisions, is, in our opinion, undoubtedly correct as applied to a proper matter. But we are of the opinion that the prohibition or licensing of the sale of intoxicating liquors is not such a matter. These constitutional provisions do not require the legislature to do what is impracticable, what they have never been able to do,—to effectively regulate the liquor traffic without regard to locality or local sentiment. Experience has demonstrated that prohibition can only be enforced where there is a strong public sentiment behind it, and there is a great difference between the amount of this sentiment in different localities in the same state. Again, this sentiment changes from time to time in the same locality. Then the legislature have a right to say that the question of license or prohibition in each locality is not a matter for them to decide, or a matter to be settled by any statute fixing absolutely or permanently the status in this respect of the whole state or of the different localities. In the case of *Frost v. Cherry*, 122 Pa. 417, the court held a local option fence law, to take effect in each county when adopted by the voters of that county, unconstitutional, as special legislation. It seems to us that the same reason of impracticability applies to a fence law as to a license or prohibition law. It is often utterly impracticable for the legislature to enact an expedient unconditional fence law. Whether the farms should be fenced, and the stock allowed to run at large, in any particular locality, depends wholly on the very complex local conditions, which determine what is for the best interests of the majority of the people of the locality, and is a question which each locality should usually be allowed to settle for itself.

The distinction is between what is properly legislation and what is properly and necessarily a local by-law. That it is not a delegation of legislative power to grant to some designated body powers which the legislature cannot themselves practically or efficiently exercise is laid down in *State, Minneapolis, v. St. Paul, M. & M. R. Co.* 38 Minn. 248, 251; and in *Anderson v. Manchester Fire Assur. Co.* 59 Minn. 194, 195. This distinction between what the legislature can do and what they cannot exists in the nature of things, and has not been eradicated by the constitutional provisions prohibiting special legislation, and requiring legislation of uniform operation. It seems to us that several of the courts above mentioned have been misled by ignoring this, and failing to consider that legislation containing a local option provision may in fact be merely a grant of power to each local body to adopt or reject a prescribed by-law, and that, by prescribing the contents of the by-law, the legislature have really granted less power to each local body than if they granted the power to pass any by-law the local body saw fit concerning the particular subject-matter.

Let us now proceed to apply these principles

to the case at bar. The most of the powers provided for by said chapter 228, Laws 1895, are distinctively charter powers; that is, they pertain to matters which are almost invariably regulated by city charters, and not by the by-laws passed under such charters. Then, the legislature cannot do indirectly what they cannot do directly; and this act is not constitutional unless the diverse results which may be brought about by the adoption of the act by one city, and the rejection of it by another, can be brought about by direct, unconditional legislation. There are two cities in the state having more than 100,000 inhabitants. Can the legislature, by a direct act, provide that said chapter 228 shall apply to the one city, but not to the other? The part of § 146 above quoted provides that, when the act is adopted by any city, "all acts and parts of acts in any charter or special law relating to said city shall be thereby repealed as to said city, so far as the same relate to the subject-matter of this act." Will not the adoption of this act by one city, and not by the other, have the effect of a partial repeal of a special law by a special law? Clearly, such a special law, partially repealing such a special law, is unconstitutional. It will be readily seen by anyone familiar with the charter law of the two cities in question that the adoption of chapter 228 by either city will, if the law is valid, repeal a part of each of several of the special acts which make up the charter of that city, leaving the other part of each special law to stand, and leaving all of the special laws of the other city on the same subject wholly unaffected. The legislature may, by a general, unconditional law, expressly repeal all special laws so far as inconsistent with it, though this may have the effect of leaving the other part of one or more special laws in force and unrepealed. *State, Baker, v. Sullivan*, 63 Minn. 288. A general law is also constitutional which does not, by implication or otherwise, repeal the special laws in conflict with it. *Re Opening Linwood Place* (Minn.) 67 N. W. 77. The reason of this is that, although the constitutional amendment requires the general law to be uniform in its operation, the amendment does not, as this court construes it, require this uniformity to be brought about immediately. Every step taken must be in the direction of a general law of uniform operation, but the legislature need not at once, or at any one time, take all the steps necessary to bring about this result. Again, the amendment provides that "the legislature may repeal an existing special law, but shall not amend, extend, or modify the same." This allows a special law to be totally repealed by a special law, and, as held in the *Sullivan Case*, it allows the partial repeal or modification by a general law of all special laws so far as inconsistent with it. Such a general law is not special legislation at all. But, as before stated, this constitutional provision does not permit a special law to be partly repealed or modified by a special law. Then, the legislature cannot, by a direct, unconditional special law (either included in a general law or enacted alone) repeal the parts of the special laws pertaining to St. Paul, attempted to be repealed by the enactment of chapter 228 and the adoption of the same by the council of that city. As before stated, if the legislature cannot do this directly, by unconditional legislation, they cannot do it indirectly, by legislation containing such a local option provision. Then is our conclusion that chapter 228, aforesaid, is unconstitutional and void; and therefore the claim of respondent, that he holds an official position under it, cannot be sustained.

*Let a writ of *certiorari* issue.*

NEW YORK COURT OF APPEALS.

Annie MITCHELL, *Respt.*,

v.

ROCHESTER RAILWAY COMPANY,
Appt.

(151 N. Y. 107.)

1. No recovery can be had for a miscarriage resulting from fright caused by the negligence of another.
2. Miscarriage resulting from fright caused by the negligence of another is not the proximate result of the negligence.

(December 1, 1896.)

A PPEAL by defendant from an order of the General Term of the Supreme Court, Fifth Department, affirming an order of the Monroe County Circuit setting aside a nonsuit

and granting a new trial in an action brought to recover damages for injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Bacon, Briggs, Beckley, & Bissell, for appellant:

To make out a cause of action it must be established, not only that a defendant was guilty of a negligent act, but that the injury was produced by a cause which might naturally and reasonably be expected to follow from the negligent act. Negligence is the proximate cause of an injury, within the legal meaning of that term, when the injury is one which is the natural and probable result of the negligence, and one that ought, naturally, to have been foreseen.

Boswell, Civil Liability, 184, 185; *Whart. Neg. Causal Connection*, §§ 78-155; *Tutwin v.*

NOTE.—For fright as a basis of a cause of action, see note to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 603.

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As to damages for miscarriage, see *Tunnicliffe v. Bay Cities Consol. R. Co.* (Mich.) 32 L. R. A. 143, and note.

Hurley, 98 Mass. 211, 93 Am. Dec. 154; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12.

Where the only injury which a person sustains by reason of the negligence of another is a severe fright, an action will not lie for damages on account of such negligence.

Lehman v. Brooklyn City R. Co. 47 Hun, 355; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666; *Victorian Railway Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Rock v. Denis*, M. L. R. 4 Super. Ct. 356; *Johnson v. Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Lynch v. Knight*, 9 H. L. Cas. 577; *Renner v. Canfield*, 36 Minn. 90; *Mayne*, Damages, Wood's Notes, pp. 70, 74; *Canning v. Williamstown*, 1 Cush. 451.

The rule in regard to damages occasioned by fright or mental suffering seems to have been universally confined to those cases where there was an actual physical injury as the result of negligence, and then the pain, the mental suffering, and the fright may be taken into consideration in estimating the amount of damages sustained by the plaintiff, but in all these cases the foundation of the action has been the physical injury itself, which was the direct result of the defendant's negligence.

Warren v. Boston & M. R. Co. 168 Mass. 484.

The fact that plaintiff had stopped the car and was about to become a passenger did not make her a passenger.

Platt v. Forty Second Street & G. S. F. R. Co. 2 Hun, 124; *Creamer v. West End Street R. Co.* 156 Mass. 820, 16 L. R. A. 490; *Donovan v. Hartford Street R. Co.* 65 Conn. 201, 29 L. R. A. 297.

The tendency of the courts in some of the western and southern states to extend the rule of liability in actions against corporations, and to introduce a myriad of new actions having their origin in the so-called law of negligence, is well illustrated by a class of cases beginning with *SoRelle v. Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805, overruled in *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, and the overruling case itself overruled by subsequent cases in the same court.

This doctrine is expressly repudiated in a large number of cases which have arisen in the Federal courts.

Chase v. Western U. Teleg. Co. 44 Fed. Rep. 554, 10 L. R. A. 484; *Wilcox v. Richmond & D. R. Co.* 52 Fed. Rep. 264, 17 L. R. A. 804, 8 U. S. App. 118; *Tyler v. Western U. Teleg. Co.* 54 Fed. Rep. 634; *Kester v. Western U. Teleg. Co.* 55 Fed. Rep. 603; *Western U. Teleg. Co. v. Wood*, 57 Fed. Rep. 471, 21 L. R. A. 706, 13 U. S. App. 817.

The doctrine of the Texas cases is also repudiated in the following cases:

Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 18 L. R. A. 859; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430; *Connell v. Western U. Teleg. Co.* 116 Mo. 84, 20 L. R. A. 172; *Spohn v. Missouri P. R. Co.* 116 Mo. 617; *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406. See also *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607.

Mr. Norris Bull, for respondent:

Negligence consists in: (1) a legal duty to use care; (2) a breach of that duty; (3) the ab-

sence of distinct intention to produce the precise damage, if any, which actually follows.

1 Shearm. & Redf. Neg. 4th ed. § 5.

With this negligence, in order to sustain a civil action there must concur: (1) damage to the plaintiff; (2) a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage, as cause and effect.

Where an injury to a passenger occurs through a defect in the construction, or working, or management of the vehicle, or anything pertaining to the services which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of plaintiff's own case.

Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Cahalin v. Cochran*, 1 N. Y. S. R. 588; *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 170; *Rigdon v. Allegany Lumber Co.* 87 N. Y. S. R. 514; *Kreuzer v. Forty-Second Street, M. & St. N. Ave. R. Co.* 88 N. Y. S. R. 461; *Hobbrook v. Utica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 536, 75 Am. Dec. 258.

The plaintiff was a passenger upon defendant's railroad.

Grimes v. Pennsylvania Co. 36 Fed. Rep. 73; *Gordon v. Grand Street & N. R. Co.* 40 Barb. 546; *Smith v. St. Paul City R. Co.* supra; *Shearm. & Redf. Neg.* 4th ed. § 488; *Brien v. Bennett*, 8 Car. & P. 724; *Platt v. Forty-Second Street & G. S. F. R. Co.* 2 Hun, 124; *Creamer v. West End Street R. Co.* 156 Mass. 820, 16 L. R. A. 490.

The negligence of the defendant was the proximate cause of the injury.

Ehrgott v. New York, 96 N. Y. 364, 48 Am. Rep. 622; *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Martin v. New York, O. & W. R. Co.* 62 Hun, 181; *Pollett v. Long*, 56 N. Y. 201; *Gibney v. State*, 187 N. Y. 1, 19 L. R. A. 365.

The consensus of opinion would seem to be that no recovery can be had for mere fright.

Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; *Canning v. Williamstown*, 1 Cush. 451; *Hurley v. Berg*, 1 Stark. 98; *Victorian Railway Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* supra.

On the other hand, *Hale v. Bonner*, 52 Tex. 93, 14 L. R. A. 336, holds that damages may be recovered for mental anxiety.

But none of these cases are in point, inasmuch as in none of them does it appear that any other injury except mere fright was caused.

No case can be found where fright accompanied by physical injury is not the subject of recovery. The line between these two classes of cases is clearly and sharply drawn, and the rule of law contended for by the respondent is well settled by the following cases:

Hill v. Kimball, 76 Tex. 210, 7 L. R. A. 618; *Barbee v. Reese*, 60 Miss. 906; *Struts v. Chicago & N. W. R. Co.* 73 Wis. 147; *Illinois C. R. Co.*

v. Latimer, 133 Ill. 163; *Oliver v. La Valle*, 36 Wis. 592; *Pitpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203.

The fact that damages may be awarded for physical injury, although caused through the agency of mental disturbance set in operation by defendant's negligence, is analogous to the rule in the law of divorce, to the effect that even where "cruelty" as defined by statute is held necessarily to imply physical injury, impaired health being a physical injury is sufficient, though caused solely through the agency of mental suffering set in operation by the misconduct of the defendant.

Powelson v. Powelson, 22 Cal. 858; *Kelly v. Kelly*, 1 West. Coast Rep. 143; *Bethune v. Bethune* [1891] P. 205.

It is argued by the appellant that it should not be held responsible for an act which would not bring injurious results upon a woman in an ordinary condition. The fallacy of this reasoning is apparent. To a woman in an ordinary condition it would be *damnum absque injuria*. But the negligence of the defendant would exist just as much. It would simply be its good fortune to have occasioned no damage thereby.

Pollock v. Brooklyn & C. T. R. Co. 39 N. Y. S. R. 568, Affirmed 133 N. Y. 624, and 60 Hun, 584.

The law may award damages for physical injury to the person, although it was caused through the agency of mental disturbance set in operation by defendant's negligence.

Report of this case in 80 Abb. N. C. 362, 371, note.

Martin, J., delivered the opinion of the court:

The facts in this case are few, and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright,

as there was no immediate personal injury. *Lehman v. Brooklyn City R. Co.* 47 Hun, 355; *Victorian Railway Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities. *Haile v. Texas & P. R. Co.* 60 Fed. Rep. 557, 23 L. R. A. 774; *Joch v. Dankwardt*, 85 Ill. 331; *Canning v. Williamstown*, 1 Cush. 451; *Western U. Teleg. Co. v. Wood*, 6 C. C. A. 482, 57 Fed. Rep. 471, 21 L. R. A. 706; *Renner v. Canfield*, 36 Minn. 90; *Allsop v. Allsop*, 5 Hurlst. & N. 534; *Johnson v. Wells, P. & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the

negligence of another, where there is no immediate personal injury.

The orders of the General and Special Terms should be reversed, and the order of the Trial Term granting a nonsuit, affirmed, with costs.

All concur except Haight, J., not sitting, and Vann, J., not voting.
Ordered accordingly.

NEVADA SUPREME COURT.

STATE of Nevada

v.

C. H. ZICHFELD, *App't*,

(.....Nev.....)

1. A marriage by contract between parties competent to enter into that relation with each other is valid, under the act of November 23, 1861, making provisions as to licenses and the persons by whom marriages may be celebrated, but containing no express clause of nullity as to marriages otherwise contracted.

2. An invalid contract to dissolve a marriage between husband and wife is not admissible in his favor to show his good faith in contracting a later marriage, when charged with bigamy, under a statute which does not require any other criminal intent than is involved in entering into the prohibited marriage.

3. A man may be guilty of bigamy although he believes his former marriage is annulled, where a statute describes the offense as marrying again while a former husband or wife is living, without any specific provision as to criminal intent.

(November 19, 1896.)

APPEAL by defendant from a judgment of the District Court of Washoe County convicting him of bigamy. *Affirmed.*

The facts are stated in the opinion.

Messa. Curlier & Curlier, for appellant:

Under our law no person other than a minister of any religious society or congregation, within this state, who has obtained a license for that purpose, or any judge of the district court in his district, or justice of the peace in his county, is authorized to join persons together as husband and wife.

Nev. Gen. Stat. §§ 478, 481, 486.

The legislature of the state of Nevada did not intend to recognize what is known as common-law marriages.

Nev. Gen. Stat. 474, § 5.

The provision of the statute making the exception that all marriages shall be deemed to be valid although the ceremony is performed by a person not authorized to perform it, and prescribing how marriages shall be solemnized, precludes the contracting of the relationship in any other manner than as provided. The legislature, having made a provision specially legalizing marriages in certain excepted cases, must be held to have contemplated all others not entered into according to the manner pro-

vided for by the statute, and not within the exception, as void.

Beckerlin v. Beckerlin, 29 W. Va. 782; *Com. v. Munson*, 127 Mass. 466, 84 Am. Rep. 411; *Norcross v. Norcross*, 155 Mass. 425; *Dunbarton v. Franklin*, 19 N. H. 257; *Re McLaughlin's Estate*, 4 Wash. 570, 16 L. R. A. 699; *Follansbee v. Wilbur*, 14 Wash. 242; *Stans v. Bailey*, 9 Wash. 115.

The contract of separation was admissible for the purpose of showing that there was no intent on the part of the defendant to commit a crime.

State v. Gardner, 5 Nev. 377, and authorities therein cited.

Messrs. F. H. Norcross, District Attorney, and *Robert M. Beatty*, Attorney General, for the State.

Boniffield, J., delivered the opinion of the court:

The appellant was convicted in the district court of the second judicial district in and for Washoe county of the crime of bigamy, and appeals from the judgment of the court and an order denying his motion for new trial. The following facts are not disputed: In the year 1898, in said county, the appellant was married to Sophia Koser, by written contract, without the services of any of the persons authorized by the statute to join persons in marriage, or to solemnize marriages. Subsequently, and in 1895, the parties separated by mutual consent, and the appellant, while he was so married to Sophia Koser, and knowing that said Sophia was still alive, was formally married to Lauretta Bosford, by J. J. Linn, a justice of the peace of Washoe county.

There is no contention as to the sufficiency of said first marriage to constitute a valid marriage at the common law; but counsel for appellant contend that our statute concerning marriages has superseded the common law, and that all marriages not entered into in conformity to the provisions of the statute are null and void. It is well settled that under the common law the marriage relation may be formed by words of present assent (*per verba de presentis*), and without the interposition of any person lawfully authorized to solemnize marriages, or to join persons in marriage. The first act passed by our territorial legislature was an act entitled "An Act Adopting the Common Law." At the same session of the legislature, it passed the act relating to marriages, of which the following is § 1: "That marriage, so far as its validity in law is concerned, is a civil contract to which the consent of the parties capable in law of contracting is essential." (November 28, 1861.) Although

NOTE.—For intent as an element of crime, see *note to People v. Flack* (N. Y.) 11 L. R. A. 807. See also *Fanning v. Chace* (R. L.) 13 L. R. A. 124.

34 L. R. A.

this act contains provisions requiring a license, directing how and by whom marriages may be celebrated, or by whom persons may be joined in marriage, and prescribing other regulations in reference thereto, the statute contains no express clause of nullity, making void marriages contracted by mutual consent *per verba de presentii*, except a prior license is obtained, or solemnization had, in accordance with its provisions.

Authorities: The Supreme Court of the United States in *Meister v. Moore*, 96 U. S. 76, 24 L. ed. 826 (opinion by Justice Strong), in construing the Michigan statute, which is substantially the same as ours, said: "It [the instruction] certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract *per verba de presentii*. That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that where a statute creates a right, and provides a remedy for its enforcement, the remedy is exclusive. No doubt a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. In many of the states, enactments exist very similar to the Michigan statute; but their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite, rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages, and evidence by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by exemplification of the registry. In a small number of the states, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. . . .

As before remarked, the statutes are held merely directory, because marriage is a thing of common right, because it is the policy of

the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law. The Michigan statute differs in no essential particular from those of other states which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or magistrate. It does not deny validity to marriages which are good at common law. The most that can be said of it is that it contains implications of an intention that all marriages, except some particularly mentioned, should be celebrated in the manner prescribed. The 6th section declares how they may be solemnized. The 7th describes what shall be required of justices of the peace and ministers of the gospel before they shall solemnize any marriage. The 8th section declares that in every case, that is, whenever any marriage shall be solemnized in the manner described in the act, there shall be at least two witnesses present beside the minister or magistrate. The 9th, 10th, 11th, 16th, and 17th sections provide for certificates, registers, and exemplifications of records of marriages solemnized by magistrates and ministers. The 12th and 18th impose penalties upon justices and ministers joining persons in marriage contrary to the provisions of the act, and upon persons joining others in marriage, knowing that they are not lawfully authorized so to do. The 14th and 15th sections are those upon which most reliance is placed in support of the charge of the circuit court. The former declares that no marriage solemnized before any person professing to be a justice of the peace or minister of the gospel shall be deemed or adjudged to be void on account of any want of jurisdiction or authority in such supposed minister or justice, provided the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. This, it is argued, raises an implication that marriages not in the presence of a minister or justice, or one professing to be such, were intended to be declared void. But the implication is not necessarily so broad. It is satisfied if it reach not beyond marriages in the mode allowed by the act of the legislature. The 15th section exempts people called Quakers or Friends from the operation of the act. As to them the act gives no directions. From this, also, an inference is attempted to be drawn that lawful marriages of all other persons must be in the mode directed or allowed [by the statute]. We think the inference is not a necessary one. Both these sections (the 14th and the 15th), are to be found in the acts of other states, in which it has been decided that the statutes do not make invalid common-law marriages." We think that in the above opinion by Justice Strong a clear and proper construction of the statute is given.

Bishop says: "It was well observed by Lord Stowell that in a state of nature no forms need be added to an agreement of present marriage to render it complete. In the opinion of the Scotch people, and of the people of a part of our states, marriage, emphatically a thing of nature, is properly regulated by the law of na-

ture. But in England, in other of our states, and largely in Continental Europe, civilization has undertaken to refine and improve nature's law, by denying marriage except under specified forms and ceremonies. The consequence of which is that shrewd rakes entrap single girls into nature's marriage; then, at their whim or exalted pleasure, cast them off, and leave a family of children under the disabilities and disgrace of bastardy." 1 Bishop, Mar. Div. & Sep. §§ 885, 886. Bishop, after an extended review of the authorities on the subject which he cites, restates the doctrine recognized by the courts of nearly all the states having statutes similar to ours, as follows: "Any required, formal solemnization of marriage is an impediment to entering into it; therefore, since marriage is favored in law, statutory provisions establishing forms are to be strictly interpreted, not being encouraged by the courts. In the absence of any statute or local usage controlling the question, only the consent treated of in our last two chapters is indispensable to the constitution of marriage; and legislation commanding formalities, even punishing those who celebrate marriage contrary to its provisions, or punishing the parties themselves, will not render a marriage had in disregard of it void, unless the statute expressly, or by necessary implication, declares this consequence. But it is otherwise of a statute which authorizes the intermarriage of parties before incompetent, for in this case there is no common law to fall back upon. And such parties must strictly conform to the legislative direction, to render their marriage valid. In the ordinary case, wherein the common law may be relied on except as excluded by the statute, only the particular things which the statute declares to be nullifying if omitted need be observed,—all the rest being directory, and noncompliance immaterial." *Id.* § 449.

In an elaborate review of the authorities, and an exhaustive discussion of the question now under consideration, the supreme court of Missouri, in *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359, held that a marriage by contract, without solemnization before a minister of the gospel or an officer of the law, was valid, the statute concerning marriages containing no positive declarations that a marriage not so solemnized shall be void. Numerous other authorities might be cited to the same effect as the above, but we deem it unnecessary.

In *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63, this court has construed § 2 of our statute, and the reasoning of the court is applicable to the construction of all the sections relied on by counsel for appellant, and by the authorities holding that the statute nullifies common-law marriages. In that case the plaintiff brought suit to have her marriage declared annulled on the ground that she was under age, and the consent of her parent or guardian had not first been obtained. Section 2 provides that "male persons of the age of eighteen years and female persons of the age of sixteen years . . . may be joined in marriage, provided always, that male persons under the age of twenty-one years and female persons under the age of eighteen years shall first obtain the consent of their fathers" or mothers or guardians, respectively, "and provided further, that nothing in

this act shall be construed so as to make the issue of any marriage illegitimate, if the person or persons shall not be of lawful age." The plaintiff's counsel contended that "the plaintiff, by reason of want of age, was incapable of contracting a valid marriage, except with the consent of her parent or guardian." He argued: "The statute provides that marriage by females under the age of eighteen shall be contracted only with the consent of their parents or guardian, and a penalty is imposed on the county clerk who shall issue a license for the marriage of such minor without such consent. . . . Beside, the statute of Nevada is peculiar in providing that nothing in it shall be construed to make the issue of any marriage illegitimate, if the person or persons shall not be of lawful age. Evidently the legislature intended by this that all marriages entered into except as provided in said act should be void. If this was not their intention, then that portion of the act which provides against bastardizing the issue of such marriages is mere surplusage and without meaning, for the reason that it would be the merest folly to provide by statute that issue of a valid marriage shall not be illegitimate." The court held, however, that "that proviso cannot indicate any such intent as claimed, as it only relates to issue of persons not of lawful age,—that is, not of the age of eighteen years in the male or sixteen years in the female. . . . By the common law, and the statute law of this state . . . marriage is held to be a civil contract. To render the contract valid, the parties must be able and willing to contract. At common law the age of capacity to make the contract of marriage was fixed at fourteen years for males and twelve years for females. . . . Marriage before such age is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under that age when the contract is made. 2 Kent, Com. 44. The statute of this state does not alter the common law, save by substituting the ages therein named for the common-law ages, and it has been generally, if not universally, held, in construing similar statutes, that, in the absence of any provision declaring marriage made in violation of the statutory proviso void, it was a valid and binding contract, upon the theory that persons of the consenting or lawful age, voluntarily entering into a contract, should be held thereto, precisely as they would be held to any other lawful contract voluntarily assumed at the legal age, or upon majority." It will be observed that the court held, in effect, that in the absence of any provision of the statute declaring the marriage of a minor, without the consent of parent or guardian, void, the marriage was valid, notwithstanding the explicit requirements of the statute that such consent shall first be obtained. Our statute does not expressly, nor by necessary implication, as we view it, render a marriage had in disregard of its prescribed formalities void. We are to presume that the legislature knew that marriages by contract are valid at common law; that they have thus been entered into from time immemorial, and are liable to continue to be so contracted. And if the legislature intended to prohibit such marriages and render them void, and thus

entail upon parties conscious of no wrongdoing, and their children, such evil consequences as must necessarily result therefrom, it would have expressed such intent in such terms as need no construction, and about which even laymen could have no doubt, and would thus have given due notice to all of the invalidity of informal marriages entered into simply by contract. It seems to us clearly that the legislature, by the terms used in the 1st section of the marriage act, intended to specifically recognize the common law in respect to marriages. It therein declared "that marriage, so far as its validity in law is concerned, is a civil contract to which the consent of the parties capable in law of contracting is essential." If the legislature had intended that compliance with any of the provisions of the succeeding section should also be essential to its validity in law, we are of opinion that it would have so expressed itself, and not left the definition of a valid marriage in law "a civil contract to which the consent of the parties capable in law of contracting is essential." We are of opinion that the subsequent sections were enacted for the purposes named above in the opinion delivered by Justice Strong, and for the additional purpose of accommodating the views of those who do not believe in marriages by contract simply, and would not be satisfied with entering into the marriage relation except by some mode prescribed by the statute, and for the purpose of giving to the forms and ceremonies in practice among many classes statutory recognition. While any form or ceremony the parties interested may choose is recognized by the statute, no particular form is required. The elements essential to a common-law marriage are required,—a contract *per verba de presentis*. In the language of the statute, the parties "shall declare that they take each other as husband and wife,"—not necessarily by word of mouth, but in some manner to declare such assent. From the great preponderating weight of authority and reason, we are of opinion that all other provisions of the statute are directory, so far as the validity of the marriage is concerned, and that a marriage by contract between parties competent to enter into that relation with each other is valid under our statute. We therefore hold that the said marriage of the appellant to Sophia Koser is valid.

Errors assigned: On the 14th day of September, 1895, about three weeks before the alleged second marriage of the defendant, he and his first wife Sophia, entered into a written agreement between themselves in settlement of their property rights, and agreed to then and there separate, and further agreed in terms as follows: "The parties hereto, each with the other, covenant and agree to sever their marital relations, and by these presents do sever their marital relations." Counsel for defendant offered to introduce this agreement in evidence, to which the district attorney objected on the ground that it was incompetent, irrelevant, and immaterial. The court sustained the objection. This ruling is assigned as error. Counsel argues, in substance, under the authority of *State v. Gardner*, 5 Nev. 377, that the agreement was proper evidence to go to the jury, as tending to show that there was no

criminal intent on the part of the defendant in entering into the second marriage, he believing that the agreement had annulled the first marriage.

Criminal intent: The rule adopted by the majority of the court in the said *Gardner Case*, to the effect that where a statute forbids the doing of a certain thing, and is silent concerning the intent with which it is done, a person commits no offense, in law, though he does the forbidden thing, within all the words of the statute, if he had no evil or wrongful intent beyond that which is involved in the doing of the prohibited act, is disapproved, and the decision to that effect is hereby overruled. We recognize the well settled rule that, where a specific intent is required by statute to constitute the crime, such specific intent enters into the nature of the act itself, and must be alleged and proved beyond a reasonable doubt. The statute under which the defendant was indicted, tried, and convicted provides: "Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive. If any person or persons within this state being married, or who shall hereafter marry, do at any time marry any person or persons, the former husband or wife being alive, the person so offending shall be punished. . . . Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years prior to the said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that is or shall be, at the time of such marriage divorced by lawful authority from the bonds of such former marriage, or to any person where the former marriage hath been by lawful authority declared void." There is no intent involved in this case, except the doing of the thing forbidden to be done by the statute. "Whatever one voluntarily does, he, of course, intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it." *Com. v. Mash*, 7 Met. 472. "There was the intent to marry a second time, not knowing the husband to be dead, who had been absent for a period of about one year only, and this is the criminal intent and the only intent which is of the essence of the offense." *Jones v. State*, 67 Ala. 84. "Upon indictment for selling intoxicating liquor to a minor without authority from his parents or guardian, it does not matter that the defendant did not know that such person was a minor. He is bound to know whether such person is a minor or not." *Farmer v. People*, 77 Ill. 322. A statute of North Carolina authorized the sheriff to issue a license to sell liquor by retail only, on an order of the board of commissioners, upon application of the person seeking the license, and made it a criminal offense to retail liquor without a license. On the 1st day of January, 1883, the board, upon application of Voight, ordered the license to issue, and on the same day revoked the order. Notwithstanding this revocation, the sheriff afterwards, and on the last day of said January,

issued the license, Voight knowing when he received the license that the order for its issuance had been revoked. Voight was prosecuted criminally for retailing liquor without a license. The trial court charged the jury "that if the jury were fully satisfied that the license was issued after the 1st of January, 1888, and defendant knew it was subsequent to the revoking order, and thereafter sold liquor as charged, . . . they should convict notwithstanding, at the time of the act, he had possession of the license." The supreme court approved the instruction, and said: "Nor is it a defense to a criminal accusation that the defendant did not intend to violate or evade the law, or supposed he had a right to sell, when he intended to do, and did do, the criminal and forbidden act. The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." *State v. Voight*, 90 N. C. 741. The provisions of a statute in Massachusetts are as follows: "Whoever falsely makes . . . any certificate of nomination or nomination paper, or any part thereof, or files any certificate of nomination or nomination paper knowing the same or any part thereof to be falsely made. . . shall be punished," etc. Connolly was convicted under

this statute, first, for falsely making nomination papers; second, for filing the same. On appeal the supreme judicial court held: "No fraudulent intent is necessary to constitute the offense. It is immaterial that the defendant did not intend to break the law. It is enough that he did the things made offenses by the statute." *Com. v. Connelly*, 163 Mass. 539. We cite the following additional authorities on the question of intent, which are in line with the ones given above: *Walls v. State*, 7 Blackf. 572; *The Ann*, 1 Gall. 62; *Reg. v. Woodrow*, 15 Meea. & W. 404; *Myers v. State*, 1 Conn. 502; *State v. Goodenow*, 65 Me. 30; *State v. Whitcomb*, 52 Iowa, 85, 35 Am. Rep. 258; *Hood v. State*, 56 Ind. 283, 28 Am. Rep. 21; *Davis v. Com.*, 18 Bush, 318; Whart. Crim. Ev. 8th ed. § 725, and cases there cited.

We therefore hold that the court did not err in excluding said agreement of the appellant and Sophia Zichfeld. This opinion disposes of all the alleged errors, and, finding no error of the court in the record, the judgment and order appealed from are affirmed.

Bigelow, Ch. J., and Belknap, J., concur.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appl.*,

v.

T. W. McELWAIN.

(.....Ky.....)

A husband's right of action for the loss of his wife's society on account of injuries which result in her death is defeated by a recovery

of judgment by her personal representative in an action for her death, brought under Gen. Stat. chap. 57, § 1, for the benefit of her estate, which is more advantageous to him than his common-law right of action for loss of her society.

(February 19, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Todd County in fa-

NOTE.—How many distinct causes of action arise from injuries resulting in death.

I. Alternative action for death or injury.

- a. Generally.
- b. Actions for death as affected by release.
 1. By injured party.
 2. By others.
 3. By plaintiffs.
- c. Other actions as a bar.
 1. Actions for the injury.
 2. Other actions for the death.
- d. Multiplicity of actions for death.
- e. Bar of other actions by limitation.
- f. For death of infants.

II. Concurrent actions for death and injury.

The case of *LOUISVILLE & NASHVILLE R. CO. v. McELWAIN* holds that a husband's right of action for the loss of his wife's society on account of injuries which result in her death is defeated by a recovery of a judgment by her personal representative in an action for her death, brought under Ky. Gen. Stat. chap. 57, § 1, providing for an action for damages for death by neglect or wrongful act for the benefit of the kindred, as this statute was intended to increase the elements of damages but not to multiply actions, and was, in fact, more advantageous to the husband than the common-law right of action. The statute was not intended to

allow an action by the personal representative practically for the husband's benefit, and at the same time to allow the husband to maintain one on his own account for the same acts or negligence.

The case of *LUBRANO v. ATLANTIC MILLS* holds that an action for injury to the plaintiff's intestate resulting in death is barred by a judgment in a previous action brought for the next of kin, for damages arising out of the death, holding that R. I. Rev. Stat. 1857, chap. 178, § 10, providing that an action of trespass on the case for damages to the person shall survive, was intended to refer to actions for damages to the person other than those which result in death, and this construction prevents two actions for the same thing. Sections 16 to 21 provide for damages for death for negligence occurring at highway or railroad crossings, and this is for the benefit of the next of kin. This is in accord with the weight of authority which holds the converse, that an action for damages for death is barred by an action or recovery for the injury which resulted in death.

Under the common law there could be no action for the death. This is shown in *Higgins v. Butcher*, Yelv. 89, and the leading case on the question is *Baker v. Bolton*, 1 Campb. 493, which held that the husband could only recover for loss of his wife's society from the time of the accident to the time of her death. There has been some diversity of de-

vor of plaintiff in an action brought to recover damages for injuries for losses caused him by negligent injury of his wife. *Reversed.*

The facts are stated in the opinion.

Mr. Ben. T. Perkins, Jr., for appellant:

It will be seen from the record mentioned, offered in evidence, that the plaintiff in that action was permitted to recover for the loss of his wife's life, for her bodily and mental suffering, and for the loss of her services and power to earn money.

The statutes have not abrogated the right to seek redress under the rules of the common law. The injured party may elect to recover under the one or the other, but he cannot maintain two actions at the same time growing out of the same state of facts.

Conner v. Paul, 12 Bush, 145; *Hansford v. Payne*, 11 Bush, 385.

Messrs. Forgy & Petrie for appellee.

Paynter, J., delivered the opinion of the court:

On the 8th day of October, 1893, a freight train on the appellant's road struck Josephine E. McElwain while she was crossing the track at a public road crossing, inflicting injuries from which she died on the 23d day of December, 1893. T. W. McElwain, the plaintiff in this case, qualified as executor of her will, instituted an action as such personal representative, and recovered a judgment against the defendant for the sum of \$5,000. This action was instituted at the same time by the plaintiff, as the husband of the deceased, seeking to recover, in his individual capacity, damages for the "loss of her society" from the date the injury was inflicted until her death. In the action as personal representative he recovered compensatory damages, under the instruction of the court, for physical and mental suffering,

against the person causing death, and such damages may be given as under all the circumstances may be just. It was said that such action may be brought either by the heirs or by the personal representatives. When one action is brought, that is the only action which is permitted.

And in *Goodsell v. Hartford & N. H. R. Co.* 88 Conn. 53, which was an action by the administrator for the injuries of the deceased, a recovery was allowed, and it was held that only one suit for the same act would lie, under Conn. act 1848 (Rev. of 1866, p. 22), providing that all actions for injury to the person, whether the same do or do not result in death, shall survive to his administrator, and under act 1853 (Rev. 1866, p. 202), providing that if the life of a person be lost by negligence of a railroad company such company shall be liable to pay damages not exceeding \$5,000, to be recovered by the executor or administrator for the benefit of the husband or widow or heirs. The same damages survived if he died and one act was to limit the extent of damages and the other was to direct the distribution to next of kin.

1. Alternative action for death or injury.

a. Generally.

In cases presenting the question of alternative action for the death or injury, the general rule is that only one action can be brought for damages arising from injury resulting in death. This rule is stated in actions for injury alone, and also in various cases where questions were made as to parties plaintiff or damages or survival of actions. *Safford v. Drew*, 3 Duer, 627; *Graetz v. McKenzie*, 3 Wash. 194; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515; *Holton v. Daly*, 106 Ill. 181; *Mason v. Union P. R. Co.* 7 Utah, 77; *Goodsell v. Hartford & N. H. R. Co.* 88 Conn. 53; *State v. Maine C. R. Co.* 60 Me. 490; *Long v. Morrison*, 14 Ind. 565, 77 Am. Dec. 72.

So, in an action for injury to the deceased, brought by the administrator, not showing that there were any next of kin, it was held that only one cause of action existed, and it must be based on reference to pecuniary damage to the next of kin under N. Y. Laws 1847, chap. 450, providing that a party causing the injury resulting in death shall be liable to damages if the injured party could have recovered, and § 2, amended by Laws 1849, chap. 256, providing that such an action shall be brought by the personal representative for the benefit of the widow and next of kin, and damages may be given with reference to the pecuniary injuries resulting from such death to the wife and next of kin. The expression in *Baker v. Bailey*, 16 Barb. 60, tending to the effect that there were two causes of action which could not be united, but the party must proceed for one or the other, was not approved. *Safford v. Drew*, 3 Duer, 627.

And in *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, in an action by an administrator on the question of the measure of damages, it was said that but one action for damages for causing death could be brought under Cal. Code Civ. Proc. § 377, providing that when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs or personal representative may maintain an action for damages

against the person causing death, and such damages may be given as under all the circumstances may be just. It was said that such action may be brought either by the heirs or by the personal representatives. When one action is brought, that is the only action which is permitted.

And in *Holton v. Daly*, 106 Ill. 181, on the question of the measure of damages, it was said that but one cause of suit, and that is the wrong done irrespective of its consequences, existed under Ill. act February 12, 1853, providing that whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action, the party liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured. In this case the action was brought by the injured party and the administrator was substituted as plaintiff. The court held the plaintiff occupied the position that she would have held had she brought a new action after death, under the act of 1853. The act of July 1, 1872 (Rev. Stat. 1874, p. 26), providing that actions to recover damages for an injury to the person shall survive, was intended to provide for the survival of an action where the party injured died from other causes.

So, an action brought by the injured party who died before judgment could not be prosecuted by his administrator under 2 Utah Comp. Laws 1888, § 3187, providing that an action does not abate by death if the cause of action survive, and § 2961, providing that whenever the death of a person shall be caused by wrongful act, which would have entitled the party if death had not ensued to maintain an action, the person who would have been liable shall be liable for damages notwithstanding the death of the person, and § 2962, providing that such action shall be brought by and in the name of the per-

for expenses of treatment, and for the permanent impairment of her ability to earn money, etc. The sole question in this case is as to whether the recovery in the action as personal representative of the estate of the deceased is a bar to the husband's right to recover for a loss for which it is claimed the common law affords him redress. To determine this question, the common law must be considered in connection with the statutory remedy afforded for negligent acts resulting in death. By the principles of the common law, the right of action for an injury to the person abated upon the death of the party injured; the case falling within the familiar rule, *Actio personalis moritur cum persona*. Therefore, if death resulted, whether instantaneously or not, from such injury, no action could be maintained by the personal representative of the

injured party to recover damages suffered by the decedent. As early as 1606, in the King's bench case of *Higgins v. Butcher*, Yelv. 89, arose, wherein the plaintiff sought to recover damages of the defendant for assaulting and beating his wife, of which she died. The action seemed to have been for damages to the wife, and not for the loss of service. It was held there could be no recovery, as, the injury having resulted in death, the cause of action therefore was merged in the felony. It might be added at this point that reasons other than merger have been suggested for the rule, to wit, the law of forfeiture, the maxim, *Actio personalis moritur cum persona*, and public policy. From the case of *Higgins v. Butcher*, the question does not appear to have been raised in England until 1808, in *Baker v. Bolton*, 1 Campb. 493. It was an action against

sonal representative, and the amount recovered shall be distributed under the directions of the probate court, and § 8179, providing that when the death of a person not a minor is caused by a wrongful act his heirs or personal representatives may maintain an action for damages. The wife or the children did not succeed to the husband's or father's cause of action, that died with him; but immediately upon his death a new cause of action arose in their favor. The statute did not revive the husband's cause of action. *Mason v. Union P. R. Co.* 7 Utah, 77.

And in an action by the surviving wife and child it was held that they could maintain the same, and it was said that only one action could be brought for damages for death of another under Wash. Code, § 8, providing for an action by heirs or representatives if death is caused by the wrongful act or neglect of another. This repealed § 717, providing for an action for damages for death, by a personal representative, if the party injured might have maintained an action, although this provision occurred in the Code after the former. This construction was attained by considering the original acts from which the Code was derived, otherwise there would be two actions allowed for the same wrong. *Graetz v. McKenzie*, 3 Wash. 194.

And in an action by the administrator, it was held that either the widow or the personal representative might sue under Tenn. Code, Act 1871, chap. 73, amending § 2291 of the Code, and providing that the right of action of an injured person shall not abate by his death but pass to his widow, and in case there is no widow, to his children, or to his personal representative for the benefit of the widow and next of kin. The cause of action was given to the widow in preference to the administrator, but not to his exclusion, where she elected not to sue, and her election would be presumed where the suit was prosecuted by the administrator without objection by her, and the defendant could not object that she did not sue. *Webb v. East Tennessee, V. & G. R. Co.* 88 Tenn. 119.

In an action by indictment it was held that the only remedy for immediate death was by indictment under Me. Rev. Stat. chap. 31, § 6, providing compensation to the heirs for the life of a person lost through the carelessness of a railroad corporation to be recovered by indictment. If he did not die immediately the right of action accrued to him, and Me. Rev. Stat. chap. 37, § 8, provided for the survival of such right to his personal representative. It was said that this construction prevented the absurdity of creating two independent, and to the same extent conflicting, remedies for one and the same injury. *State v. Maine C. R. Co.* 60 Me. 490.

34 L. R. A.

Where an administrator brought a suit for the wrongful death of a wife, and the husband and wife could have brought a joint action in her life for the injury, it was held that a right of action existing in the injured party might survive to the representative, or if not that an action might be maintained by the representative joining with her husband, under 3 Ind. Rev. Stat. p. 205, § 784, providing that when the death of one is caused by the wrongful act of another, the personal representative of the former may maintain an action if the former might have if he lived, and the damages must inure to the exclusive benefit of the widow and children. The action should have been brought in the joint names of the husband and administrator, but the nonjoinder was held immaterial because not objected to below. *Long v. Morrison*, 14 Ind. 596, 77 Am. Dec. 72.

b. Actions for death as affected by release.

1. By injured party.

A release given by the injured party generally bars an action for damages arising out of the death, whether brought by the personal representative or for the surviving husband or widow, or for the benefit of next of kin. There is an exception in a Kentucky case. *Price v. Richmond & D. R. Co.* 33 S. C. 556; *Read v. Great Eastern R. Co.* 9 Best & S. 714, 37 L. J. Q. B. N. 8, 278; *Hecht v. Ohio & M. R. Co.* 132 Ind. 507; *Dibble v. New York & E. R. Co.* 25 Barb. 183; *Littlewood v. New York, 89 N. Y. 24*, 43 Am. Rep. 271, *Overruling Schlichting v. Wintgen*, 25 Hun, 628; *Re Taylor's Estate*, 179 Pa. 264.

And the same was said to be the rule in *Walker v. Erdman*, 23 Can. S. C. 352, and *Fowkes v. Nashville & D. R. Co.* 9 Heisk. 629; *Holton v. Daly*, 106 Ill. 131.

A release by the injured party bars an action for damages resulting to the next of kin.

So, the settlement of a suit brought by an injured person is a bar to a subsequent action afterwards brought by his administrator for the death caused by the same injury under Ind. Rev. Stat. 1881, § 22, providing that a cause of action arising out of an injury dies with the person except in cases in which an action is given for an injury causing the death of any person, and § 224, providing that where the death of one is caused by wrongful act or omission of another, the personal representative of the former may maintain an action against the latter if the former could have maintained an action if he had lived. The court held that the intention of this section was that when the injury caused death, the action should survive, but an action for the cause of action liquidated and satisfied could not survive. It was not the intention that the party compelled to pay all

the proprietors of a stagecoach on which the plaintiff and his wife were traveling when it was overturned, inflicting injuries on himself, and also upon his wife, from which she died within a month. It was declared that "the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." Lord Ellenborough said: "The jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution." The above is the opinion in full. Although the case was at *non pro*, it is the leading case on the subject. It was recognized as the law in England until

the enactment of the statute familiarly known as Lord Campbell's act, in 1846. Until the passage of that act the law was recognized to be that "in a civil court the death of a human being could not be complained of as an injury." Formed after Lord Campbell's act, nearly, if not all, the states of the Union have enacted statutes making an action at law maintainable against a person who, by wrongful act, neglect, or default, may have caused the death of another. The courts of this country, with one or two exceptions, accepted *Baker v. Bolton* as authority until the enactment of the statutes to which we have just referred. *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616, follows *Baker v. Bolton*, and is a leading case upon the subject.

The question arose in this court, in 1853, in *Elden v. Lexington & F. R. Co.* 14 B. Mon.

damages resulting from injuries sustained by the wrongful act should again be subjected to an action by the personal representative after his death. *Hecht v. Ohio & M. R. Co.* 132 Ind. 507.

And the same was held under N. Y. Sess. Laws 1847, chap. 450, providing that in case of the death of a person caused by the wrongful act or neglect of another, where the party injured would have been entitled to maintain an action if death had not ensued, the party causing such injury shall be liable to an action for damages notwithstanding the death of the person injured. When death ensued the deceased had no subsisting cause of action. This construction gave but one action for the same injury to the same person. The plaintiff's construction would give two actions for the wrongful act and frequently double compensation. *Dibble v. New York & E. R. Co.* 25 Barb. 183.

So, a settlement by an injured party in action for such injury barred a subsequent action by his administrator for damages under N. Y. Laws 1847, chap. 450, which provided that the wrongdoer should be liable to an action for damages notwithstanding the death of the person injured, if the act was such as would have entitled the party injured to maintain an action and recover damages. It was said that a double liability might be created by a proper statute. *Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 371, Overruling Schlichting v. Wintgen, infra.*

In *Schlichting v. Wintgen*, 25 Hun. 626, a settlement of a judgment in an action brought in the lifetime of the deceased was held not a bar to an action by the administrator for damages for the wrongful killing under N. Y. Act 1847 as amended in 1849 and 1870, providing damages for the pecuniary injuries resulting to the wife and next of kin, denying *Dibble v. New York & E. R. Co. supra*. But this case was overruled in *Littlewood v. New York, supra*.

In *Re Taylor's Estate*, 179 Pa. 264, where the injured party brought an action and died, and her administrators were substituted, and the case was compromised by the administrator, and pending that action the guardian of the children of the deceased party had brought an action also, it was held that the decision in *Birch v. Pittsburg, C. C. & St. L. R. Co.* 135 Pa. 339, *infra*, L. c. 1, prevented the second action, as under Pa. act 1851 (Pub. Laws, 674), act 1855 (Pub. Laws, 309), the defendant was liable to but one action for the recovery of damages for the same injury to the same person.

In *Walkerton v. Erdman*, 23 Can. S. C. 352, which was an action by a widow as administratrix to recover for her own benefit and the benefit of her children damages for causing the death of her husband, it was said that a wrongful act causing death

should be such as would, but for the death, have entitled the person injured to have maintained an action, and if previous to his death he released his right of action or discharged it by accord and satisfaction, a statutory cause of action could not arise upon the death.

And a release by the injured party, and satisfaction of all damages, was a bar to an action by an administrator for the use of the widow and child for damages resulting in death, under S. C. Gen. Stat. § 2183, which provided that whenever the death of a person should be caused by the wrongful act of another, and the act, if death had not ensued, would have entitled the injured party to have maintained an action, the person liable if death had not ensued should be liable notwithstanding the death of the person, and § 2186 which provided that the provision of the third preceding section should not apply where the injured party brought action which proceeded to trial and final judgment before his death. Section 2186 was to prevent a double remedy for the same wrongful act in any possible case. As to whether the statute gave a new cause of action, or simply continued the same cause of action, was not decided. *Price v. Richmond & D. R. Co.* 38 S. C. 556.

So, an accord and satisfaction made by and with the injured party was a bar to an action after his death by his wife for damages for death where there was no personal representative, under 9 & 10 Vict. chap. 93, which provided that if death was caused by wrongful act, and the party injured could have recovered, then the wrongdoer should be liable notwithstanding the death of the injured party, and § 2, which provided that the action was for the benefit of the wife, husband, parent, and child, and was to be brought in the name of the personal representative, and 27 & 28 Vict. chap. 95, § 1, which provided that if there was no personal representative the action might be brought by the beneficiary. The intention of the statute was not to make the wrongdoer pay damages twice for the same act. *Read v. Great Eastern R. Co. L. R. 3 Q. B. 553, 37 L. J. Q. B. N. S. 278, 9 Best & S. 714, 18 L. T. N. S. 822, 16 Week. Rep. 1040.*

And in *Fowkes v. Nashville & D. R. Co.* 9 Heisk. 529, it was said that if an action was brought in the lifetime of the injured party, and a recovery had for his injury, or a settlement and release of the claim or accord and satisfaction was made, his representative could not then sue and recover under Tenn. Code, § 2291, which provided that the right of action to an injured person whose death was caused by wrongful act or omission of another, should not abate by his death, but should pass to his personal representative for the benefit of his widow and next of kin.

204, before the enactment of the statute. That was an action by the husband against a railroad company for the alleged negligent killing of his wife. She was killed instantly. The court followed the principle enunciated in *Baker v. Bolton*, but erroneously assumed that it was decided in that case that when death resulted the civil remedy was merged in the public offense. The court said in the *Eden Case*: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential. But, for aggregated injuries to the person of the wife or child, the husband or parent has an independent or separate cause of action, for the loss of the society of the wife, or the services of the

child, as the case may be. This cause of action does not abate by the subsequent death of the wife or child, but the death of either affects the extent of the recovery, as by that event all further claim to the society of the one, or the services of the other, ceases and determines. And the rule still prevails, although the death that produced this effect results from the same injury which gives rise to the action. . . . According to the existing law, there can be no recovery for this injury, inasmuch as the death of the wife was instantaneous, and it is only for the loss that is sustained by the husband in this respect, from the moment of the injury up to the time of the death of the wife, for which any recovery can be had." The death resulting immediately on the infliction of the injuries, no appreciable time elapsed in which the husband could have enjoyed his wife's so-

And in *Holton v. Daly*, 106 Ill. 131, it was said that if the injured person in his lifetime released his claim for damages, his representative could not maintain an action upon his subsequent death resulting from the injury thus compounded.

But in *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 884, it was held that a compromise by a husband of a suit for damages for a deadly assault did not bar his widow's right of action for the death, under Ky. Gen. Stat. chap. 1, § 6, p. 142, providing that the widow and minor child of a person killed by the careless, wanton, and malicious use of a deadly weapon, not in self-defense, may recover for reparation of the injury, and the jury may give vindictive damages; and Gen. Stat. chap. 10, provided that action for assault, battery, slander and crim. con. cease with the death of the person and cannot be brought or reviewed by the personal representative, and all other actions for personal injuries survive. The new cause of action given to the wife and child was one in which the deceased had no interest and for which his administrator could not sue. They had the exclusive right of action under the statute.

The case of *Donahue v. Drexler*, *supra*, distinguishes the case of *Hansford v. Payne*, 11 Bush, 380, *infra*, holding that case was decided upon a different state of affairs, and the recovery there could have been made only by the personal representative for the pecuniary injury to the estate.

2. By others.

Some cases hold that a release of damages arising out of the death of a party, given by the party authorized to sue, or given by the sole beneficiary, will prevent further action for the benefit of the survivor or next of kin. *Stephens v. Nashville, C. & St. L. R. Co.* 10 Lea, 448; *Holder v. Nashville, C. & St. L. R. Co.* 92 Tenn. 141; *Greenlee v. East Tennessee, V. & G. R. Co.* 5 Lea, 418; *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672; *Trafford v. Adams Exp. Co.* 8 Lea, 96; *Stuebing v. Marshall*, 10 Daly, 406; *Hartigan v. Southern P. Co.* 86 Cal. 142.

So, only one action for damages for an injury resulting in death could be brought under Cal. Code Civ. Proc. § 877, providing for an action by either the heirs or the personal representative, and a compromise in an action by an executor barred an action subsequently brought by the heirs of one who was killed through the negligence of the defendant. *Hartigan v. Southern P. Co.* *supra*.

A release by the surviving widow as sole beneficiary bars an action by the children for damages arising from the death.

So, a compromise by a widow and a dismissal of the suit prevented a reinstatement of the action in favor of the guardian for an infant child of the deceased L. R. A.

ceased, under Tenn. Code, Act 1871, chap. 46, which provided the right of action passed to the widow, in case of no widow to his children, or to his personal representative for the benefit of the widow or next of kin, and § 2 which provided that the widow might sue, and if no widow the children. Where the widow brought suit the children had no right to sue, and the right of the children could only accrue where there was no widow. *Stephens v. Nashville, C. & St. L. R. Co.* 10 Lea, 448.

And a compromise by a widow of an action barred a suit in behalf of the children against the railroad, who claimed that the widow was unauthorized to receive any part of their share, under Tennessee (Mill. & V.) Code, § 3130, which provided that damages passed to the widow, or if none to his children, or to his personal representative for the benefit of the widow and next of kin. The widow, having the first right to sue, had the right to compromise. *Holder v. Nashville, C. & St. L. R. Co.* 92 Tenn. 141.

In *Holder v. Nashville, C. & St. L. R. Co.* *supra*, it was said that the case of *Knoxville, C. G. & L. R. Co. v. Aouff*, 92 Tenn. 26, *infra*, I. b. 2, which held that a widow had no power to compromise the suit of the personal representative, distinctly recognized her right to compromise her own suit.

And a compromise by the widow and the dismissal of the suit could not be prevented by the children in an action under Tenn. Code, § 2291 (Amended Act 1871, chap. 78), which provided that the right of action to the injured person should not abate by his death but pass to the widow, and in case there was no widow to his children, or to his personal representative for the benefit of the widow or next of kin, and § 2292, amended by the same act, which provided that the widow, or if there be none, the children, should prosecute the suit. *Greenlee v. East Tennessee, V. & G. R. Co.* 5 Lea, 418.

And a compromise by a widow for the death of her husband prevented the prosecution of a bill afterwards by the minors through their next friend, who claimed the compromise was void as to their interests, under Miss. Code 1880, § 1510, which provided that an action might be brought in the name of the widow for the death of her husband, the damages to be for the use of such widow, except that in case a widow had children, and that the damages should be distributed as the personal property of the husband. The court held that the widow alone had the right of action and had the right to accept satisfaction and discharge the defendant. *Natchez Cotton Mills Co. v. Mullins* 67 Miss. 672.

A release by sole beneficiaries generally bars an action for the heirs.

So, a settlement by a husband of his claim for

ciety; hence, no damage could result. It is perfectly manifest that at the common law a husband could recover damages for the loss of her society from the date of the injury until her death, for a negligent act resulting in the injury of his wife, although she died therefrom.

The question here arises as to what effect the statute providing a remedy for injuries to the person by negligence has upon the right of the husband to maintain an action for such injuries for which the common law afforded him redress. At the common law, although the person injured may have suffered great physical and mental pain, the cause of action was abated by his death. The general assembly, in order to preserve and keep alive such causes of action, provided that, except actions for assault and battery, slander, criminal conversa-

tion, and so much of the action for malicious prosecution as is intended to recover for personal injury, they survive to the personal representative. Gen. Stat. chap. 10. To provide a cause of action where none existed, the Statute of 1854 was enacted, which gave a cause of action to the personal representative of one not in the employment of the railroad, whose life was lost by reason of the negligence or carelessness of the servants or agents, etc., of such railroad. A recovery under § 1, chap. 57, Gen. Stat., goes to the estate of the decedent. This was the section under which the plaintiff, as personal representative of the estate of his deceased wife, recovered in the other action mentioned. Counsel for appellee cites *Hansford v. Payne*, 11 Bush, 381, to sustain the contention that this action can be maintained, while counsel for appellant cites

damages for the injury in killing his wife barred an action by her administrator for the next of kin, under Tenn. Code, § 2291, amended December 14, 1871, chap. 73, which provided that the right of action for personal injuries causing death should not abate by his death but pass to the widow, and if none to his children, or his personal representative for the benefit of his widow or the next of kin, and § 2292, which provided that the action might be instituted by the personal representative, or, if he declined, by the widow and children, and amended by act December 14, 1871, which provided in addition to this remedy, that the widow, or if none the children, might prosecute the suit. It was held that a recovery for a personal injury to the wife, which resulted in her death, inured to the benefit of the husband under these statutory provisions, and there could be but one recovery. The court held that there was no error in submitting to the jury whether the husband had settled the case or had waived all right of action by failing to sue in twelve months. *Trafford v. Adams Exp. Co.* 8 Lea, 96.

And a release by a father of a deceased minor child barred an action by the personal representative of the child against the party who caused the injury, under N. Y. Laws 1847, chap. 450, where the father alone would be entitled to the proceeds of the claim for damages. *Stuebing v. Marshall*, 10 Daly, 405.

But in *Yelton v. Evansville & I. R. Co.* 134 Ind. 414, 21 L. R. A. 153, it was held that a release by a widow, who was the sole heir, could not be pleaded in bar where the release was given while an action was pending by the personal representative of the decedent, under Ind. Rev. Stat. 1881, § 284, which provided for an action to be prosecuted by the administrator and the damages recovered to inure to the exclusive benefit of the widow and children. While actions were for the benefit of the widow and children, she was not a party to the suit, and the fund was chargeable with the expenses incurred by the administrator for his services and attorney's fees and expenses.

A release by one who is not the sole beneficiary is not a bar to an action for others. *South & North Ala. R. Co. v. Sullivan*, 59 Ala. 272; *Yelton v. Evansville & I. R. Co.* *supra*; *Dowell v. Burlington*, C. R. & N. R. Co. 62 Iowa, 629; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 28; *Houston & T. C. R. Co. v. Bradley*, 45 Tex. 171; *Southern Pac. Co. v. Tomlinson*, 168 U. S. 899, 41 L. ed. 193.

So, a release given by the husband for damages causing the death of his wife did not bar an action by the representative of the wife under Ala. act February 5, 1872 (Code 1876, §§ 2641, 2642), which provided for an action by the personal representative, 24 L. R. A.

and that the amount recovered should be distributed as personal property, and should not be subject to the payment of debts of the deceased. No common-law action could have been maintained in such a case, but only the action which the statute provided. *South & North Ala. R. Co. v. Sullivan*, *supra*.

So, a widow could not release and discharge an action by an administrator for the death of an intestate, where she was not the administratrix; but she could release the claim for damages she individually sustained. The satisfaction pleaded by defendant could extend no further. *Dowell v. Burlington*, C. R. & N. R. Co. *supra*.

And a settlement by a widow did not defeat a pending suit by the administrator for the use and benefit of widow and children, under Tenn. (Mill. & V.) Code, § 3180, which provided for an action for negligent killing of the intestate. Although the widow had the first right to sue, it was waived by permitting the administrator to sue. *Knoxville, C. G. & L. R. Co. v. Acuff*, *supra*. See *Holder v. Nashville, C. & St. L. R. Co.* *supra*.

And a compromise by a widow for damages for the death of her husband did not affect the rights of her children to prosecute a suit under Tex. (Paschal's) Dig. 16, which authorized the heirs, representatives, or relatives of deceased persons to sue for and recover damages where the death of such person had been caused by negligence, culpable or wilful act of another, and § 2, which provided that every such action should be for the exclusive benefit of the husband, wife, child, or children, and might be brought by any one of them, and if such parties fail for three months to sue then it should be the duty of the personal representative to sue. *Houston & T. C. R. Co. v. Bradley*, *supra*.

In an action by the widow for the benefit of herself and children, under *Ariz. Rev. Stat. §§ 2145-2147*, providing an action for damages against a railway for death by negligence, and §§ 2149-2151, providing that the action shall be for the exclusive benefit of the surviving husband, wife, children, and parents, and may be brought by all or by one for the benefit of all, a remittitur by the widow for each of the beneficiaries, amounting in all to over \$31,000, rendered the judgment invalid. It was held that the intent of this provision is that the action is to be once for all. The authority given for prosecuting the action in the name of one of the parties for the benefit of all was to avoid multiplicity of actions; but it gave the nominal plaintiff no power to compromise or release the rights of others. *Southern Pac. Co. v. Tomlinson*, *supra*, *Reversing (Ariz.)* 83 Pac. 710.

3. By plaintiffs.

A settlement by a person authorized to bring the

the case of *Conner v. Paul*, 12 Bush, 144, in support of the opposing view. *Hansford's Case*, was not under either §§ 1 or 8, chap. 57, Gen. Stat. The petition did not charge that the life was lost by the wilful neglect of the defendant,—hence, it was not under § 8; and as it was not lost by reason of the negligence or carelessness of the proprietor of a railroad, or its agents or servants, the action could not be, and was not intended to be, under § 1. It was an action against apothecaries, because their prescription clerk, in attempting to fill a physician's prescription, put up croton oil instead of linseed oil. The croton oil was administered to plaintiff's intestate. It was charged, among other things, in the petition, that it caused him great suffering and agony, and did him serious and irreparable injury, and was the immediate cause of his death.

The action was brought by decedent's personal representative. At common law, had the deceased lived, he could have maintained the action for the agony and suffering resulting from the clerk's mistake, and at his death the cause of action would have ceased, except for chapter 10, Gen. Stat., which caused it to survive in the name of his personal representative. For this reason the court in that case held the petition was good. Under the statements of the petition, no recovery could be had for the death of the injured party. It was not in issue in the case as to what the rights of a husband were when his wife lost her life by the wrongful act of another, but the judge delivering the opinion, in the discussion of the case, restated the doctrine of *Baker v. Bolton*, as sanctioned in *Eden's Case*, 14 B. Mon. 204. Had the injured party been the

suit, or by the sole beneficiary, bars an action by such person. *Henchey v. Chicago*, 41 Ill. 138; *Guldager v. Rockwell*, 14 Colo. 459; *Washington v. Louisville & N. R. Co.* 34 Ill. App. 658.

So, a settlement of an administratrix for the wrongful death of her intestate prevents further prosecution by her of the suit. *Washington v. Louisville & N. R. Co.* *supra*.

And an administratrix, in a suit under Ill. act 1853 for causing the death of her husband, had power to settle and dismiss the case before judgment. Whether the children could call her to account was not decided. *Henchey v. Chicago*, *supra*.

And a release by a widow in full demand of every name and nature whatsoever from one party to the other, given to a party causing the death of her husband, barred any suit by her for damages resulting from his death, although nothing was said of any claim on account of his death at the time of settlement. *Guldager v. Rockwell*, *supra*.

In *Schmidt v. Deegan*, 69 Wis. 300, it was held that a compromise of damages by a widow for killing her husband was based on a valuable consideration, and was obligatory on the party causing the injury, although the personal representative was the proper party to sue under Wis. Rev. Stat. § 4523, which provided for an action by him for the exclusive benefit of the widow.

But in *Maney v. Chicago*, B. & Q. R. Co. 49 Ill. App. 105, it was held that an action by the wife as administratrix was not barred by accepting payments under an insurance contract in a voluntary relief department run by a railroad, which provided in the application that the same should be a "release of all claims for damages arising from injury or death, which could be made by me or by my legal representative." The action by the wife for the death of her husband was under Ill. Rev. Stat. chap. 70, §§ 1, 2, which provided an action for damages for death for the exclusive benefit of the widow and next of kin, to be brought in the name of the personal representative. Although the payment was made to the wife it was not made to her as administratrix under the statute, but as beneficiary under the certificate.

c. Other actions as a bar.

1. Actions for the injury.

A former recovery for the injury to the deceased person bars an action for the next of kin. So, an action for an injury which does not abate by his death bars another action for the next of kin for damages arising from the death. *Conner v. Paul*, 12 Bush, 144; *Littlewood v. New York*, 39 N. Y. 24-43 Am. Rep. 371; *Legg v. Britton*, 64 Vt. 652; *Wood v. Gray* (H. L. So.) [1892] A. C. 578; *Hansford v. Payne*, 11 Bush, 380, 34 L. R. A.

So, a recovery by a person injured by the wrongful act of another barred an action by his personal representative under N. Y. Act 1847, chap. 450, which provided damages for the next of kin. *Littlewood v. New York*, *supra*.

And a settlement of an action brought by an injured party and prosecuted after his death by his administrator, under Vt. Rev. Laws, §§ 2134, 2135, which provided for the survival of the cause of action where the injured party died, barred an action for the benefit of the widow and next of kin for the wrongful act which resulted in his death, under Vt. Rev. Laws, § 2138, which provided for the recovery of damages for the benefit of the widow and next of kin where death resulted from the neglect of another person. This did not create a new cause of action, but provided for the recovery of a new class of damages. *Legg v. Britton*, *supra*.

In *Legg v. Britton*, *supra*, it was said that the doctrine in *Needham v. Grand Trunk R. Co.* 38 Vt. 294, to the contrary was a dictum, was not approved, and was denied in the unreported case of *Haliday v. Dover*, Vt. 1881. And the court held that the right of recovery was conferred only where the intestate would have had remaining a right of action if he had survived.

And in Kentucky a plea in abatement of a pending action on the same facts by a resident administratrix seeking to recover only damages for mental and bodily suffering of the intestate prior to his death was sustained to an action brought by a foreign administratrix for damages causing death based upon an Indiana statute. Ky. Gen. Stat. chap. 30, art. 2, § 45, provided that if there was an administrator qualified in this commonwealth he alone should have power to sue. The acts causing the death of the party from either wilful or ordinary negligence, constituted but one cause of action, whether the measure of damages was for the suffering of the intestate during his life or for the wilful negligence causing his death. It was held that the party entitled to bring the action either at common law or under the statute should make his election, and a recovery by an administrator for mental and bodily suffering would bar any proceeding either by the representative or next of kin. *Conner v. Paul*, 12 Bush, 144.

And the bringing of an action by the injured party for damages, and the reviving of the same after his death, barred another action by his executrix in her own name as mother of the deceased for damages for her son's death, who was her sole means of support. It was claimed that there was an independent right of action in favor of every person who was injured by the death of the deceased, but no authority was cited. It was said no case could be found in Scotland in which an action

wife, instead of the husband, then certainly she would have had the right, at the common law, to have maintained an action for the loss of the society of his wife, although her personal representative might have instituted an action to recover damages for mental and physical suffering. Had the wife survived her injuries, she could have maintained her action for her mental and physical suffering. Had the husband sustained damages in consequence of his wife's injuries, by the "loss of her society," then he could have also maintained his action to recover such damages. Had she lived, he could not recover for her mental and physical suffering, because that was a damage to her. Neither could he recover for his "loss of her society" because that was his damage. Both causes of action existed at common law. The action instituted

by McElwain as personal representative was not based on a common-law right, but to enforce a right secured by statute. This statute very much enlarged the rights which had existed at common-law. It gave the personal representative the right to recover for the loss of the life, and thus increased many fold the amount which formerly could be recovered. The husband, under the statute (Gen. Stat.), would take the entire amount recovered, subject to the debts of decedent. It was greatly to the advantage of the husband to enjoy the statutory rights, instead of those which formerly existed. Therefore it cannot be said that the statute diminished the rights of the husband. We cannot believe that the general assembly intended that the personal representative should maintain an action for the death of the wife, practically for the husband's benefit,

by relatives was sustained after the deceased's claim had been settled or extinguished by judgment, or where he had raised an action which passed to and might be insisted on by his executor. It was held that in cases where the relatives had the right to sue they could bring only one action in which the damages due to them respectively must be assessed. *Wood v. Gray, supra.*

In *Hansford v. Payne*, 11 Bush, 330, a recovery by the administrator for the suffering of the decedent was allowed, under Ky. Gen. Stat. chap. 10, providing that no right of action for personal injury shall die with the person injured. It was said that this would not enable parties to sue for the death under the act of 1854, § 3, and also for the damages accruing prior to the death under chap. 10. And it was further said that a recovery of punitive damages for the destruction of life would bar any other action for the injury, and a recovery for injury under survival of action would bar a recovery of punitive damages. See *Donahue v. Drexler*, 63 Ky. 157, 36 Am. Rep. 386, *supra*, I. b. 2.

Where an injured person brought suit and died, the action properly proceeded in the name of her executors as plaintiffs. It was held that the right of action given by Pa. act April 15, 1851 (Pub. Laws, 474, § 19), amended by act April 28, 1856, § 1, providing that if no suit is brought by the injured party during life, the widow, or if none the personal representative, may recover damages for death, was conditioned upon two concurring facts: first, that the injured party's death was occasioned by violence or negligence, and second, that no suit for damages had been brought by him. *Birch v. Pittsburgh, C. C. & St. L. R. Co.* 165 Pa. 339.

But an action for injury of a party abating by his death does not bar an action for the next of kin.

So, an action for damages for an injury to the plaintiff abating by his death could not be pleaded in bar to an action by his personal representative for the death resulting from such injuries, under Ind. (Gavin & H.) Stat. § 782, providing that a cause of action arising out of an injury to the person dies with the person except in cases in which an action is given for an injury causing death, and § 784, providing that when the death is caused by wrongful act, the personal representative of the party injured may maintain an action therefor if the person injured might have maintained an action had he lived. It was held that the damages inured to the exclusive benefit of the widow and child, if any, or next of kin. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 142.

In *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582, where the injured party had brought a suit for the injury and died, and the widow then brought an action for the next of kin for damages resulting

from the death, and these two actions were consolidated, the opinion says: "That deceased had instituted suit for damages, which suit was pending at his death, is no bar to the action of the plaintiffs."

This action was evidently under Sayles's Tex. Civ. Stat. art. 2899, providing an action for damages for injury causing death by negligence of a railway company, and art. 2908, providing that the action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents. If only one action can be brought this case can only be maintained on the theory that the action brought by the injured party in fact abated at his death.

2. Other actions for the death.

An action by the party authorized to bring the suit, or by the sole beneficiary, bars further action.

So, an action by minor children after the expiration of six months from the death of their father would not lie where the widow had brought an action and voluntarily dismissed the same under Mo. Rev. Stat. §§ 2121-2123, providing for an action for injuries resulting in death to be brought first by the husband or wife, or second, if there be neither, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased. The court said that there was no joint right of action in the husband or wife and the children. The statute gave the husband or wife six months to appropriate the cause of action, the election to be made by a suit. If they sued within that time, it was an exercise of the option, and he or she then had absolute control and could compromise, release, or otherwise settle the matter. *McNamara v. Slavens*, 76 Mo. 329.

And in an action by a husband as administrator of his wife to recover damages from the physician for negligence in not removing the placenta, causing the death of the wife, the court said that in the same circuit the husband had recovered damages for malpractice, and *N. Y. Seas. Laws 1847, p. 575*, providing for an action by the personal representative, was not intended to allow a second action for precisely the same injury, and the husband had availed himself of the common-law right of action to recover damages for the loss of his wife, and this action was not within the statute. *Lynch v. Davis*, 12 How. Pr. 323.

In *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, which was an action by an administrator under an act providing that the heirs or personal representative may maintain an action for damages, it was said that the pendency of one action might be pleaded in abatement to another, and a judgment in one would bar another action.

But an action for damages for death is not a bar to another action, unless the beneficiaries are represented in the prior action.

and allow at the same time the husband to maintain one on his own account for the same acts or negligence. In the *Hangford Case*, in discussing the effect of a recovery of punitive damages under § 3, chap. 57, Gen. Stat., the court said: "A recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury or any of its consequences." It is the degree of negligence which determines whether the recovery be compensatory or punitive, but, when the action by the personal representative is based on § 1 of the statute in question, the recovery should be as effectual a bar to any other action for the injury or any of its consequences as if the jury should have added punitive to the compensatory damages. In *Conner v. Paul*, 12 Bush, 145, it appeared that two actions were instituted by the personal representative of the deceased. The mother of the deceased qualified as administratrix in Indiana, where the injury was inflicted, and also in Kentucky, where the deceased lived. As administratrix under her Kentucky appointment she insti-

tuted an action to recover for the mental and physical suffering of deceased. As administratrix under the Indiana appointment she instituted an action to recover for the loss of life of her intestate. The acts of negligence were the foundation of each action, and the court held a recovery in one action would bar a recovery in another action. We conclude that as the statute gives the personal representative the right to maintain the action for the loss of life of the wife, and the consequences of the negligent act producing the injury, the husband cannot maintain the action for the loss of her society. The legislative intent was to increase the elements of damage following from the acts or negligence producing death. It was not the intention of the legislature to multiply actions. The husband must accept the benefits which the statute secures him, in lieu of those he possessed at common law.

Wherefore the judgment is reversed, with directions that further proceedings be had consistent with this opinion.

So, a recovery for the death of a party by the surviving wife and one child was not a bar to a recovery by a child subsequently born, in an action under Tex. Civ. Stat. art. 2903, providing that the action shall be for the benefit of the surviving husband, wife, children, and parents, although the statute only contemplated one suit should be brought. This meant one suit brought by all the beneficiaries. *Nelson v. Galveston, H. & S. A. R. Co.* 78 Tex. 621, 11 L. R. A. 391.

And an action by a husband for the death of his wife was not a bar to an action by the surviving children of their mother for death, under Tex. Rev. Stat. art. 2899, providing a right of action for the surviving husband, wife, parents, or children of one whose death was caused by the wrongful act of another. The defendant in the first suit should have required other parties interested to have been made parties plaintiff. The court said that if several persons having the right to sue would be concluded by the judgment to which they were not parties against one having the right of action against them, the result would be that one would have the power to compromise, and that there was nothing in this inconsistent with the rule that only one suit should be brought. *Galveston, H. & S. A. R. Co. v. Kutao*, 72 Tex. 643.

d. Multiplicity of actions for death.

Where the question arises as to the multiplicity of actions for the beneficiaries, it is held that only one action can be brought. This rule is stated in cases involving the misjoinder of plaintiffs or the failure to apportion the damages in the pleadings or the verdict. *Paschal v. Owen*, 77 Tex. 583; *East Line & R. R. Co. v. Culberson*, 68 Tex. 664; *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 199; *Houston & T. O. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *Western & A. R. Co. v. Strong*, 52 Ga. 461; *Hayes v. Phelan*, 4 Hun, 733; *March v. Walker*, 48 Tex. 372; *St. Louis, I. M. & S. R. Co. v. Needham*, 52 Fed. Rep. 871, 10 U. S. App. 339.

So, the wife had no right to sue alone for the death of her husband, under the laws of Tennessee, as she was not the only beneficiary, but the wife and children were the beneficiaries. The court held that whatever damages accrued belonged to the widow and children jointly, and an action by the widow was improperly brought. *Western & A. R. Co. v. Strong*, *supra*.

In *Hayes v. Phelan*, *supra*, which was a suit by the widow under N. Y. Laws 1873, chap. 646, pro-34 L. R. A.

viding that every person who shall be injured in means of support in consequence of the intoxication of any person shall have a right of action against any person who caused such intoxication. It was said by Learned, P. J., that if that action would lie, three more could be brought, one by each child. It was held that one to be injured must be one who has a right of action therefor against the intoxicated person. The demurrer to the complaint was sustained.

In *St. Louis, I. M. & S. R. Co. v. Needham*, *supra*, it was held that only one action could be brought under Ark. (Mansf.) Dig. § 5225, which provided an action for damages notwithstanding the death of a person which should be caused by the wrongful act or neglect of another, if the injured party could have maintained an action, and § 5226, which provided that such action should be brought by and in the name of the personal representative and if none then by the heirs, and the recovery should be for the exclusive benefit of the widow and next of kin. A petition in an action by the widow which showed that there was a brother by half blood of the deceased living, was insufficient because all the beneficiaries should be joined, and there could be no splitting into separate actions.

In *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 238, a different construction was placed on these sections on another question showing that three actions could be brought.

And in case the party injured was an infant where there were a widow and minor children only one action could be brought under Tex. (Paschal's) Dig. arts. 15-18 (act February 2, 1860), similar to Lord Campbell's act, and Const. (1869), art. 12, § 30, which gave to certain classes of persons separately and consecutively, the right to exemplary damages, as the re-enactment in Const. (1876) art. 16, § 24, omitted "separately and consecutively." The omission showed that but one suit should be allowed and all the beneficiaries should join. It was said that when both actual and exemplary damages are sought, they should be claimed by proper allegations, in the nature of two distinct counts on different causes of action, with averments respectively appropriate to each remedy. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 199.

And a judgment for part of the beneficiaries was set aside because all did not unite in the one action, under Tex. Rev. Stat. art. 2903, providing that the action shall be for the exclusive benefit of the sur-

RHODE ISLAND SUPREME COURT.

Michael LUBRANO, Admr. etc.,

ATLANTIC MILLS.

(19 R. L. —)

The right of action for damages resulting from death is exclusive of an administrator's right of action to recover for the pain and expense suffered by the person of his intestate from the injuries which caused his death, under Rev. Stat. 1857, chap. 178, creating a right of action for death, and also providing for the survival of actions of "trespass on the case for damages to the person," as the survival applies to cases of injuries not causing death.

(June 25, 1895.)

ACTION to recover damages for injuries inflicted on the plaintiff's intestate which

afterward resulted in his death. On demurrer to replication. *Demurrer sustained.*

Mr. W. B. Tanner, for plaintiff:

In *Bradshaw v. Lancashire & Y. R. Co. L. R. 10 C. P. 189*, it was decided that an action would lie by the administrator to recover for breach of contract to carry safely a passenger who was injured on a railway and died thereafter of said accident. The court said that this action was exclusive of the action by the administrator as trustee of the next of kin.

See also to the same effect, *Leggott v. Great Northern R. Co. L. R. 1 Q. B. Div. 599*; *Barnett v. Lucas*, 6 Ir. C. L. Rep. 247; *Barley v. Chicago & A. R. Co. 4 Biss. 480*; *Kishelman v. Shuman*, 18 Pa. 561; *Roves v. Boston*, 155 Mass. 844, 15 L. R. A. 365; *Tiffany, Death by Wrongful Act*, § 80.

The only English case to the contrary is *Read v. Great Eastern R. Co. L. R. 3 Q. B.*

living husband, wife, children, and parents of the party whose death has been so caused by the wrongful act or neglect of another. It was held that art. 2908, providing for a division of the damages by the verdict, contemplated one verdict. *East Line & E. R. R. Co. v. Culberson*, 68 Tex. 664.

In *Paschal v. Owen*, 77 Tex. 582, which was a suit by the widow for causing the death of her husband, and the amendment set out the names of the children, it was said that Tex. Stat. art. 2904, providing that an action may be brought by all the parties or by one for the benefit of all, intended that there should be but one suit for all the parties. But as the amendment showed that as to the new parties the action was barred, the widow was allowed to recover her damages.

In *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98, in an action brought by a widow and as mother and natural guardian of her two infant children the judgment was reversed because the verdict failed to divide the damages assessed among the beneficiaries. It was said that but one action could be brought under Tex. (Paschal's) Dig. art. 15, providing for suits by heirs, representatives, or relatives of the deceased person for death of a relative, and Tex. Const. 1869, art. 12, § 30, providing for exemplary damages; and the petition must show the parties who are the beneficiaries, and the jury must make a division.

In *March v. Walker*, 48 Tex. 372, under Tex. (Paschal's) Dig. art. 15, providing for an action for the benefit of the husband, wife, child, children, and parents, and damages apportioned to the injury resulting from such death, and Tex. Const. art. 12, § 30, providing that in cases of homicide through wrongful act or omission, exemplary damages may be recovered by the surviving widow, husband, or heirs, separately or consecutively, it was said: "We see no reason why the children of deceased should not recover in one action whatever they might be entitled to under both the statute and the Constitution." This was an action by the children for the malicious killing of the father.

c. Bar of other actions by limitation.

The question as to whether or not there is more than one cause of action, one for the injury and one arising out of the death, is presented in some cases involving the statute of limitation. There is such a conflict on this question, and so few cases, that it cannot be said that a uniform rule of law can be deduced.

Where the injured party lived for fifteen months 34 L. R. A.

after the injury, it was held that the fact that an action by the party injured was barred by the Civil Code of Lower Canada, § 2262 (2), providing that actions for bodily injuries are prescribed in one year, did not prevent the recovery by a widow in her own behalf as tutrix of their minor children, under § 1056, providing an action for injuries causing death "but only within one year after his death." The court held that the death was the foundation of this right of action. *Robinson v. Canadian P. R. Co. (P. C.) [1892] A. C. 481*, Reversing 19 Can. B. C. 232.

And in *Andrews v. Hartford & N. H. R. Co. 34 Conn. 87*, it was held that a cause of action would not be barred until one year after the appointment of the administrator, under Conn. Gen. Stat. p. 202, § 544, giving a right of action to the representative and requiring such suit to be brought within one year after the cause of action arises. This was held on the ground that no cause of action existed in favor of an administrator until he was appointed, and no suit could be brought by the representative founded on the injuries which occasioned the death alone.

In *Sherman v. Western Stage Co. 24 Iowa. 515*, it was held that the cause of action for the death was not barred by the fact that the cause of action for the injury was barred by limitation where the death was almost instantaneous. The majority opinion held that in applying the statute of limitation the cause of action did not accrue in favor of the deceased. The minority opinion held that if the statute gave the right of action for the death instead of for the wrongful act it would follow that two causes of action in favor of the same party might have their basis in the same wrongful act, one to the injured party where he survived long enough to prosecute and another after he died to his personal representative for his death, and that only one action is given. This minority opinion was affirmed in *Kellow v. Central Iowa R. Co. infra*.

Where the damages for the death of a party was given to the wife and children, and a recovery was had by the wife and child, it was held, in another action which was brought by a child born after the first suit was settled, that the action was not barred by limitation, although not brought within one year after its birth or for the reason that he was in being at the time of the first action, and a suit could have been brought by the mother. The doctrine that the infant was barred by the statute of limitation of one year seemed to be predicated upon the rule that there could be but one recovery; but it

555. The point really decided in this case, however, is that a satisfaction made to the deceased before death bars a subsequent action by the administrator for the benefit of the next of kin. This would not necessarily conflict with a decision that a recovery by an administrator after death would not bar an action by the administrator for the benefit of the next of kin. *Pym v. Great Northern R. Co.* 2 Best & S. 759, Affirmed, 4 Best & S. 396; *Needham v. Grand Trunk R. Co.* 38 Vt. 801.

The action by the estate is for sufferings and expense, and not for death. The action by the next of kin is for the death and the pecuniary loss sustained by the death. It is absolutely necessary to show that there are next of kin who would suffer pecuniary loss by the death.

Leggott v. Great Northern R. Co., and *Needham v. Grand Trunk R. Co.* *supra*; *Blake v.*

Midland R. Co. 18 Q. B. 95; *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Woerner*, American Law of Administration, p. 628; *Safford v. Drew*, 3 Duer, 627; *Chicago v. Major*, 18 Ill. 349; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400.

Mr. Raymond G. Mowry for defendant.

Stiness, J., delivered the opinion of the court:

This action is brought to recover for the pain and expense arising from injuries to the plaintiff's intestate before his death, which resulted therefrom. The defendant pleads a judgment in its favor in a suit by the plaintiff in the same cause of action. The plaintiff replies that the former action was brought by him as trustee for the next of kin of the deceased, and in a different right from that in-

was said that this rule does not obtain in Texas where the suit is not brought by all the beneficiaries. *Nelson v. Galveston, H. & S. A. R. Co.* 78 Tex. 621, 11 L. R. A. 391.

This case refuses to follow the case of *Louisville & N. R. Co. v. Sanders*, 86 Ky. 252, which held under a similar statute that an action for damages by an infant for the death of his parent was barred where there was a personal representative who could have brought suit within the time given by law, and there was no widow, and an administrator was appointed shortly after the death and the infant did not sue until more than five years after the death. The statute says that suit shall be brought within one year after the cause of action accrues. The court held that if there was one person in case who could sue and recover, the cause of action had accrued. "But it was said that the cause of action has not accrued to the infant. There is but one cause of action. There can be but one recovery." And the court said that if the administrator had sued and recovered, it would have barred an action by the children, and when the administrator qualified the statute then began to run, not only against him, but against the cause of action, and the statutory saving in behalf of the infant only applied where there was no one who could sue.

In *Kennedy v. Burrier*, 36 Mo. 128, it was held that there was but one cause of action and that accrued to the parents, and in default of suit by them it passed to the children, under Mo. Rev. Code 1865, p. 648, § 2, providing for an action for damages from death to be brought: first by the husband or wife, second, on failure to sue within six months, then by the children, and the cause of action shall be brought one year after it accrues. The failure of the parent to sue within one year barred an action by the child.

But in *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 56 Am. Rep. 568, in an action by the administrator for the benefit of the estate, where the injured party lived a few moments, it was claimed that at common law the action could not be maintained, and that there was no statute which gave a remedy for such an injury, that none accrued, and that the only action which could be maintained by the representative was on a right of action which accrued before death and which survived, under Iowa Code, § 2525, providing that all causes of action shall survive notwithstanding the death of the person entitled to the same. The court said: "We do not find it necessary to determine whether this position that the statutes of this state give no remedy for the death of a human being is sound or not." It was conceded that if one accrued to him it survived, and as he lived a few moments it was held that the cause of action accrued to him and the action could be

maintained. On petition for rehearing the court adopted the minority opinion in the case of *Sherman v. Western Stage Co.* 24 Iowa, 515, and therefore that case is overruled in so far as it conflicts with this opinion.

And the cause of action for the injury was barred where an action for damages for the death was barred. Only one right of action was given under Iowa Code, § 2526, which provided that the civil remedy was not merged in a public offense, and when a wrongful act produced death the damages should be disposed of as personal property, and § 2527, which provided that a right of action for a wrongful injury causing death should be deemed a continuing one and to have accrued to such representative or successor at the same time as it did to the deceased if he had survived. It was held that the statute of limitation began to run as though the deceased had survived. The statute was changed since *Sherman v. Western Stage Co.* *Ewell v. Chicago & N. W. R. Co.* 29 Fed. Rep. 67.

A judgment for the widow in an action by her for the death of her husband was reversed where the petition disclosed that the deceased left neither children nor father but a mother living, and it was not sufficient to assert that her claim, if any, was barred by limitation. *Dallas & W. R. Co. v. Spiker* 59 Tex. 437.

f. For death of infants.

Some cases hold that only one action can be brought for the death of an infant, and that the primary right of action is in the parent, as in Indiana and Oregon. Some cases hold that only one action can be maintained, and that the personal representative has the primary right of action, as in Minnesota, South Carolina, Nebraska, and Kansas. In Iowa and Washington it seems that two actions may be maintained, one by the parent for loss of services, and one by the administrator based on the expectancy. In Michigan it is intimated that an action may be brought by the representative for the next of kin, and one by him for the injuries to the deceased. In Vermont an action may be maintained for loss of services, and also damages in an action by the representative. In Illinois an action may be maintained for loss of services up to the time of his death, and by the administrator for the death. In Arkansas three actions are allowed, one for the personal injury, one for the benefit of the widow and next of kin, and one by the father for loss of services from the time of injury to the time of death. In Pennsylvania an action for the benefit of the family cannot be split.

The following cases hold that only one action can be brought for damages arising from the death of a minor: *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am.

volved in this action, which is for the benefit of the estate. To this replication the defendant demurs. The question therefore is whether, under our statutes, an administrator has the right to maintain two actions for negligence resulting in death,—one for the benefit of the widow and next of kin, according to our form of Lord Campbell's act, and another for the damage to the person, under our statute for the survival of actions.

Upon this question two theories have been advanced. One is that the action for personal injury upon which the deceased could have sued at common law, if death had not ensued, is given, by a statute for survival, for the benefit of his estate, and that a new and independent remedy is given by Lord Campbell's act for the loss sustained by the widow and children on account of the death. The other theory is

that there is but one cause of action, and one remedy, which is given, by grace, to the family of the deceased, in lieu of the aid which they might have expected from him, instead of a recovery for the benefit of his estate; and that this remedy is exclusive. It is to be borne in mind that prior to 1846 no recovery at all could be had for an injury resulting in death. The action died with the person. Neither creditors nor kin had any enforceable rights, however great might have been the loss which the death had brought upon them. Then came Lord Campbell's act, entitled, "An Act for Compensating the Families of Persons Killed by Accidents." It was not an act for the benefit of an estate, but for the family. It took no right from the estate, for it had none. It transferred no right to the family, for none then existed. It gave a new remedy to the

Dec. 259; Pittsburgh, Ft. W. & C. R. Co. v. Vining, 27 Ind. 513, 32 Am. Dec. 299; Mayhew v. Burns, 103 Ind. 328; Berry v. Louisville, E. & St. L. R. Co. 128 Ind. 484; Louisville, N. A. & C. R. Co. v. Goodykoonz, 119 Ind. 111; Scheffler v. Minneapolis & St. L. R. Co. 32 Minn. 518; Edgar v. Castello, 14 S. C. 20, 37 Am. Rep. 714; Wilson v. Bumstead, 12 Neb. 1; Eureka v. Merrifield, 58 Kan. 794; Putman v. Southern Pac. Co. 21 Or. 230.

Other cases allow two actions, one by parent and one by administrator. Walters v. Chicago, R. I. & P. R. Co. 36 Iowa, 458; Hedrick v. Ilwaco R. & Nav. Co. 4 Wash. 400; Bradley v. Andrews, 51 Vt. 525; Barley v. Chicago & A. R. Co. 4 Ill. 430; Davis v. St. Louis, I. M. & S. R. Co. 63 Ark. 117, 7 L. B. A. 283.

Some allow two actions by the representative. Hurst v. Detroit City R. Co. 84 Mich. 539.

The action for the benefit of the family cannot be split. Lehigh Iron Co. v. Rupp, 100 Pa. 98.

So, an action could be maintained by a widow for damages for killing her infant son, under 2 Ind. (Gavin & H.) Stat. p. 33, § 27, providing that the father, or in case of death, imprisonment, or desertion the mother, may maintain an action for the injury or death of her child. This was held not repugnant to § 784, providing that when the death of one is caused by the wrongful act or omission of another the personal representative of the former may sue in a case where such person might have sued for the wrongful act had it not caused death. The statutes were reconciled by holding the latter applicable to adults and the former to infants. Ohio & M. R. Co. v. Tindall, 18 Ind. 366, 74 Am. Dec. 259.

And under the statute it was held that two rights of action for the death of an infant did not exist. Where the injury occurred to a minor the right of action was in the parent, and where an adult was injured the action was to be by the administrator. Pittsburgh, Ft. W. & C. R. Co. v. Vining, 27 Ind. 513, 32 Am. Dec. 299; Mayhew v. Burns, 103 Ind. 328.

In Mayhew v. Burns, *supra*, the case of Gann v. Worman, 69 Ind. 458, to the effect that there was no statute giving the father the right of action for the loss of services of the child after the child's death, and that under §§ 27 and 784, *supra*, the only action which could be maintained by a father was as representative of the injured child's personal right of action, was modified.

And the administrator could not sue for the death of his minor child unless he alleged that the minor was emancipated, although he alleged that the deceased was eighteen years of age and left surviving him both father and mother, but that for two months before and at the time of his death he was not in the services of his parents. The petition did not show that the child was emancipated. Berry v. Louisville, E. & St. L. R. Co. 128 Ind. 484.

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In Berry v. Louisville E. & St. L. R. Co. *supra*, it was said that the construction of the Indiana statute in Mayhew v. Burns, *supra*, and Louisville, N. A. & C. R. Co. v. Goodykoonz, *infra*, was not altogether satisfactory, but the court said: "We cannot feel that we would be justified in overruling them."

Where death was instantaneous, and it did not appear that the guardian paid anything out of the ward's personal estate for funeral expenses, he had no right of action, the mother being alive at the time the suit was commenced. It was said that the mother might recover for loss of services. Louisville, N. A. & C. R. Co. v. Goodykoonz, 119 Ind. 111.

So, a release by a father, who is sole beneficiary, for damages causing the death of his child, is a bar to any further action. Stuebing v. Marshall, 10 Daly, 406.

Where a father brought an action for damages for services on account of the negligent killing of his infant child, under Minn. Gen. Stat. 1873, chap. 77, § 2, creating a cause of action where the death was caused by the wrongful act or omission of any party investing it in the personal representative, it was held that no one but the personal representative could maintain such a suit. Scheffler v. Minneapolis & St. L. R. Co. 32 Minn. 125. While this action was pending the father as administrator brought an action under the same section to recover damages sustained by the next of kin, and only such damages were claimed as would accrue to the plaintiff as next of kin after the arrival at the age of twenty-one years if his son had lived. An estimate of damages made in this case upon the basis that the child will turn over to his next of kin all his accumulations over expenses was held to be erroneous. 32 Minn. 518.

In Edgar v. Castello, 14 S. C. 20, 37 Am. Rep. 714, it was held that an action by a father to recover damages for the negligent killing of his child three years of age, where death was instantaneous, there being no allegation of loss of service, would not lie under S. C. Gen. Stat. chap. 109, p. 507, providing for an action whenever death shall be caused by wrongful act of another who would have been liable if death had not ensued, and that such action shall be brought by the personal representative for the benefit of wife, husband, parent, and children as such statute excluded the idea that the party causing the injury resulting in death was to be subjected to two actions for such injury.

A father cannot maintain an action for the death of his children independent of Nebraska Comp. Stat. chap. 21, § 1, providing that the party causing the injury shall be liable for damages notwithstanding the death of the injured party, and § 2, providing that such action shall be brought in the names

family for the death, and for that only. From that time to this the damages to be recovered by them have been only those resulting from the death. The states of this country quickly adopted the general features of this act, beginning with New York, in 1847. With characteristic conservatism the act was not adopted in this state until October, 1858. In § 1 it gave the remedy to an administrator, for the benefit of the widow and heirs, for the loss of life of a passenger or person in care of a common carrier; but in § 6, for general cases of death by wrongful act, it was provided that the action could be sustained "by the person who would otherwise have been entitled thereto;" for example, parents and masters, for loss of service. In January, 1855, railroad companies were made liable for the loss of life,

by their negligence, of persons crossing a highway, and the same remedy for the benefit of the family was provided, except that in this act husbands were put among the beneficiaries. Up to this point, it is clear that no remedy was provided for the personal injury of the deceased, or for the benefit of his estate. In the Revised Statutes of 1857, chap. 176, §§ 16-21, the laws relating to passengers and persons crossing a highway were consolidated, and that relating to general cases of death by wrongful act was expanded to cover all cases in which an action for damages might have been maintained at the common law had death not ensued; with the remedy, however, for the benefit of the family. But in the same chapter (§ 10) there was added to the causes of action, and actions which survive, that of "tres-

of the personal representatives, and shall be for the exclusive benefit of the next of kin. The plaintiff in this case might have recovered his reasonable costs and expenses in a proper case. *Wilson v. Dumstead*, 12 Neb. 1.

In this case it was said: "There are a few cases decided in this country, notably that of *Sullivan v. Union P. R. Co.* 3 Dill. 335, where it is held that such an action can be maintained. But it is evident from an examination of the cases that such decisions are not derived from the common law."

In an action by a father and mother for damages for the death of their children it was held that only one action could be brought, and that must be by the personal representative under Kan. Civ. Code, § 422, providing for actions by the personal representative for the family. It was held that § 420, providing for survival of action for injuries means when the injuries do not result in death, § 422 a, providing for action by the widow or next of kin only applied where the injured party died out of the state or had no resident personal representative. *Eureka v. Merrifield*, 53 Kan. 794.

In *Eureka v. Merrifield*, *supra*, the construction placed upon these sections of the Code by the case of *McCarthy v. Chicago, R. I. & P. R. Co.* *infra*, was followed. This is not the same as that in *Missouri P. R. Co. v. Bennett*, *infra*, but that decision was not referred to in this opinion.

Where the relation of parent and child continued after majority, the parent receiving support of service could maintain his action under Hill's Or. Code, § 34, providing that the parent may maintain an action for the injury or death of a child. This was held notwithstanding the administrator could maintain his action under § 371, providing that when the death of a person is caused by the wrongful act or omission of another the personal representative may maintain an action for the injury if the injured party could had he lived, and the amount recovered is to be administered as other personal property. It was said that if the child was under age and in the service of the parent there would be no right of action under § 371. *Putman v. Southern Pac. Co.* 21 Or. 230.

The administrator was not entitled to recover for damages accruing prior to the time at which the child would have attained his majority, under Iowa Rev. § 4111, providing that when a wrongful act produces death, the perpetrator is civilly liable for the injury; the parties to the action shall be the same as though brought for a claim founded on contract against the wrongdoer and in favor of the estate of the deceased. But it was said that the father or mother would be the proper party to an action to recover such damages under Iowa Rev. § 2792, providing that the father, or in case of death, imprisonment, or desertion, the mother may prosecute, as plaintiff, an action for

the expenses and actual loss of services resulting from the injury or death of a minor child. The administrator may recover damages to the estate which might have accrued after the child reached majority. *Walters v. Chicago, R. I. & P. R. Co.* 36 Iowa, 458.

A judgment in favor of an administrator for killing a child, under Wash. Code 1881, § 8, providing that when the death of a person is caused by the wrongful act or neglect of another, his heirs or representative may recover such damages, pecuniary or exemplary, as may be just, was held not a bar to an action by the father for loss of services of the child aged five years and seven months, under § 1, providing that a father, or in case of death or desertion the mother, may maintain an action as plaintiff for the injury or death of a child. The damages to the parents was the value of the child's life until he would have reached the age of majority less support and maintenance, and adding expense of nursing and medicine. It was said that the administrator was only entitled to recover for injury accruing to the estate after the child would have reached majority. *Hedrick v. Ilwaco R. & Nav. Co.* 4 Wash. 400.

A recovery by a father for loss of services of his minor son and expense of nursing was not a bar to a recovery by the father as administrator of the son of such damages as the son might have recovered in an action which was brought by the son before he died, and exemplary damages might also be recovered under Vt. Gen. Stat. chap. 52, § 11, providing that if a party to an action for personal injuries shall die during the pendency of the action, it may be prosecuted to final judgment by the personal representative. *Bradley v. Andrews*, 51 Vt. 525.

A recovery for loss of services of a minor child from the time of the injury until he died, for medical attendance, funeral expenses, and the loss of time by father and mother, did not bar an action by the administrator for the death of the minor, under Ill. Rev. Stat. 1874, p. 582, § 1, providing that whenever death is caused by wrongful act, neglect, or default, which would have entitled the injured party to maintain an action, such damages may be recovered by the personal representative, for the benefit of the widow and next of kin, as the jury shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin. *Barley v. Chicago & A. R. Co.* 4 Ill. 430.

In *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 233, it was held that three different suits could be maintained in Arkansas for injury causing death of a minor, one by the personal representative for personal injury of the deceased occurring in his lifetime, under Ark. (Manuf.) Dig. § 5323, providing for an action for wrongs done to another, to be brought after his death by his personal represen-

pass on the case for damages to the person." It is under this section that the plaintiff claims. In support of his claim he relies on *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189; *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599; *Barnett v. Lucas*, 6 Ir. C. L. Rep. 247; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365; and *Needham v. Grand Trunk R. Co.* 38 Vt. 300. The opinion in *Bowes v. Boston* is based upon the statutes of Massachusetts, and holds that two actions, one for the benefit of the family and one for the benefit of the estate, may proceed at the same time, on independent grounds, and for different purposes. It cites no authority. In *Needham v. Grand Trunk R. Co.* the point decided was that the injury to the deceased having occurred in New Hampshire, where no right of action in either form

survived, the plaintiff could not maintain action therefor in Vermont. The *dictum* relating to two causes of action has recently been overruled in *Legg v. Britton*, 64 Vt. 652. *Barnett v. Lucas* was an action for injury to personal estate, and is therefore not in point. *Bradshaw v. Lancashire & Y. R. Co.* was on demurrer to the declaration, which alleged a breach of contract to carry a passenger safely, and it was held that the action could be maintained, notwithstanding the fact that provision for compensation for the death was made by Lord Campbell's act. The case was decided in 1875; and *Leggott v. Great Northern R. Co.*, decided in 1876, was a case upon a similar contract, to which the defendant pleaded a denial of the averments of fact, and a recovery by the plaintiff under Lord Campbell's act. The plaintiff

tatives for the benefit of the estate, and one by the personal representative under §§ 5225, 5226, providing for an action by him for the benefit of the widow and next of kin, and one by the father for loss of services between the time of the injury and the time of his death under the common law. The damages to the father after death are to be recovered by the administrator for the benefit of the father as next of kin.

And in an action by the personal representative of an infant for the benefit of the next of kin, under Mich. (How.) Stat. § 8314, providing for an action by the personal representative and damages with reference to the pecuniary injury, an amendment was refused setting out an additional cause of action to the administrator for injuries to the deceased, under § 7397, providing that actions for negligent injuries to the person shall survive. It was said that they were two separate and distinct causes of action and satisfaction of one would not bar the other. *Hurst v. Detroit City R. Co.* 34 Mich. 539.

In an action by a father to recover for the negligent killing of his married minor son, it was held that independent actions to the father and to the widow of a minor killed by wrongful act or negligence are not given by Pa. act 1858 giving a right of action first to the husband or widow, second to the children, and last to the parents. It was said that this statute limiting the right in all cases to the family had never been construed to give the husband and parents joint or separate actions for the loss of a deceased wife and daughter. The widow's rights in this case are the same as though the son was of age. *Lehigh Iron Co. v. Rupp*, 100 Pa. 98.

II. Concurrent actions for death and injury.

Some decisions hold that more than one cause of action is given by the statutes, one for the injury or expenses and one for the death. *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 781; *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 81 L. T. N. S. 847; *Hurst v. Detroit City R. Co.* 34 Mich. 539; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 233; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Westcott v. Central Vermont R. Co.* 61 Vt. 440; *Com. v. Metropolitan R. Co.* 107 Mass. 236; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693.

The contrary was held in Kansas in an early case, but there is some conflict in that state. See *infra*.

So, an action by an administratrix of her husband for expenses in loss of business, medical attendance, and nursing, where he was a season-ticket holder, and died from injuries received through the negligence of the railway company, was held not barred by an action brought by the administratrix for the 34 L. R. A.

benefit of herself as wife and his children for the injury caused to them by his death. The last action was under 4 Edw. III, chap. 7, which enabled an executor to bring an action for damages to the personal estate, and the first action was under Lord Campbell's act, and the administratrix sued in different rights. The court held that the cause of action was sustained by *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 81 L. T. N. S. 847, *infra*; but that case was questioned, although followed. *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. N. S. 557, 35 L. T. N. S. 334, 24 Week. Rep. 784.

And a recovery was allowed in two actions, one for pain and suffering of the deceased, under Mass. Pub. Stat. chap. 52, § 17, providing for an action for damages for the life of a person lost by a defective highway, by the personal representative for the use of the widow and children or of next of kin, and another under § 18, providing for a recovery by the person who was injured from the defective highway, which survived under chap. 165, § 1. *Bowes v. Boston*, *supra*.

In *Westcott v. Central Vermont R. Co.* *supra*, where the declaration showed that death resulted from the tortious act of the defendant, and that the deceased left a widow and next of kin, and that plaintiff was his representative, it was held that this was a cause of action under Vt. Rev. Laws, §§ 2138, 2139, providing for the recovery of damages for the benefit of the widow and next of kin, and that the declaration should show that they were living at the time the suit was brought. It was further said that two rights of action might arise from death caused by tort, one under this section and one under Rev. Laws, §§ 2134, 2135, which authorized a recovery for damages sustained by the deceased. See *Legg v. Britton*, 64 Vt. 652, subd. I. c. 1, *supra*.

In *Needham v. Grand Trunk R. Co.* 38 Vt. 294, it was said that the personal representative has two causes of action, one in favor of the decedent for his injury in his lifetime, and the other founded on his death for damages to widow and next of kin, under Vt. Gen. Stat. chap. 52, § 15, providing an action for death if the injured party could have maintained an action, and § 16, providing that the action shall be for the benefit of the widow and next of kin, and chap. 52, § 11, providing for the survival of an action for personal injury. But see *Legg v. Britton*, *supra*, I. c. 1.

In *Com. v. Metropolitan R. Co.* 107 Mass. 236, which was an indictment under Mass. Stat. 1890, chap. 223, § 37, for death by a street-railway company, and it was claimed that the indictment was bad because it did not allege that death was immediate, the fact that a civil action for damages lies under another statute does not justify this interpretation. It was said that the common-law action surviving under the statute to the administrator

replied that the defendant was estopped by the judgment in the former case to deny the facts, and to this replication the defendant demurred. The court held that there was no estoppel, because the plaintiff sued in a different right, and, in so deciding, followed *Bradshaw v. Lancashire & Y. R. Co.* but not without protestation. Mellor, J., said: "With the single exception, so far as I am aware, of the case in the common pleas, *Bradshaw v. Lancashire & Y. R. Co.*, there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action.

But as that case has been decided on the very point, I entirely yield to the authority of the decision, so far as to say that in this court it cannot be questioned, and we must therefore abide by it." In *Pulling v. Great Eastern R. Co.* L. R. 9 Q. B. Div. 110, the *Bradshaw* case was further commented upon. Denman, J., said: "None of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in con-

and an indictment under the statute did not cover the same ground. In the former damages for the personal injury to the deceased are alone recovered; in the latter the purpose is to secure to the relatives some compensation for their loss as well as to inflict some punishment. In one case damages are recovered by the legal representative, which may never come to the relatives, in the other the amount of the fine is fixed by the court and paid to the use of the widow and children. As to what effect, if any, the proof of a judgment in a civil action before a settlement with the party injured or his representatives would have upon the prosecution of an indictment for the same act, was not decided.

In *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 143, 31 L. T. N. S. 847, a recovery was allowed an executrix in an action for breach of contract to carry a passenger who died in consequence of an injury by an accident on the cars, and damages were allowed to his personal estate for medical service and loss occasioned by inability to attend to business. It was claimed that Lord Campbell's act took away any right of action that the executrix would have had but for that act, and provided for the only action that could be brought, but it was held that the intention of the act was to give the personal representative a right to recover compensation as trustee for children or other relatives, and not to affect any existing right belonging to the personal estate in general, and did not interfere with the common-law right of the executor.

In a suit by the administrator to recover damages for killing the intestate, it was held that an independent right of action was given by Miss. Code 1880, § 2078, providing for suit by a personal representative of any personal action whatever, which the deceased might have commenced and prosecuted, this was held to be distinct from and independent of Code, § 1510, authorizing a suit by husband, wife, or child to recover for the death of a person caused by the wrong or negligence of another, if the party injured could have sued had he lived. *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693.

In *Illinois C. R. Co. v. Crudup*, 63 Miss. 291, as to whether two suits might be brought, one by the administrator for the injury to the deceased and another for the damages suffered by the next of kin by his death, was not decided; but one suit for both causes may be brought and a full recovery be had in an action by the father as administrator of his son, killed in Tennessee. Tenn. Code, §§ 2291, 2292, provided that the right of action for personal injuries caused by another should not abate by his death, but passed to his personal representative for the benefit of the widow and next of kin, and Tenn. laws 1863 provided that where the person's death was caused by the wrongful act of another, the party suing under Code, §§ 2291, 2292, should have the right to recover damages for mental and physical suffering, loss of time and necessary expenses resulting to the deceased, and damages resulting to 34 L. R. A.

the party for whose use and benefit the right of action survives. It was held that whether the damages given to the next of kin by the death were distinct or not from the right to recover for the injury inflicted on the deceased, given as a new cause of action, both may be recovered in one suit.

In *Missouri P. R. Co. v. Bennett* (Kan. App.) 67 Pac. 183, which was an action to revoke the appointment of an executor so as to prevent him from prosecuting a suit brought by the injured party, it was held that two causes of action are given by Kan. Civ. Code, § 420, providing that actions for injury to the person shall survive, and § 422, providing that the personal representative may recover for the death if the injured party might have recovered if he had lived, and the damages must inure to the widow and children. Under the first section the right of action survives for the benefit of the estate, and under the second a new right of action is created for the sole benefit of the widow, children, or next of kin. (Disapproving *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 28 Am. Rep. 742.)

But in *McCarthy v. Chicago, R. I. & P. R. Co.* *supra*, where the person was injured in Missouri and died in Kansas, and his administrator appointed in Kansas brought an action under Kan. Civ. Code § 422, providing for an action by the personal representative for the benefit of the next of kin when death results from wrongful act, it was held that this section takes away the right of the administrator to sue for the benefit of the estate generally where death resulted from the injury, and the action could not be maintained by claiming the benefit of § 420, providing that an action for injury to the person shall survive notwithstanding the death. This was construed to mean when death resulted from other causes than the injury, and when death results from the wrongful act § 422 applies. An administrator could not maintain an action under §§ 420, 422, for the same injury. This case was followed but doubted in *Hulbert v. Topeka, *infra**, and denied in *Missouri P. R. Co. v. Bennett, supra*.

And the only action which can be maintained in Kansas when the wrongful act of the defendant causes the death of the intestate is that provided for by Kan. Comp. Laws 1879, § 422 providing that when death is caused by the wrongful act of another the personal representative may maintain an action for the injury if the injured party might have maintained an action had he lived, and the damages must inure to the exclusive benefit of the widow and children, § 420 providing that a cause of action for the personal injury shall survive as construed with § 422 only causes an action to survive for injuries to the person when the death occurs from other causes. (Justice Brewer rendering the decision doubted this construction although he was a member of the Kansas court which established the rule, but felt constrained to follow the state decision of *McCarthy v. Chicago, R. I. & P. R. Co. supra*; *Hulbert v. Topeka*, 34 Fed. Rep. 510.) See *Eureka v. Merrifield, supra*, L. T.

sequence of the personal injury. The case of *Bradshaw v. Lancashire & Y. R. Co.* certainly does not go to that length, because the judgments in that case are expressly based upon the distinction, in this respect, between actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract." The opinion (Pollock, B., concurring) decided that the plaintiff could not sue for damages to the intestate's person. In view of these comments, the support which the *Bradshaw Case* gives to the plaintiff turns out to be more apparent than real. Prior to these cases, that of *Read v. Great Eastern R. Co. L. R. 3 Q. B. 555*, had been decided in 1868, holding that satisfaction received by the deceased, in his lifetime, for the injury, was a bar to a suit for the death. That case stated the principle upon which the compensatory act is founded. It creates no new cause of action by reason of the death, but gives a new right of recovery in substitution for the right of action which the deceased would have had if he had survived. Upon this principle the new remedy must be exclusive, since otherwise there would be two recoveries for the same cause of action, namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law, if he had survived. Moreover, the recognized rules of construction lead to the conclusion that the remedy for the death is exclusive. While the act relates to a remedy, it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law, and so it should be strictly construed. The provisions for survival of actions for damages to the person and for the remedy for the death, have been embodied in the same statute in this state since 1857, although the latter was first adopted. The general provision should not be construed to modify the special, since the intention to modify the former statute by giving an additional remedy is not plain, and both can stand together; the act for survival embracing damages to the person other than those which result in death. This is the construction which was given to precisely similar provisions in *Holton v. Daly*, 106 Ill. 184, where it was held that the only cause of action was the wrong done, irrespective of consequences, and that a statute of survival, subsequently passed, did not give a remedy additional to that of the prior act relating to the death. That case had been commenced by the deceased in his lifetime, but

the court held that it could not proceed without amendment alleging and suing for the death. So, in *Chicago & H. I. R. Co. v. O'Connor*, 119 Ill. 586, it was held that where the plaintiff, pending an action for injuries, dies from some other cause than the injury, the action survives, and may be prosecuted by his administrator. In *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 28 Am. Rep. 742, where both provisions for an action for death and for survival of an action for injury to the person had been embodied in a revision, as in our own statutes, it was held that they must be construed *in part materia*, and that the latter provision applied only to cases where the death did not result from the injury. This decision was followed in *Hulbert v. Topeka*, 34 Fed. Rep. 510; but "Mr. Justice Brewer, although he had concurred in the opinion, as a member of the state court, and felt constrained to follow it, expressed a doubt of its correctness. See also *Hurst v. Detroit City R. Co.* 84 Mich. 539; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515; *Hartigan v. Southern Pac. Co.* 86 Cal. 143; *Andrews v. Hartford & N. H. R. Co.* 84 Conn. 57; *Putman v. Southern Pac. Co.* 31 Or. 280.

A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible. The measure of pain and suffering, or estimated damage to one's estate, cannot be so definitely marked as to limit liberality of a sympathetic jury.

One more consideration may also be noted. While a court may not be justified in resting a decision upon a common opinion of the bar, yet such an opinion, held and acted upon for a long time, furnishes a strong presumption that a decision in accordance therewith is correct. We think that the common understanding has been that two actions could not be maintained. The memory of the members of this division, covering a period of more than thirty years at the bar and on the bench, does not recall an instance where two suits have been brought, and, in view of the diligence which has been shown by many attorneys in cases of this kind, it is hardly conceivable that the second one would have been omitted if it had been thought that it could be maintained.

Our conclusion is that the *defendant's demurrers to the plaintiff's replication must be sustained.*

NORTH CAROLINA SUPREME COURT.

Nathan HOLLEMAN, *Appt.*,

v.

W. H. HARWARD *et al.*

(119 N. C. 150.)

The sale of laudanum as a beverage to

a married woman, knowing that it is destroying her mind and body and causing loss to her husband, when continued after his repeated warnings and protest, renders the seller liable to him for the damages which he sustains on account of the loss of her services.

(November 24, 1894.)

NOTE.—The above case, like the recent case of *Kujek v. Goldman* (N. Y.) 84 L. R. A. 156, applies old and broad principles to sustain a novel cause of action. The peculiar element of difficulty in the present case is that of the wife's free will. To 34 L. R. A.

avoid the maxim *Volenti non fit injuria* the decision must rest upon the fact that she had become incapable of rational action in the matter, so that the injury to her is like an injury to property or to a person *non compos mentis*.

APPEAL by plaintiff from a judgment of the Superior Court for Wake County in favor of defendants in an action brought to recover damages for injuries sustained by plaintiff by reason of the sale of laudanum to his wife. *Reversed.*

The facts are stated in the opinion.

Messrs. Argo & Snow, for appellant:

For every legal right there is a corresponding legal remedy for the deprivation or infringement of that right.

8 Bl. Com. 23; 1 Addison, Torts, 72.

Injuries that may be offered to a person considered as a husband are principally three: Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her.

If the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate action upon the case for this ill-usage, *per quod consortium amittit*, in which he shall recover a satisfaction in damages.

8 Bl. Com. 140.

The husband has the right to sue alone for any infringement of his conjugal rights to her services, society, affection, and fidelity; hence arise rights of action against one who injures his wife.

9 Am. & Eng. Enc. Law, p. 829.

For an injury to the wife either intentionally or negligently caused, which deprives her of the ability to perform services or lessens that ability, the husband may maintain an action for the loss of service, and also any incidental loss or damage, such as moneys expended in care and medical treatment and the like.

Cooley, Torts, 2d ed. p. 226; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Mowry v. Chaney*, 48 Iowa, 609; *Berger v. Jacobs*, 81 Mich. 215; *Bloomington v. Arnett*, 16 Ill. App. 199; *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 364; *Hyatt v. Adams*, 16 Mich. 180; *Steenerson v. Morris*, 87 Ohio St. 10; *Matteson v. New York C. R. Co.* 35 N. Y. 487, 91 Am. Dec. 67; *Atlantic & P. R. Co. v. Hopkins*, 94 U. S. 11, 24 L. ed. 48; *Kavanaugh v. Jonesville*, 24 Wis. 618; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *Fuller v. Naugatuck R. Co.* 21 Conn. 557.

He who assists the wife in the violation of her duty as such is guilty of a wrong, for which an action will lie by the husband, where injury is thereby inflicted upon him.

Hoard v. Peck, 56 Barb. 202.

The consent of the wife to the performance of the act or acts is no defense and does not defeat the right of action.

Ibid.; *Reeves*, Dom. Rel. 139; *Barnes v. Allen*, 30 Barb. 668; *McAulay v. Birkhead*, 18 Ired. L. 28, 55 Am. Dec. 427.

Messrs. Battle & Mordecai and *H. E. Norris* for appellees.

Montgomery, J., delivered the opinion of the court:

This action was brought to recover of the defendants damages for injuries alleged to have been sustained by the plaintiff in consequence of the defendants having sold laudanum to his wife, the defendants being druggists, and knowing that the plaintiff's wife was using the

same in large quantities, and as a beverage, to the injury of her health. A demurrer *overtans* on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained by his honor. The defendants had answered, denying all the material allegations of the complaint, but, for the purposes of this action, the demurrer having been entered and sustained, the matters alleged in the complaint are to be taken as true. The complaint shows that the plaintiff's wife, many years before this action was brought, while suffering from some temporary illness, was forced to take preparations of opium for relief, and from this was formed the habit of taking laudanum. The plaintiff, as soon as he discovered the habit, set to work to cure or prevent it, and so informed the defendants, who lived in the same town with him, and forbade them to sell to his wife opium in any form, except upon his own order, the defendants then and before having sold her the laudanum knowing that she was addicted to the use of it as a beverage. It is further alleged in the complaint that, notwithstanding these protests and orders to the contrary of the plaintiff, the defendants have almost daily, through a series of years, against the frequent protest and warnings of the plaintiff, sold to the plaintiff's wife large quantities of laudanum, which they knew she was using as a beverage; that the defendants knew that at the times when they were selling the laudanum to the plaintiff's wife she was using it as a beverage; that she was becoming, and had become, what is known as an "opium eater;" that she was, through the use of the drug, wrecking her mind and body; and that the plaintiff was doing his utmost to prevent such use, and to counteract the effects of the ruinous drug. The plaintiff alleges in his complaint "that his wife, by reason of the use of the drug as a beverage, had become a mental and physical wreck, and almost deprived of moral sensibility, unfitted and disqualified to attend to her household duties, or to the care and nurture and direction of her children; and that by the means aforesaid so furnished by the defendants knowingly, wilfully, and unlawfully, the plaintiff has been deprived of the society of his wife, of her services in her home, and his children have suffered from neglect and want of motherly care;" that the plaintiff's family consists of his wife and six children, some of them very young, and all under age; that the plaintiff himself is dependent on his daily toil for a living, and the care of his household and children is dependent upon the services and attention of his wife; and that by the sale and use of the laudanum she has become physically and mentally incapable of attending to her duties. The complaint further alleges that, but for the conduct of the defendants in selling and furnishing the plaintiff's wife laudanum, the plaintiff would have been able to have counteracted the habit, which was only forming at the time the defendants began to furnish her with the said deadly drug; and his said wife instead of being a burden from mental and physical and moral imbecility, would have been a comfort and a helpmeet. The question, then, is, Can the plaintiff, upon the facts set out in the complaint, maintain an action?

The action is a novel one. With the exception of the case of *Hoard v. Peck*, 56 Barb. 202, which, in its most important aspects, resembles the one before us, we have been able to find no precedent in the English common-law courts or in the courts of any of our states. It does not follow, however, that because the case is new the action cannot be maintained. If a principle upon which to base an action exists, it can be no good objection that the case is a new one. It is contended for the defendants, though, that there is no principle of the common law upon which this action can be sustained, and that our own statutory law gives no such remedy as the plaintiff seeks in this action for the wrong done to him by the defendants, and that the novelty of the action, together with the silence of the elementary books on the subject-matter of the complaint, while not conclusive, furnishes strong countenance to their contention. It is claimed for the defendants that while, in the abstract, such facts as are stated in the complaint would make the parties charged guilty of a great moral wrong, there would be no legal liability incurred therefor. It was argued for the defendants that there was no legal obligation resting upon themselves not to sell the drug, as is alleged, to the plaintiff's wife, or upon the wife not to use it; that many of the ancient restrictions upon the rights of married women had been repealed by recent legislation, or modified by a more liberal judicial construction; that a married woman was ordinarily free to go where she would, and that the husband could not arbitrarily deprive her of her liberty, nor use violence against her under any circumstances, except in self-defense, and that, if he could not restrain her locomotion and her will, he could not prevent her from buying the drug and using it; that the wife's duty to honor and obey her husband, to give to their children motherly care, to render all proper service in the household, and to give him her companionship and love, was a moral duty, but that they could not be enforced by any power of the law, if the wife refused to discharge them. But, notwithstanding the claim of the defendants, we think this action rests upon a principle,—a principle not new, but one sound and consistent. The principle is this: "Whoever does an injury to another is liable in damages to the extent of that injury. It matters not, whether the injury is to the property, or the person, or the rights, or the reputation, of another." Story, J., in *Dexter v. Spear*, 4 Masson, 115. And also in the third book of Blackstone's Commentaries (chap. 8, p. 123) it is written: "Wherever the common law gives a right, or prohibits an injury, it also gives a remedy, by action." A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship, and of rendering all such services in his home as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill, and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever wilfully joins with a mar-

ried woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband. The defendants and the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband. There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife. That assaults and batteries are made criminal offenses makes no difference, the foundation of the husband's suit being, not for the public offense, but for damages,—compensation for the injury which he has sustained on account of the loss of his wife's services. The sale of the laudanum by the defendants to the plaintiff's wife, under the circumstances set out in the complaint, was wilful and unlawful, and the husband's injury is just as great as if his wife had been disabled from a battery committed on her, although the unlawful act is not indictable.

The defendant's counsel also insisted that the selling of laudanum is a lawful business, that it is on the same footing as the sale of spirituous liquors unrestrained by the statute. It is true that there is no statutory provision in North Carolina prohibiting the sale of laudanum as a beverage or as a medicine, but it does not therefore follow that a sale of it under all circumstances is lawful. As is well said in *Hoard v. Peck*, *supra*, "Its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied." It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealer's complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and wilfully sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action. We have in our state (Code, § 1077) a statute which makes it unlawful to sell liquor in any quantity to a minor (except he is a married man), and § 1078, gives to the person injured damages therefor. But suppose we had no statute on the subject of liquor selling to minors, would the law permit with impunity a dealer or other person to sell liquor to a man's child, without his knowledge or consent, in such quantities as to produce habitual intoxication, or to render him unfit for employment? But laudanum is well known to be a poisonous drug. As a beverage, it cannot be drunk without injury to the body, affecting the health of the physical and moral powers, and this is

known to most persons of ordinary intelligence and to all druggists. The defendants knew, taking the complaint in this appeal to be true, that the plaintiff's wife did not buy the laudanum for medicine. They knew that she was buying it as a beverage; that she was violating her duty to her husband in destroying her health, and thereby rendering herself unfit as a companion for him, and to render proper service in the household. They assisted her and encouraged her, for gain, with the means of do-

ing all this in face of his frequent protests and warnings. The habit she had formed was the direct result of the use of the drug, which the defendants sold to her in such large quantities, and they knew it, and persisted in it, although repeatedly warned and entreated by the husband not to do so. His honor erred in sustaining the demurrer. It ought to have been overruled.

Error.

SOUTH CAROLINA SUPREME COURT.

FARMERS' MUTUAL INSURANCE ASSOCIATION OF FLORENCE COUNTY, Resp't.,

v.

Thomas S. BURCH, App't.

(47 S. C. 453.)

1. The lien of a mutual insurance company upon insured property of members for their shares of the losses and expenses of the company takes precedence of the members' homestead rights under a by-law which provides that the insured buildings and the right, title, and interest of the assured to the lands on which they stand shall be pledged to the company, which shall have a lien against all persons interested during the continuance of the insurance as to all debts or liabilities incurred by the company.
2. A pledge of property insured in a mutual insurance company as security for payment of the owner's share of the debts and liabilities of the company is a mortgage within the meaning of a statute restricting the modes of waiving homestead rights to alienation or mortgage of the property.

(August 10, 1896.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Florence County in favor of plaintiff in an action brought to enforce a lien upon defendant's property for his portion of the losses and expenses of plaintiff. *Affirmed.*

"The plaintiff, by its amended complaint, shows to the court:

(1) "That at the times hereinafter mentioned, plaintiff was, and still is, a corporation duly organized and authorized under an act of the general assembly of this state, and the following provisions appear in said act of incorporation (Laws 1894, p. 1049):

"Sec. 2. That said corporation shall have the right to mutually insure the respective dwelling houses, barns, and other buildings of its members, of Florence county, against loss by fire, wind, or lightning, upon such terms and upon such conditions as may be fixed by the by-laws of the said corporation. It may sue and be sued in any court of this state, and may have a common seal."

"Sec. 4. That every member of said corporation shall be, and is hereby, bound and obliged to pay his, her, or their portion of all losses and expenses accruing to said corporation, together with the right, title, and interest of the assured to the lands on which such buildings or other property may stand, shall be pledged to the said corporation; and the said corporation shall have a lien thereon against the insured, his or her heirs, representatives, and assigns, during the continuance of their insurance, as to all debts or liabilities contracted or incurred by said corporation subsequent to the passage of this act.

"Sec. 5. All property insured by said corporation shall be liable as herein provided until all outstanding losses shall have been paid, and until the owner thereof shall have withdrawn his insurance in the manner prescribed by the by-laws of said corporation."

"(2) That on 1st day of January, 1895, the plaintiff and the defendant duly entered into a contract in writing, duly signed by the plaintiff and the insured [the defendant], whereby the defendant became a member of plaintiff association, and whereby the plaintiff insured the defendant against loss or damage by fire of the property hereafter described. A copy of the material portions of said contract of insurance is hereto attached as Exhibit A. and made a part of this amended complaint.

"(3) That it is provided in said contract of insurance and membership, and in consideration thereof, that the defendant 'does, on the 1st day of January, 1895, at 12 o'clock M., become a member of said company, assigning to the same the following described property: One frame, shingle roof, one-story dwelling-house, situated upon the following described real estate, to wit: All that tract of land, in county and state aforesaid, containing 7 1/2 acres bounded north by lands of estate of Sarah W. Kennedy, east by lands of Mrs. M. D. Burch, south by lands of Mrs. M. D. Burch, and west by lands of Mrs. S. J. Harrell; also, 'three bed-room sets, and one set of parlor furniture, stove, and kitchen furniture, being in and upon the house and premises, as above described;' also, 'one frame barn and contents, situated upon the above described premises.' And the said plaintiff insured, as aforesaid,

NOTE.—For the liabilities of members of mutual insurance companies, see note to *Ionia*, R. & B. 84 L. R. A.

Farmers' Mut. F. Ins. Co. v. Ionia Circuit Judge (Mich.) 82 L. R. A. 481.

the above-described property to the amount of \$700, as will more fully appear by reference to said policy, hereto attached, and made part of this complaint.

"(4) That in said contract of insurance the defendant agreed to bear his *pro rata* portion of all expenses and losses sustained by the members of this association on account of loss or damage of property that has been assigned to this association by fire . . . and likewise the said association shall pay to the insured, within thirty days after the treasurer has given notice of assessment, all damages to the property described in said insurance contract.

"(5) That afterwards Mrs. M. A. Anderson, who was a member of said association, sustained loss by fire on her dwelling house, insured by plaintiff association, and which had been assigned to plaintiff, as aforesaid, to the extent of \$320; and D. H. Mixon, likewise a member of said association, sustained loss by fire on his dwelling house, insured by plaintiff, and which property had been assigned to plaintiff, as aforesaid, to the extent of \$35; and H. N. Mixson, likewise a member of said association, sustained loss by fire on her dwelling house, insured by plaintiff, and which property had been assigned to plaintiff, as aforesaid, to the extent of \$125; and John Chisholm, likewise a member of said association, sustained loss by fire on his dwelling house, insured by plaintiff, and which property had been assigned to plaintiff, as aforesaid, to the extent of \$500. And plaintiff further alleges that all of said losses were duly adjusted by plaintiff association at the respective sums as aforesaid.

"(6) That the defendant's *pro rata* portion of said losses and expenses, under the terms of the policy or contract, set out in this complaint, was duly fixed and assessed at the sum of \$3.50; and the defendant was duly notified of said assessment, but he has failed and refused to pay the same, although long since due.

"Wherefore the plaintiff prays judgment that the said lien be enforced by this court; that the personal property and the real property (if so much be necessary) be sold and the proceeds applied to the payment of the costs of this action, then to the payment of the said sum claimed to be due; and for such other and further relief as to the court may seem just and equitable."

Exhibit A was as follows:
Policy of the Farmers' Mutual Insurance Association of Florence County,
South Carolina.

This agreement, this day entered into between Thomas S. Burch, of Florence, S. C. (who is called the insured), and the Farmers' Mutual Insurance Association of Florence County, whereby it is agreed: (1) That the insured shall bear his *pro rata* portion of all expenses and losses sustained by the members of this association on account of loss or damage of property that has been assigned to this association by fire, lightning, or wind storm of any description. Likewise, the said association shall pay to the insured, within thirty days after the treasurer has given notice of assessment, all damages to the property described below (provided the amount of insur-

ance herein specified shall equal such loss), by fire, lightning, or wind storm of any description. . . . (5) This policy shall remain in force until such time as it may be canceled, either by the insured or the association, as provided in this policy, or the by-laws of this association. . . . In consideration of the above, the insured does, on the 1st day of January, in the year 1895, at 12 o'clock, become a member of said company, assigning to the same the following-described property: One frame, shingle roof, one-story dwelling house, situated upon the following-described real estate, to wit: All that tract of land, in county and state aforesaid, containing seventy-seven and one half acres, bounded on the north by lands of estate of Sarah W. Kennedy, east by lands of Mrs. M. D. Burch, south by lands of Mrs. M. D. Burch, and west by lands of Mrs. S. J. Harrell, \$500; three bed-room sets and one set of parlor furniture, stove and kitchen furniture, being in and upon the house and premises as above described, \$100; one frame barn and contents, situated upon the above-described premises, \$100. Dated this 1st day of January, A. D. 1895. [Duly signed by insured and officers of company.]

The amended answer was as follows:

"The defendant above named, answering the amended complaint herein, admits the truth of the allegations set forth therein. The defendant, further answering the said amended complaint, alleges that he is the head of a family residing in the state; that the personal property described in the complaint is worth less than the sum of \$500; and that the real estate described therein is worth less than the sum of \$1,000; and that he owns no other property out of which his homestead exemption can be assigned. Wherefore the defendant prays that the said complaint be dismissed in so far as it prays for the sale of said property."

The decree was as follows:

"This cause came on before me at chambers, under an agreement of counsel filed in the cause, on the amended pleadings. All the facts alleged in the amended complaint and the answer are admitted to be true. The defendant raises the question that he is entitled to homestead exemptions, and resists the sale of the property on that ground. I hold that the charter of the plaintiff and the agreement of insurance create a lien on the property insured and the real property upon which the same is situated. The claim of homestead cannot prevail against this lien or its enforcement. It is ordered and decreed that the property described in the complaint (if so much be necessary) be sold by the clerk of this court on sales day in July, 1896, etc.
"O. W. Buchanan, Judge 3d Circuit."

Report of the Circuit Judge.

"The matter herein presents a novel question in relation to the homestead exemption: Whether or not under the circumstances the benefit of the exemptions should be allowed the defendant. As in the previous judgment heretofore rendered, I hold that under such

contract no such exemption should be allowed him. Upon the appeal, for the settlement of this question, certain facts contained in the record were admitted. No question was made as to the time at which the contract was made with reference to the incorporation of the plaintiff herein, but argument was made below upon the admitted facts of the complaint, answer, etc. In the decision on appeal, the case was decided upon the time of its contraction with reference to the incorporation of the plaintiff. It is proper for me to say that no such question was made before me, and the admitted facts for the settlement of this case contained no such issue before me. Certain facts were admitted, and judgment was rendered upon such admission. Let this report be made a part of the 'case' on appeal."

Exceptions.

"(1) That his honor erred in holding that the alleged contract of insurance is anything more than an attempted waiver of homestead. (2) That his honor erred in holding that the charter of the plaintiff creates such a lien on all the property described in the complaint as will defeat the claim of homestead. (3) That his honor erred in holding that the policy of insurance and charter of the plaintiff create such a lien on said property, both real and personal, as will defeat the defendant's claim of homestead, when it is respectfully submitted that they create a lien, if any, on said personal property only. (4) That his honor erred in holding that the plaintiff had a lien on the land described in the complaint, when it appears that the policy or contract of insurance only purports to assign to plaintiff the dwelling house and the personal property insured. (5) That his honor erred in holding that the claim of homestead herein can be defeated in any other way than by aliening or mortgaging said property. (6) That his honor erred in ordering the sale of the property described in the complaint."

Messrs. W. A. Brunson and H. A. Brunson, for appellant:

The legislature has provided the machinery for completing the homestead exemption, and has established a homestead law, providing that there are only two ways by which a debtor can defeat his homestead, *viz.*, by "aliening or mortgaging," the same.

The charter of the plaintiff is a special act, private and local in character. There is no express repeal by it, or any existing provisions of the homestead law. There is nothing in the title of the act of incorporation indicating anything more than the chartering of a mutual insurance company.

21 S. C. Stat. 1040.

The alleged lien is void for want of certainty.

The lien adjudged to exist is not that of a legal mortgage of real estate, is not the act of the debtor, and is not within the definition of a mortgage as contemplated by the law, and in any event, as the defendant "assigned" only the "dwelling house situated upon" the land and the personal property, this assignment will not carry the land.

Hendrix v. Seaborn, 25 S. C. 485, 60 Am. 24 L. R. A.

Rep. 520; *Harper v. Barsh*, 10 Rich. Eq. 149; *Pledger v. Ellerbe*, 6 Rich. L. 266, 60 Am. Dec. 123; *Whilden v. Pearce*, 27 S. C. 44.

Words denoting conveyance or transfer are essential to a legal mortgage.

Green v. Jacobs, 5 S. C. N. S. 283; *Jones, Chat. Mortg.* 8, 12, 18.

The nature of the agreement must be such that by the mere nonperformance of the conditions, the title will be transferred to the mortgagee by the force of the agreement.

3 Am. & Eng. Enc. Law, p. 175.

The word "assigning" alone does not convey this force as between the parties.

1 Jones, Liens, § 81.

Messrs. Thompson & Kershaw, for respondent:

The general assembly shall enact such laws as will exempt from attachment, and sale under any mesne or final process issued from any court, to the head of any family residing in this state, a homestead, etc.

Const. 1868, art. 2, § 32 (Amend. 1890).

The right of dominion of the owner of lands, including the power to alien or encumber, is not either directly or indirectly the subject of this provision. The whole force of the constitutional provision is expended in preventing interference in certain cases with that dominion.

Homestead Assn. v. Enslow, 7 S. C. N. S. 19.

The right to alien, of necessity, carries the right to do a lesser thing, to wit, to encumber.

Thompson, Homesteads & Exemptions, 456.

A sale to enforce a lien on specific property is not a sale under any "mesne or final process," within the meaning of the Constitution.

Homestead Assn. v. Enslow, 7 S. C. N. S. 20.

An instrument whereby a corporation pledges the real and personal estate of said company for the fulfillment of a contract may be enforced as a mortgage.

1 Jones, Mortg. 166.

Jones, J., delivered the opinion of the court:

The sole question in this case is whether the plaintiff association, by its charter and the contract of insurance with the defendant, a member, has a lien on the property insured for the member's portion of the association's losses and expenses, which will prevent the defendant from claiming a homestead therein against such claim. This action was commenced January 1, 1896, to enforce an alleged lien for \$3.50 against certain real and personal property of the defendant, to pay his *pro rata* portion of the losses and expenses of the plaintiff corporation. On the former appeal in this case, the judgment of the circuit court was reversed (46 S. C. 550), on the ground solely that the alleged contract of insurance, according to the record before this court, antedated the act incorporating the plaintiff. This court, while reversing the judgment below on this point, surmising that there was some error in the pleadings below, gave leave to apply for amendment. In justice to Judge Buchanan, who heard the case, it should be said that the point upon which the case was reversed was not called to his attention or passed on by him. The pleadings having been amended, the case

was again submitted to Judge Buchanan, who held that the charter of the plaintiff and the agreement of insurance create a lien on the property insured and the real property upon which the same is situated, and that the claim of homestead cannot prevail against this lien or its enforcement, and accordingly decreed for sale of the property, or so much as may be necessary to pay the claim, etc. The case was heard upon the facts stated in the complaint and answer, which, with the exhibit, the decree and report of his honor, and the exceptions, will be found in the report of this case. The exceptions raise practically the one question stated at the beginning of this opinion.

We hold with the circuit court on this question. The plaintiff is a mutual insurance association, chartered by the legislature of this state December 18, 1894, with power to "mutually insure the respective dwelling houses, barns, and other buildings of its members of Florence county against loss by fire, wind, or lightning, upon such terms and under such conditions as may be fixed by the by-laws of said corporation." Section 4 of the act of incorporation, incorrectly set out in the complaint, is as follows: "That every member of said corporation shall be, and is hereby, bound to pay his, her, or their portion of all losses and expenses accruing to said corporation; and all buildings and other property insured by and with said corporation, together with the right, title, and interest of the assured to the lands on which such buildings or other property may stand, shall be pledged to the said corporation; and the said corporation shall have a lien thereon against the insured, his or her heirs, representatives, and assigns, during the continuance of their insurance, as to all debts or liabilities contracted or incurred by said corporation subsequent to the passage of this act." When, therefore, a person becomes a member of this association, and enters into the contract of insurance, he voluntarily gives to the corporation the lien upon the dwelling houses, barns, and outbuildings insured, together with the right, title, and interest of the insured to the lands on which such buildings stand. We are not to be understood as ruling that this association has power to insure, and by its charter acquire therefor a lien upon personal property. This question is not before us. Indeed, in the third exception of appellant it is claimed that the charter and contract create a lien, if any, on the personal property only. While the first exception might be strained to cover this question, the question was not made before the circuit court,

nor argued in this court; hence we assume it is not intended to be made.

The question is to be determined by the Constitution of 1868, in force when the contract in question was made. Under that Constitution, it has been often adjudged that the homestead is not an estate, but a mere exemption from attachment and sale under any mesne or final process issued from any court. The title and dominion over the property remaining with the owner, he could alienate or encumber it as he saw fit, consistently with the constitutional or statutory enactment creating the homestead. The Constitution of 1868 placed no limitation on this power. But it is provided in § 2180, Rev. Stat., that "no waiver of the right of homestead, however solemn, made by the head of a family at any time prior to the assignment of the homestead, shall defeat the homestead provided for in this chapter: provided, however, that no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged, either before or after assignment, by any person or persons whomsoever, as against the title or claim of the alienee or mortgagee, or his, her, or their heirs or assigns." It has been held that this act limits the modes of defeating a homestead to those named therein,—alienation or mortgage of the property. *Hendrix v. Seaborn*, 25 S. C. 485, 60 Am. Rep. 520. The mortgage, however, need not be in form a legal mortgage; an equitable mortgage may defeat the homestead allowed by the Constitution and act under consideration. Besides, the "pledge" of the property insured—the "lien" thereon, which is "a tie that binds property to a debt or claim for its satisfaction"—is, in this case, given by the statute, upon the assent of the owner by his becoming a member of the association, and entering into the contract of insurance, designating the property insured and subject to the lien. The express purpose of the act of incorporation was to give a lien on the very property usually included and claimed under homestead exemption—"the dwelling house," etc. The lien created by the statute and contract pursuant thereto is a mortgage in the sense of § 2180, quoted above. It is a voluntary pledge or dedication of specific property, as a security for the satisfaction of an obligation.

We reach this result with all the more satisfaction because the legislation and contract in question are not hostile to the preservation of homesteads, but, on the contrary, are directly designed to afford owners of homesteads, at small expense, mutual protection against the destruction of their homes.

The judgment of the Circuit Court is affirmed

KANSAS SUPREME COURT.

KINGMAN COUNTY COMMISSIONERS,

Piffs. in Err.,

v.

William F. LEONARD.

(.....Kan.....)

"The statutes of this state do not provide for, nor authorize, the assessment and taxation of judgments rendered by the courts of this state in favor of, and owned by, citizens of other states.

(December 5, 1894.)

ERROR to the District Court for Kingman County to review a judgment enjoining the collection of a tax upon plaintiff's interest in a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. John T. Little, Attorney General, and C. W. Fairchild for plaintiffs in error.

Messrs. M. D. Libby and P. B. Gillett, for defendant in error:

All tax certificates, notes, judgments, bonds, and mortgages in this state are subject to taxation as personal property. The *situs* of such property must be "in this state;" but the statute does not mean that tax certificates, notes, judgments, bonds, and mortgages, as such, shall be subject to taxation; the intent and meaning are, that the right, the debt (credit), the thing of value, shall be subject to taxation, if "in this state." "Tax certificates, notes, . . . bonds, and mortgages," as such, are tangible—tangible evidences of the things of value, and as such might be the subjects of taxation (*Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462); but the legislature clearly makes a distinction between the evidence and the things of value thereby represented, as property subject to taxation, for it is said, "the term 'personal property' shall include every tangible thing, etc.; also tax certificates, notes, judgments, bonds, and mortgages, etc.," indicating that the latter things, as property, are intangible, and that the intangible—the debt (credit), is what "shall be subject to taxation, in the manner prescribed by this act," when "in this state."

State v. Earl, 1 Nev. 394; *Desty*, Taxn. 330; *Cooley*, Taxn. 43; *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 530; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-held Bonds"), 82 U. S. 15 Wall. 300-326, 21 L. ed. 179-189; *Murray v. Charleston*, 96 U. S. 432, 445, 24 L. ed. 760, 763; *Arapahoe County Comrs. v. Cutter*, 3 Colo. 349; *Collins v. Miller*, 48 Ga. 336; *Goldgart v. People*, Goar, 106 Ill. 25; *Lanesborough v. Berkshire County Comrs.* 131 Mass. 424; *St. Paul v. Merritt*, 7 Minn. 258; *Thomas v. Mason County Ct.* 4 Bush, 185; *Falkner v. Hunt*, 16 Cal. 167; *People v. Park*, 28 Cal. 189; *Adam v. Litchfield*, 10 Conn. 127; *People v. Eastman*, 25 Cal. 602.

The old maxim, *Mobilia sequuntur personam*,

*Headnote by ALLEN, J.

applies to choses in action in determining a *situs* for taxation.

In the absence of any statutory provision to the contrary this common-law rule would control, and personal property be taxable only where the owner had his domicile.

Griffith v. Carter, 8 Kan. 571; *Swallow v. Thomas*, 15 Kan. 66.

The domicile of the owner determines the *situs* of choses in action ("credits") for the purposes of taxation.

Finch v. York County, 19 Neb. 50, 56 Am. Rep. 741; *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546; *Griffith v. Watson*, 19 Kan. 23; *Ottawa County Comrs. v. Nelson*, 19 Kan. 245, 27 Am. Rep. 101.

The balance of judgment sought to be taxed in this case is not secured by lien on real estate, and being a demand for money it comes within the term "credit" when and where used in the statute.

Brown v. Thomas, 37 Kan. 286.

Then, by the common-law rule, as affirmed by the statutes (§ 6854) and this court, the judgment in the case at bar is not taxable in Kansas, but at the domicile of its owner in the state of Missouri.

A judgment is the decision or sentence of the law pronounced by a court or other competent tribunal in a proceeding therein.

Davidson v. Smith, 1 Biss. 351; *Blaskie v. Griswold*, 10 Wis. 236; *Cooper v. American Cent. Ins. Co.* 8 Colo. 321; *Zeigler v. Vance*, 3 Iowa, 530; *Bouvier*, Law Dict.; *Bl. Com.* 395; *Blood v. Bates*, 31 Vt. 150.

The final determination of a right is not the thing taxed; it is the thing of value, the right itself, which the taxing power reaches for.

If the old maxim, *Mobilia sequuntur personam*, ever applied to intangible property, in the very nature of things it must apply to judgments.

Story, Conf. L. § 378; *Broom*, Legal Maxims, 522; *Black*, Law Dict.; *Kirtland v. Hotchkiss*, 100 U. S. 491-499, 25 L. ed. 558-563; *Cleveland, P. & A. R. Co. v. Pennsylvania* ("State Tax on Foreign-Held Bonds"), 82 U. S. 15 Wall. 300-326, 21 L. ed. 179-189; *Com. v. Cleveland, P. & A. R. Co.* 29 Pa. 370; *Shakespeare v. Fidelity Ins. T. & S. D. Co.* 97 Pa. 178; *Orcutt's Appeal*, 97 Pa. 179; *Commonwealth's Appeal* (Pa.) 14 Rep. 183; *Com. v. Standard Oil Co.* (Pa.) 15 Rep. 59; *Com. v. American Dredging Co.* 123 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221.

By and of itself a judgment for money has no *situs*, no dwelling place on land or sea, but is a mere rule of human conduct finally determined as between living persons and their representatives, and apart from these it has no existence in fact or law.

People v. Eastman, 25 Cal. 603; *Barber v. Farr*, 54 Iowa, 57; *Smith v. Byers*, 43 Ga. 191; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 95.

The creditor who has debts due him from

NOTE.—As to the *situs* of debts evidenced by notes and mortgages for the purpose of taxation, see *Boyd v. Seima* (Ala.) 16 L. R. A. 729.

34 L. R. A.

The present case seems to be a novel one on the subject of taxing judgments.

residents of another state than that of his residence is not taxable in the state of the debtor's residence; the credits, not the debts, are taxable.

Murray v. Charleston, 96 U. S. 432, 445, 24 L. ed. 763; *Arapahoe County Comrs. v. Outter*, 3 Colo. 849; *Collins v. Miller*, 43 Ga. 836 (promissory note); *Goldpart v. People*, *Goar*, 106 Ill. 25; *Lanesborough v. Berkshire County Comrs.*, 181 Mass. 424; *St. Paul v. Merritt*, 7 Minn. 258; *State v. Earl*, 1 Nev. 894.

Allen, J., delivered the opinion of the court:

This action was brought by the defendant in error, as plaintiff below, to enjoin the collection of taxes on the unpaid balance of a judgment in his favor rendered by the district court of Kingman county. This judgment was rendered in an action to recover the amount of a promissory note, and to foreclose a mortgage given to secure the same. The mortgaged property was sold, and, after the application of the proceeds of the sale to the payment of the judgment, there remained a balance; and the balance remaining unpaid was assessed, in the city of Kingman, the county seat of Kingman county, for taxation. The plaintiff is a resident of Missouri. The question presented for our consideration is whether judgments rendered by the courts in this state in favor of nonresident parties are taxable while they remain unsatisfied. There is no claim in this case that the party against whom the judgment was rendered is insolvent, or that the valuation placed on the judgment is excessive. Has the legislature assumed the power to and provided for the taxation of such judgments? Section 1, chap. 107, of the General Statutes of 1889, reads: "Section 1. That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act." In § 2 the term "personal property" is defined as follows: "The term 'personal property' shall include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also, all tax-sale certificates, judgments, notes, bonds and mortgages, and all evidences of debt secured by lien on real estate; also, the capital stock, undivided profits, and all other assets of every company, incorporated or unincorporated, and every share or interest in such stock, profit, or assets, by whatever name the same may be designated; provided, the same is not included in other personal property subject to taxation, or listed as the property of individuals; and also every share or interest in any vessel or boat used in navigating any of the waters within or bordering on this state, whether such vessel or boat shall be within the jurisdiction of the state or elsewhere; and also all 'property' owned, leased, used, occupied, or employed by any railway or telegraph company, or corporation within this state, situate on the right of way of any railway." Section 7 of the same chapter provides where property shall be listed for taxation, and the part of the section material to this inquiry reads as follows: "Every person required to list property in behalf of others shall list such property in the same township, school district, or city in which said property is

located; but he shall list such property separate and apart from his own, specifying the name of the person, estate, company, or corporation, to which the same may belong. All toll bridges shall be listed in the township or ward where the same are located; and if located in two wards or townships, then one half in each of such wards or townships. And all personal property shall be listed and taxed each year in the township, school district, or city in which the property was located on the 1st day of March, but all moneys and credits not pertaining to a business located shall be listed in the township or city in which the owner resided on the 1st day of March." It will be observed that the provisions with reference to what property shall be subject to taxation are very sweeping, and that judgments, as well as other forms of intangible property, are not only included within the general terms used, but are specifically mentioned as included in the term "personal property." Sections 9 and 10 of the act require the owners of property subject to taxation to make lists thereof and § 10a provides that the statement shall set forth the number of the school district or districts in which such property was situated on the 1st day of March. It is ably and earnestly argued that the common-law rule embodied in the maxim, *Mobilia personam sequuntur*, applies with full force in this case, and that the *situs* of the intangible property evidenced by the judgment is at the domicile of the owner, and subject to taxation there only. This rule of law is subject to so many exceptions and limitations that it is quite as liable to mislead as to furnish a correct guide, when considered alone. In the distribution of the estates of deceased persons, it is generally, if not universally, given full force and effect, both as to tangible and intangible property; and, from comity, nations foreign to each other generally recognize the law of the place of the owner's domicile as controlling in the distribution of the personal estate of the deceased owner. To questions of taxation the maxim has very little application. Every sovereignty asserts the right to levy taxes on persons and property within its protection, and the ground on which all taxation is justified is that it is a burden necessarily imposed by the sovereignty in order to enable it to perform its duty in protecting persons and property. 1 Desty, Taxn. 59; Cooley, Taxn. 19 *et seq.*; Story, Conf. L. 548, note A, and cases cited. We think it now quite well settled that choses in action belonging to a nonresident, in the hands of a managing agent within the state, are taxable. *New Albany v. Meekin*, 56 Am. Dec. 522, note page 580, and cases therein cited; 1 Desty, Taxn. 64; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741. The power to tax residents of the state on credits due from citizens of other states is often upheld. *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546. And this even where it results in duplicate taxation. *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 400; note to *People v. Worthington*, 74 Am. Dec. 85, and cases cited. The cases upholding the power to tax promissory notes and other written securities held within the state, though owned by a nonresident, sometimes lay stress on the fact that the securities

are, in a certain sense, property, and are subject to seizure for debt, and that a title may be made to the intangible debt by delivery of the written evidence of it.

We perceive no valid objection to the power of the legislature to tax all judgments by domestic courts, and remaining unsatisfied, whether owned by citizens of this state, or other states, or foreign countries, provided the rate of taxation be the same as that imposed on other forms of property belonging to citizens of this state. The question here, however, is whether the legislature has expressed a purpose to tax judgments in favor of a citizen of another state, rather than as to the power to do so. Judgments are included, by the express provision of § 2, in the term "personal property." Does this mean judgments owned by citizens of this state, or those rendered by courts within the state, without reference to ownership? In answering this question, some weight, at least, should be given to the rule that credits are generally regarded as residing with the creditor. The case of *Fisher v. Rush County Comrs.* 19 Kan. 414, is an extreme one, and has been criticised. A resident of this state may undoubtedly be taxed on moneys due him from citizens of other states, and this would be equally true after the claim is reduced to judgment in a foreign jurisdiction. Under the provisions of § 7, where the owner of a domestic judgment resides in this state, it seems clear that it must be taxed at the place of his residence, provided it does not pertain to a business located at some other place. Where the owner is a nonresident, if taxed at all, it

must be taxed in the township, school district, or city in which it is located; and, to be taxable, it must be held to have a *situs* of its own. The authorities with reference to the *situs* of a judgment are not numerous, and no case is called to our attention where the precise point now under consideration has been decided in an action where the owner of the judgment resided out of the state. But, in cases where the owner resided in the state, it has been held that the *situs* of the judgment for purposes of taxation is at the residence of the judgment creditor. *Meyer v. Pleasant*, 41 La. Ann. 645; *People v. Eastman*, 25 Cal. 601.

When this case was first considered, the writer was strongly inclined to the opinion that a judgment should be held to have a *situs* of its own at the place where the record of the court rendering it is kept; but it seems quite clear that, if the owner be a resident of the state, the *situs* is with him, at his place of residence, and there is no purpose expressed by the legislature to give judgments in favor of nonresidents a *situs* for the purpose of taxation. If the legislature wishes to change the rule, and establish a *situs* for taxation for all judgments rendered by the courts of this state, it ought to employ language expressive of its purpose to do so. The natural implication from the language in fact employed would seem to be that, as to the *situs* of credits for taxation, the rules generally recognized were intended to be followed.

The judgment is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

S. T. McLAUGHLIN, *Appt.*,

v.

LOUISVILLE ELECTRIC-LIGHT COMPANY.

(.....Ky.....)

1. A stockholder in a corporation which owns stock in another company is disqualified to act as juror in an action against the latter company.
2. The utmost care is necessary to keep the insulation of dangerous electric wires perfect at a place where people have a right to go to work, business, or pleasure, although very great care may be sufficient as to wires at other places.
3. The apparently proper insulation of electric-light wires on the side of a building is an invitation or inducement to persons painting the building to risk the consequences of contact with them, especially in the middle of the day.
4. The fact that the insulation of dangerous electric wires is very expensive or inconvenient is no excuse for failure to make such insulation perfect at points where

NOTE.—For negligence as to electric light wires in or on buildings, see *Griffin v. United Electric Light Co.* (Mass.) 32 L. R. A. 400, and note.
34 L. R. A.

people have the right to go for work, business, or pleasure.

5. A man who comes in contact with an electric-light wire on the side of a building while climbing out of a window upon a cornice while at work painting the building is not guilty of contributory negligence, unless in so doing he fails to exercise the degree of care which ordinarily careful and prudent persons usually exercise under such circumstances.

(November 25, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for personal injuries caused by contact with an improperly insulated electric wire belonging to defendant. *Reversed.*

The facts are stated in the opinion.

Mr. Junius C. Klein for appellant.

Messrs. Gibson & Marshall, O'Neal, Phelps, & Pryor, and Phelps & Thum for appellee.

Guffy, J., delivered the opinion of the court:

It is alleged in the petition in this action that "the plaintiff is and was on the 8th day of

July, 1893, a painter by trade, and followed the same for a livelihood, and was on the 8th day of July, 1893, engaged in painting a house on the east side of Fourth street, in the said city of Louisville, between Market and Main streets, and numbered —; that on said 8th day of July, 1893, and long prior thereto, the defendant, its agents and servants, had erected and maintained one of its electric wires, charged with electricity, on the side of said house facing Fourth street; that the said wire, on the 8th day of July, and long prior thereto, was insufficiently, carelessly, and negligently insulated, and that defendant, its agents and servants, were well aware of said want of insulation, or could have been aware of same by the exercise of proper diligence; that plaintiff on said 8th day of July, 1893, while in the discharge of his duties as painter aforesaid, and without fault on his part, came in contact with said wire, which at the said time was heavily charged with electricity by the defendant, its agents and servants, whereby he was severely shocked and rendered insensible, and that he remained insensible and unconscious for twenty minutes and more; that he suffered severe pain, both physically and mentally, by reason of said shock, and that the flesh on his left hand was burnt and blistered to such an extent as to render said hand useless, and that ever since and now said plaintiff is unable to use said hand in the performance of his vocation as a painter; that plaintiff is rendered less able thereby to make a living at his trade as a painter; that the said injuries received by the said plaintiff are permanent, and that his entire nervous system, by reason of said shock, is unbalanced, causing plaintiff much and severe pain; that the said injuries complained of herein were caused wholly by the gross negligence of the defendant, its agents and servants; that the plaintiff had been damaged by reason of said injuries in the sum of \$2,500. Wherefore the plaintiff prays judgment against the defendant for the sum of \$2,500, and for his costs, and for all proper relief." The defendant filed a demurrer to the petition, which was overruled by the court. The first paragraph of the answer substantially denies all the averments in the petition which show any right to recover. The second paragraph of the answer is as follows: "Further answering, this defendant says that the injuries received by the plaintiff, and set forth in the petition, were received wholly and entirely because of his want of proper care and caution in looking out for his own safety, and by reason of his carelessness in coming in contact with an electric light wire, which he knew, or by the exercise of ordinary care for his own safety could have known. Was then and there charged with a current of electricity, making it dangerous to life for anyone to come in contact with the said wire. Defendant says that, by the exercise of ordinary care for his own safety, and such as circumstances and surroundings made it apparent was necessary, the plaintiff could have avoided coming in contact with the said wire, and could have escaped all injury therefrom. Defendant says that plaintiff came into contact with said wires by failing to exercise that degree of care which he knew or ought to have

known under the circumstances was necessary to be exercised by him to avoid injury from said wire. Wherefore, having answered, defendant prays to be dismissed. The reply of plaintiff traversed the allegations of the answer. The jury found for the defendant, and his petition was dismissed. Appellant relied on these grounds for a new trial, *viz.*: That the court erred in refusing to instruct the jury as requested by plaintiff in instructions Nos. 1, 2, 8, 8, and 9; (2) that the verdict of the jury is not sustained by sufficient evidence; (3) that the court erred in not excusing a juror, William Fryatt, for cause, he being a stockholder in the Louisville Gas Company, and it being the owner of stock in the defendant company. The motion for a new trial was overruled, and plaintiff has appealed.

The plaintiff below (appellant here) testified in substance as follows: "S. T. McLaughlin testified: That he was twenty-two years of age, and a house painter by trade; was a contractor in that line, and had a job in conjunction with Asa Carr of painting the front of H. C. Green's hotel, known as the 'Fourth Avenue Hotel,' and had almost finished the work, on the 8th day of July, 1893, when he came in contact with one of the defendant's electric wires, near the side of a window, and received a shock. That defendant had two wires running from the west side of Fourth street in Louisville, Kentucky. That these two wires were fastened to brackets attached to the side of the wall between the first and second windows of the hotel, counting from the north. These windows were on the second floor of the building. The first floor was occupied by business firms. That these brackets were fastened to the wall about 6 inches from each window, and about 5 feet above the sill of the windows. That defendant had an iron box, called a 'converter,' attached to the side of the hotel building, midway between these two windows. That this box was about a foot above an iron cornice running the full length of the building, immediately below the windows, about 6 inches below. That these two wires ran from the brackets to the top of this converter or box. That plaintiff was shocked by the wire next to the north side of the second window, at a place where the wire was joined together, and about half way between the bracket and the converter. That this wire ran down from its bracket along the side of the window, and 6 inches from the window, for about 2 feet, and then turned over north to the converter. That the iron cornice was about 12 inches wide; space enough for a man to stand on conveniently, and paint. That he and his men had used the cornice to work from, as there were wires preventing the staging or swinging ladder from being let down between them. When he had painted down to the bracket and wires, he pulled the staging up, out of the way, and painted around the wires and the iron box, while standing on the iron cornice. The window sill was outside about 5 inches by 5 inches, and rested on the iron cornice inside of the wood about a foot wide. That he had put several coats of paint on the house, and was through, with the exception of touching up the right hind ear of the iron box. That he was in the act of get-

ting out of this second window on the cornice, to touch up this ear, when he received the shock. That he had taken his brush full of paint in his right hand, and nothing in his left, and was on the sill of the window, turning back out onto the cornice, when he used his left hand to steady himself against the north side of the window opening, when his hand came in contact with the wire, and he received the shock which rendered him unconscious, and he did not know anything more for about a half an hour, when he was revived and found himself inside of the house, with Asa Carr, W. J. Cody, his employee, and Mr. H. C. Green, working with him to revive him. That his left hand was burnt and blistered on the 3d and 4th fingers, and at the edge of the palm, at base of small finger. That he suffered a great deal at the time of the shock and long afterwards. That he went home and went to bed for a week. That he has never fully recovered the full use of his left arm and hand. That he has not been able to work at his trade or calling on account of the weakness of his hand. That he cannot properly handle the brush and ropes. That in his trade it requires strong hands and arms to hoist and lower himself on the staging. That he has not had any work at his trade at all. That he did and is working as a hand on the steamer —, plying between Louisville and Cincinnati; and has worked about two months. That there was no sign or anything else to warn him of a danger about or near those wires." On cross-examination, said S. T. McLaughlin testified: That no one warned him at any time about those wires. That he did not know Squire Green, but did know Mr. Green, proprietor of the hotel. That Squire Green did not tell him to keep away from those wires. Did not see Squire Green around the building the day before the accident. Squire Green did not offer to cut the wires if he wanted it done. Nor did he tell Squire Green that he could get along without the wires being cut. That no one told him that the wires were alive or dangerous. That he knew that electric wires were dangerous, but that he had been working around the wires all week, and all seemed to be insulated, and yet he was not hurt. That he did not know electricity was turned on. That it was about noon of the 8th day of July, 1893, when he was hurt. That he saw no lights about the building. That he came up to the office of the defendant one Sunday night; whether first Sunday after the accident or not he did not remember. Was there because Mr. Smith had sent for him. Did not tell Mr. Smith or anyone else that he was not hurt, or was scared more than hurt, and did tell him then and there that he was hurt, and showed him his hand, and pointed out the places where it was burned. That he did not meet Squire Green every other Sunday on Third and Jefferson streets. Witness then showed his hand to the jury, pointing out the only indication of the burn at edge of palm. That what appeared to be a wart there was not a wart. It was not there when he was shocked. It came there afterwards, when it healed up.

William J. Cody testified: "Was working there on the 8th day of July, 1893, the day on which Sam McLaughlin was hurt. That he

was standing on the first window, inside of same, stirring some paint. The work of painting the building was finished with the exception of a little space below the second window sill, and one of the ears of the iron box on the side of the house between the first and second windows. That McLaughlin got his brush full of paint, and was going out to paint this ear; and, while I was at the first window, he started to get out of the second window, with his brush in his right hand. Had nothing left in his left. He had hardly gotten into the window opening when I heard a groan, followed immediately by a second one, and I then leaned out of the window, and looked in the direction of the groans, and saw McLaughlin have hold of the electric wire between this iron box and a bracket right on the joint of the wire. I quickly ran to the second window, put my arm between him and the north side of the window out around his body, then reached over his head, and took hold of the wrist of his left hand, and jerked it loose from the wire, and lifted him into the building, and laid him down on the floor. About that time Asa Carr came into the room, and then Mr. Green, of the hotel. We all rubbed him, walked him, and slapped him for fully twenty minutes before he was revived. At the time I pulled his hand loose from the wire, I received a shock myself, but not enough to hurt me. McLaughlin, when I reached him, was doubled up partly on the window sill, and one leg out on the iron cornice below the window. He suffered a great deal; was unconscious for fully twenty minutes. Examined the joint he had hold of immediately after we had got him to himself. Found the joint very loose and rotten. One end of the stuff used in wrapping it was hanging down about 2 inches. The wires all seemed to be covered with insulation. The place McLaughlin had hold of this wire was very near the north edge of the north side of the second window. The bracket to which it was fastened was within 6 inches of the edge of the window. These windows were about 3 feet apart. The sills were of wood and stone. The stone was 5 inches wide and thick, and rested on an iron cornice, running above the storerooms on the first floor. This iron box or converter was placed against the wall between the first and second windows in the middle, and about a foot above the iron cornice. This wire entered at the top of the box at the side. The wires come from across the street, from the west side, and run over to these brackets, and then down to the box. Whenever we had painted to the top down to these wires, we pulled the staging up out of the way, and stood on this iron cornice, and painted from there. The cornice is 12 inches wide. Had worked around the very same wire several times. Had experienced no shock, nor did he notice anything wrong with the wire. All seemed insulated. Did not remember seeing Squire Green around there. Did not hear him or anyone else warn McLaughlin to beware of the wires. Nothing was said about the wires being dangerous." Other witnesses testified as to the injury.

John F. Bunscomb testified as follows: "John F. Bunscomb testified that he is an electrician. Have run similar plants to that of

defendant. Knows the defendant's plant well, and its power. Formerly an employee, when the defendant was on Third street, several years ago. Electric wires are always insulated; that is, covered with a material that is a nonconductor. This is done to prevent a waste of power, and for safety. There are different grades of insulation. The insulation is put on at the factory. Whenever it is desired to join two ends of different wires, the ends are scraped of all insulation. The clean ends are then twisted around each other closely, in order to make close connection. After, the joint is then soldered together. This makes a perfect connection. Then, to protect this joint, it is wrapped usually with a rubber tape about an inch wide, putting on five layers, which is considered by the underwriters as a sufficient insulation. This rubber tape adheres to itself, and, if pressed and wrapped on tightly, it will not come off easily. This is the method of wrapping joints in high tension wires, which is the character of defendant's electric wires. These joints, as well as the regular insulation on the wires, is apt to rot and wear off. The action of weather has something to do with this. The rubber will rot in time, and, in case a layer or two is thus rotten, it will more easily catch moisture, which renders the joint dangerous. All wires are more or less dangerous when wet, as in raining weather; and if, in such case, a good ground was had, I would not risk any of them. Iron cornice as usually used above stone buildings forms an excellent conductor, and standing on it, and holding a wire charged with electricity of high tension, even though insulated and in dry weather, is risky; also, most certainly so, in bad weather. Stone is not a good conductor as iron in wet weather. Using it instead of iron, I would not risk it. There is absolutely no perfect insulation except at a great cost, which prevents it being used extensively. All insulation is affected by the changes in the weather. Rubber, for instance, gets wet, and then it is dried by the sun. This soon wears it out. If a joint has on it less than five layers of wrapping, it is just as much or more apt to be dangerous. The smallest pinhole is sufficient to let the electricity of these high-tension wires escape in force enough to be fatal. If a joint is wrapped loosely, it will catch the rain and moisture, and rot sooner than if wrapped tightly and evenly. A joint with an end of the wrapping hanging down a couple of inches would be considered dangerous. The iron box referred to is a converter. It reduces the force of the current. The wires entering the converter are called the 'primary wires,' and those leaving the box the 'secondary wires,' which are not dangerous because they carry a light current; otherwise, if a heavy current, it would burn out the lamps. The full power or volt of the plant is used on those arc lights we see on the streets, and only a small part is used for lights inside the stores and residences. Have seen men apparently receive two thousand volts of electricity without serious results. The amount taken, though, is mostly guesswork. So many conditions enter into the estimation of the amount actually received. Some men seem to be able to stand more than others. Would not tempt even the

best of insulation if I was standing on a good conductor, especially in wet weather."

At the conclusion of plaintiff's testimony, the defendant asked the court to instruct the jury to find for defendant, which motion was overruled by the court. The testimony of defendant conducted to show that the defendant had used reasonable care, and that plaintiff was not severely injured. It also contends that plaintiff was guilty of contributory negligence.

The following are the instructions offered by plaintiff, and refused by the court: "No. 1. The court instructs the jury that it is the duty of the defendant, the Louisville Electric Light Company, to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they shall believe from the evidence that the said company failed to so insulate or protect the wire with which S. T. McLaughlin came in contact, and that his injuries were caused by the reason of such failure, then the law is for the plaintiff, and they shall so find, unless they shall further believe from the evidence that the said S. T. McLaughlin, by his own negligence, contributed to cause his injuries, and that he would not have been injured but for his contributory negligence, if any there was. No. 2. If the jury shall believe from the evidence that S. T. McLaughlin came in contact with said wire while in the act of climbing out of said window, and that the said wire was not so insulated or protected as to be free from danger to him, and that his injuries were caused thereby, they ought not to find him guilty of contributory negligence, unless, in so doing, he failed to exercise that degree of care which ordinarily careful and prudent persons usually exercise under the same or similar circumstances. No. 3. That the injury to the plaintiff is conclusive proof of the defective insulation of the said wire, and of negligence of the defendant." "No. 5. Contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from injury, and, by reason of such failure, helped to cause or bring about the injury complained of." "No. 8. That if they believe from the evidence that the said wire had all the appearances of having been properly insulated at the time the plaintiff received his injuries, that this was then an invitation or inducement to plaintiff to risk the consequences of contact with same, in the performance of his work in painting the house to which said wire was attached. No. 9. That, if the jury believe from the evidence that the plaintiff was not cautioned especially as to the dangerous condition of said wire before the accident occurred, then they are not to find him guilty of contributory negligence." The instructions given are as follows: "No. 1. The court instructs the jury that it was the duty of the defendant, the Louisville Electric Light Company, to so insulate or protect its wires at places where they may be dangerous to human life, as to make them reasonably free from danger to persons who may come in contact with them; and if they shall believe from the evidence that the wire with which the plaintiff

came in contact was not insulated or protected at the point where he caught it, and that he received the injuries of which he complained because thereof, then the law is for the plaintiff, and they shall so find, unless they shall further believe from the evidence that he contributed to cause his injury by his own negligence, and that he would not have been injured but for his contributory negligence, if any there was. No. 2. But unless they shall believe from the evidence that the defendant's wire at that point mentioned in instruction No. 1 was not so insulated or protected as to make it reasonably free from danger, and that the plaintiff was injured thereby, the law is for the defendant, and they should find. No. 3. Or if they shall believe from the evidence that the plaintiff was negligent, and thereby contributed to cause the injury of which he complained, and that he would not have been injured but for his contributory negligence, if any there was, then the law is for the defendant, and they should so find. No. 4. If the jury find for the plaintiff, they should award him such a sum in damages as they may believe from the evidence would fairly compensate him for the mental and physical sufferings endured by him by reason of his injuries, and for loss of time and capacity to earn money at his trade and occupation. If they shall find from the evidence that the injuries of S. T. McLaughlin were caused by the negligence of defendant, and shall further believe from the evidence that the negligence, if any there was, was gross, then they may, in their discretion, award him such a further or additional sum as punitive damages as they may deem right and proper, under the evidence and these instructions, not exceeding in all the sum claimed in the petition. Gross negligence means the absence of slight care. No. 5. Ordinary care means that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances. Negligence means the failure to observe ordinary care. No. 6. Contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from harm, and, by reason of such failure, helped or caused to bring about the injury complained of." To the giving of instructions Nos. 1 and 2, the plaintiff excepted.

The demurrer to the petition was properly overruled, as was also the motion for instruction to the jury to find for the defendant. It also seems to us that William Pryott had a disqualifying interest in the action, and should have been excused for cause. But by far the most important question involved is the law applicable to the case. Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public, nor is its presence easily ascertained or determined. Its use for private gain is very extensive, and becoming more and more so. The daily avocation of many thousands, of necessity, brings them near to the subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a

death-dealing force. In the case of *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 695 et seq., 16 L. R. A. 48, the court said: "The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that, in so doing, he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not latent, defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact there was no apparent danger. . . . It cannot be said that, when Clements went on the roof to repair it, he went into the presence of known danger, and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless. It was only a remote danger, which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances, the only indication of performed duty to which Clements' attention could be fixed, were guarantees that the defendant company had done its duty. These appearances assured him that in the performance of his work in sweeping the roof, it was not dangerous for him to risk going over or under the wire. *Bomar v. Louisiana North & South R. Co.* 42 La. Ann. 983. Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed. From the appearances of the wire, its wrappings with insulated tape, and the known duty of the defendant to protect the insulation at this particular splice or joint, Clements had no reason to anticipate danger except from the fault of the defendant company. This fault was the cause of his death, and his act in passing under or over the wires was too remote to give it the character of contributory

negligence." The case of *Haynes v. Raleigh Gas Co.* 114 N. C. 211, 26 L. R. A. 810, was an action to recover for death caused by a boy taking hold of a live broken wire that was in the street. We quote from the decision of the court as follows: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such case is likely to result in great bodily harm, and sometimes death to those who are compelled to use that means of conveyance, 'as the result of the least negligence may be of so fatal a nature the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents.' Ray, *Negligence of Imposed Duties*, p. 58. All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not fall or break, unless subjected to some strain that could not be anticipated; and it can as readily prevent the possibility under ordinary circumstances of the contact of wires that should not be allowed to touch one another."

The evidence in this case conduces to show,

that appellant was at work at his regular trade, and was where he had a right to be, and the joint of the wire, being apparently insulated, was to some extent, at least, a guaranty that there was no danger; but, independent of that fact, the situation of appellant, his work in hand, and the proximity of the wire, were such that he might without negligence have thoughtlessly taken hold of the wire, because he seemed to need support; and, besides, it was hardly to be expected that the current was on the wire at about noon, the wire being used wholly to supply incandescent lights or lamps. It seems clear to us that appellee should have been required to have had perfect protection on its wires at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points remote from public pass-ways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business, or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so. Instructions Nos. 1, 2, 8, 5, and 8, asked by appellant, should have been given. The others refused were not important, and tended to draw attention to particular facts or evidence. Such instructions are not favored in law. It results from the foregoing views that the court erred in giving instructions Nos. 1 and 2, marked as given. The other instructions given by the court were not excepted to; hence need not be discussed.

For the errors indicated, *the judgment below is reversed*, and cause remanded, with directions to set aside the verdict and judgment, and for a new trial upon principles consistent with this opinion.

WASHINGTON SUPREME COURT.

Thomas LANCEY *et al.*, *Appts.*,

v.

KING COUNTY *et al.*, *Rspts.*

(25 Wash. 2.)

1. Provisions concerning the condemnation and disposal of land by counties in relation to public improvements undertaken by the state or the United States are sufficiently covered by a title "An Act to Grant to and Prescribe Powers of Counties Relative to Public Works Undertaken or Proposed by the State or the United States."

2. A prohibition of county aid to any individual, association, company, or corporation does not apply to such aid to the state or United States.

3. A prohibition against county indebtedness for any other than strictly county pur-

poses will not prevent indebtedness for a public canal through the county to connect two large public waterways with the ocean.

4. That title to a public improvement when it is completed is to be conveyed to the United States will not prevent the state from exercising its power of eminent domain to acquire the necessary land upon which to construct it.

(June 18, 1893.)

A PPEAL by plaintiffs from a judgment of the Superior Court for King County in favor of defendants in a proceeding to enjoin defendants from making a certain public improvement under an act of the legislature. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to what will constitute a public purpose for which public money may be used, see *note* to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474.

34 L. R. A.

As to the right of a foreign corporation to take property by eminent domain, see *note* to *Lancaster v. Amsterdam Improv. Co.* (N. Y.) 24 L. R. A. 327.

Mr. C. W. Turner, for appellants:
No bill shall embrace more than one subject,
and that shall be expressed in the title.

Const. art. 1, § 19. This is mandatory.

The act of the legislature in question violates this provision of the Constitution, because it embraces more than one subject and not one of the real subjects of it is expressed in the title.

Woolf v. Taylor, 98 Ala. 254; *State, Standish v. Nomland*, 8 N. D. 427; *Quinn v. Cumberland County*, 162 Pa. 55; *State, Ives v. Kansas City*, 50 Kan. 508; *Grand Rapids v. Burlingame*, 93 Mich. 469; *Davies v. Saginaw County Supers.* 89 Mich. 295; *Montgomery v. State*, 88 Ala. 141; *People, Longenecker v. Nelson*, 133 Ill. 568; *State v. Brown*, 79 Ga. 824; *Astor v. Arcade R. Co.* 113 N. Y. 93, 2 L. R. A. 789; *People, Seeley v. Hall*, 8 Colo. 485; *Henderson v. London & L. Ins. Co.* 185 Ind. 23, 20 L. R. A. 827; *Thomas v. Wabash, St. L. & P. R. Co.* 40 Fed. Rep. 126, 7 L. R. A. 145; *Davis v. State*, 61 Am. Dec. 381, and note and cases cited therein at pp. 342-346; *People v. Parks*, 58 Cal. 624; *Ryerson v. Utley*, 16 Mich. 269; *Cooley, Const. Lim.* 4th ed. pp. 147-151.

The statute under consideration provides that the expenses to be incurred in acquiring the property, etc., mentioned therein for the United States, shall be defrayed through the taxing power of the state, and that therefore such power shall be exercised by one sovereign for the benefit of another, at the sole cost of the taxpayers of one county. This is not the "public purpose" for which the state can lay taxes.

Cooley, Taxn. 2d ed. pp. 4, 55, 108-110, 113, 140-142, and note, 143-145, 688, *et seq.*; 1 *Desty, Taxn.* pp. 14, 17, 25, 26 (embracing §§ 8, 9); *Taxation and Eminent Domain Distinguished*, Id. § 2; *Restriction on Legislative Power*, Id. p. 272; *Purpose must be Local*, Id. pp. 274, 283-287.

The statute objected to authorizes the exercise of the state's eminent domain for the use and benefit of the United States, which is beyond the power of any state to do.

People, Twombly v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *New Orleans v. United States*, 35 U. S. 10 Pet. 723, 9 L. ed. 597; *Dickey v. Maysville, W. P. & L. Turnp. Road Co.* 7 Dana, 113; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 429, 4 L. ed. 607; *Darlington v. United States*, 82 Pa. 382, 22 Am. Rep. 766.

Messrs. A. W. Hastie, R. S. Greene, and Thomas Burke, for respondents:

The judiciary will not interfere to avoid legislative action except in cases where the violation of constitutional inhibitions is most clear.

Sutherland, Stat. Constr. § 92; *Montclair Twp. v. Ramsdell*, 107 U. S. 155, 27 L. ed. 433; *State, McCarty v. Montgomery County Comrs.* 26 Ind. 522; *People, Rochester v. Briggs*, 50 N. Y. 553.

The Constitution does not prescribe the terms in which the subject of a bill shall be set out in its title. It will be sufficient if the subject of the act is so expressed in the title as to indicate to all what that subject is, or to call attention thereto.

Allegheny County Home's Case, 77 Pa. 77; *Johnson v. People*, 83 Ill. 436; *Sun Mut. Ins.* 34 L. R. A.

Co. v. New York, 8 N. Y. 252; *Marston v. Humes*, 8 Wash. 276; *Illinois v. Illinois C. R. Co.* 33 Fed. Rep. 766; 1 *Dill. Mun. Corp.* 4th ed. § 51.

The provisions of the act, as described in its different sections, are not incongruous, but, on the contrary, have an intimate connection and relation to each other.

State, Weir v. Davis County Judge, 2 Iowa, 280; *Clinton Twp. v. Draper*, 14 Ind. 295; *Wishmier v. State, Dickey*, 97 Ind. 160; *Brester v. Syracuse*, 19 N. Y. 116; *Woodson v. Murdock*, 89 U. S. 22 Wall. 351, 22 L. ed. 716; *San Antonio v. Mehaffy*, 96 U. S. 315, 24 L. ed. 817; *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431; *Otoe County v. Baldwin*, 111 U. S. 1, 28 L. ed. 331; *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. ed. 982; *Carver County v. Sinton*, 120 U. S. 517, 30 L. ed. 701; *People, Badger v. Loewenthal*, 93 Ill. 191; *Blake v. People*, 109 Ill. 504; *Miz v. Illinois C. R. Co.* 116 Ill. 502; *Phillips v. Covington & C. Bridge Co.* 2 Met. (Ky.) 219; *State v. Bank of Missouri*, 45 Mo. 528; *Morford v. Unger*, 8 Iowa, 82; *Whiting v. Mount Pleasant*, 11 Iowa, 482; *Reed v. State*, 12 Ind. 641; *Sutherland, Stat. Constr.* § 8; *Sedgw. Stat. & Const. L.* 2d ed. p. 520, note; *Yesler v. Seattle*, 1 Wash. 308; *Gauch v. Davis*, 1 Wash. 290; *State v. Spokane Falls*, 2 Wash. 40; *Marston v. Humes*, 8 Wash. 267; *Maling v. Crumney*, 5 Wash. 222; *Seymour v. Tacoma*, 6 Wash. 138; *McMaster v. Advance Thrasher Co.* 10 Wash. 147.

The proposed improvement is a public improvement; and, being such, is a public purpose for which debt can be incurred or taxes levied either by the state or one of its municipal subdivisions.

Cooley, Taxn. 2d ed. 130-182; 1 *Dill. Mun. Corp.* 4th ed. §§ 153, 158, 508; *Sedgw. Stat. & Const. L.* 2d ed. 429, note; *Burroughs, Taxn.* §§ 15, 25; *Thomas v. Leland*, 24 Wend. 65; *Philadelphia v. Field*, 58 Pa. 320; *Henson v. Albany*, 24 Barb. 248; *Clarke v. Rochester*, Id. 446; *People, Doty v. Henshaw*, 61 Barb. 409; *Leavenworth County Comrs. v. Miller*, 7 Kan. 479, 12 Am. Rep. 426; *Pattison v. Yuba County Supers.* 13 Cal. 179; *Stockton & F. R. Co. v. Stockton*, 41 Cal. 147; *Stewart v. Pitkin County Supers.* 30 Iowa, 9; *Bonfield v. Edgewell*, 32 Iowa, 149; *Thompson v. Lee County*, 70 U. S. 8 Wall. 827, 18 L. ed. 177; *Knox County Comrs. v. Aspinwall*, 62 U. S. 21 How. 539, 16 L. ed. 208; *Amey v. Allegheny City*, 65 U. S. 24 How. 364, 16 L. ed. 614; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 539; *Mercer County v. Hackett*, 68 U. S. 1 Wall. 83, 17 L. ed. 549; *Myer v. Muscatine*, 68 U. S. 1 Wall. 384, 17 L. ed. 564; *Chicago, B. & Q. R. Co. v. Otoe County*, 83 U. S. 16 Wall. 674, 21 L. ed. 380; *Butler v. Dunham*, 27 Ill. 474; *Northern P. R. Co. v. Roberts*, 42 Fed. Rep. 734; *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873; *Sharpless v. Philadelphia*, 21 Pa. 171, 59 Am. Dec. 759; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; 1 *Desty, Taxn.* §§ 8, 59; *Stockton v. Powell*, 29 Fla. 1, 15 L. R. A. 42.

The canal in this instance is a county purpose.

Goddin v. Crump, 8 Leigh, 120; *Taylor v. Neuberger Comrs.* 2 Jones, Eq. 141, 64 Am. Dec. 566; *Nichol v. Nashville*, 9 Humph. 532; *Lar-*

brouck v. Milwaukee, 18 Wis. 42, 80 Am. Dec. 718; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Atlantic Trust Co. v. Darlington*, 68 Fed. Rep. 76; *State, Atty. Gen., v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729; *Folsom v. Township Ninety-Six* ("Folsom v. Ninety-Six") 159 U. S. 611, 40 L. ed. 278; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99; *Burr v. Carbondale*, 76 Ill. 455; *Marks v. Purdue University*, 37 Ind. 155; *Gordon v. Cornes*, 47 N. Y. 608; *Merrick v. Amherst*, 12 Allen, 500.

The question of what is a public purpose is for the legislature to determine in the first instance.

Cooley, Const. Lim. 5th ed. p. 604; *Brodhead v. Milwaukee*, 19 Wis. 658, 88 Am. Dec. 711; *Speer v. Blairsville School Directors*, 50 Pa. 150; *Schenley v. Allegheny*, 25 Pa. 128.

Admitting, for the present, the assumption that the intent of this act is to provide that the state should vicariously exercise its right of eminent domain in behalf of the United States, the weight of authority and the better reasoning are in support of that right.

Gilmer v. Lime Point, 18 Cal. 258; *Lewis, Em. Dom. § 1*; *Burt v. Merchants' Ins. Co.* 106 Mass. 868, 8 Am. Rep. 339.

It cannot be successfully claimed that a ship canal within the borders of the state is not a public use to the people of that state.

Lewis, Em. Dom. § 170; *Mills, Em. Dom. § 14*; *Cooley, Const. Lim. 5th ed. 659*; *Sedgw. Stat. & Const. L. 2d ed. 449*, note; *Cheapecke & O. Canal Co. v. Key*, 3 Cranch, C. C. 599; *Willard v. Hamilton*, 7 Ohio St. pt. 2, p. 111, 30 Am. Dec. 195.

Assuming, then, that the object to be accomplished is a public use, the question of the necessity of exercising the power arises. The decision of this question is legislative and not judicial.

Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 406, 25 L. ed. 207; *Story, Const. Lim. 5th ed. 653*; *Lewis, Em. Dom. § 238*; *Mills, Em. Dom. § 11*.

The use being public and its necessity declared, the agency by or through which the state proceeds to the fulfillment of the use and the accomplishment of that end lies in the judgment of the legislature.

Cooley, Const. Lim. 5th ed. 666; *Morris Canal & Bkg. Co. v. Townsend*, 24 Barb. 658; *New York & E. R. Co. v. Young*, 33 Pa. 175; *Abbott v. New York & N. E. R. Co.* 145 Mass. 450; *Re Townsend*, 89 N. Y. 171; *Harris v. Elliott*, 35 U. S. 10 Pet. 25, 9 L. ed. 338, and cases cited below.

The state has a general right to condemn land to public use; she may select her own agent to accomplish this public end, she has selected the United States as such agent; the government is capable of undertaking the trust and receiving title; this public use is a use to the state; neither the Constitution of the state nor that of the United States forbids the Federal government from taking or the state from granting this right; and the rights and interests of the citizens are as fully protected as if the state took the land for her own peculiar purposes.

Gilmer v. Lime Point, 18 Cal. 258; *United States v. Dumplin Island*, 1 Barb. 24; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Burt* 34 L. R. A.

v. Merchants' Ins. Co. 106 Mass. 856, 8 Am. Rep. 339; *Orr v. Quimby*, 54 N. H. 590; *United States v. Reed*, 56 Mo. 585; *Re United States*, 96 N. Y. 237.

It is not the intention of the act to exercise the right of the state for the use and benefit of the United States.

Vast works of the character indicated may be beyond the present ability of the county to prosecute, but that should be no good reason for refusing to permit it to receive aid from, and so far as it can to extend help to, the Federal government, when that government moves in a matter in which the county is so vitally interested.

Re United States, supra; *Cooley, Const. Lim. 5th ed. 525*; *Gilmer v. Lime Point*, 18 Cal. 229; *Burt v. Merchants' Ins. Co.* 106 Mass. 856, 8 Am. Rep. 339; *People, Twombly, v. Humphrey*, 23 Mich. 481, 9 Am. Rep. 94; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Darlington v. United States*, 82 Pa. 382, 22 Am. Rep. 766.

Scott, J., delivered the opinion of the court:

This action was brought to enjoin the respondents, as county officers, from proceeding under an act of the legislature approved February 12, 1895 (Laws 1895, p. 3), entitled "An Act to Grant to and Prescribe Powers of Counties Relative to Public Works Undertaken or Proposed by the State of Washington, or the United States, and Declaring an Emergency" to condemn land for a right of way for a ship canal to connect lakes Union and Washington, in King county, with the waters of Puget sound, an undertaking projected by the general government. The constitutionality of the act is attacked upon several grounds, the first of which is that it is in violation of § 19, art. 2, of the Constitution, which provides that "no bill shall embrace more than one subject, and that shall be expressed in the title." Similar provisions are contained in the Constitutions of many of the states, and there are so many cases bearing upon the proposition as to prevent a consideration of them in detail. It is well settled, however, by the weight of authority, that an act of the legislature will not be declared void except in cases where the violation of this constitutional inhibition is most clear, and sound policy and legislative convenience require that this provision should be liberally construed. The subject of this act is the condemnation and disposal of land by counties for a public use in relation to public improvements undertaken by the state or the United States; and, in our opinion, the subject-matter of the act is fairly included within the scope of its title, and there is nothing misleading in the title. The powers granted are not itemized therein, but this is unnecessary. The title gives notice that certain powers are granted for the purposes mentioned, and that those powers are prescribed in the act. There is one general subject embraced in the act, and only one, and that is expressed in the title sufficiently to prevent any person from being misled thereby. The purpose of the title is only to call attention to the subject-matter of the act and the act itself must be looked to for a full description of the powers conferred. *Marston v. Humes*, 3 Wash. 267; *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431;

State, McCarty, v. Montgomery County Comrs. 26 Ind. 522; *People, Rochester, v. Briggs*, 50 N. Y. 558; *Allegheny County Home's Case*, 77 Pa. 77; *Johnson v. People*, 83 Ill. 481.

Another objection is that the act is in conflict with § 7, art. 8, of the Constitution, which provides that "no county . . . shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation." It is clear that neither the state nor the United States is an "individual, association, company, or corporation," within the meaning of this section, and cannot legitimately be brought therein by any judicial construction thereof. *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

It is next insisted that the act is obnoxious to the provisions of § 6, art. 8, of the Constitution, which prohibits a county from incurring debt for any other than strictly county purposes, it being contended that the tax to be levied in the prosecution of said undertaking is not for a county purpose, but that it is for a state or Federal purpose. But it is beyond question that the proposed undertaking is a public improvement. It is entirely within the limits of King county, and is for the purpose of connecting two large public waterways with the Pacific ocean; and it seems to us that such a canal can more properly be considered a public improvement than a railway for the construction of which it is well settled that aid may be granted by a municipality when authorized to do so by the legislature, there being no constitutional prohibition. The word "strictly" lends little or no additional meaning to the provision. It could not have been intended thereby to limit counties to ordinary running expenses, and a canal may be as strictly a county purpose as a highway or a bridge, etc. It is apparent that the benefits resulting from this particular improvement will be largely local, notwithstanding the fact that it may also be of great general benefit; and it results that the purpose of the tax is local as well as public. 1 *Desty, Taxn.* §§ 8, 59; *Goddin v. Crump*, 8 Leigh, 120; *Mobile County v. Kimball*, 103 U. S. 691, 26 L. ed. 288; *Folsom v. Township Ninety-Six* ("Folsom v. Ninety Six"), 159 U. S. 611, 40 L. ed. 278; *Atlantic Trust Co. v. Darlington*, 63 Fed. Rep. 76; *Hasbrouck v. Milwaukee*, 18 Wis. 42, 80 Am. Dec. 718; *Burr v. Carbondale*, 76 Ill. 455.

The remaining objection to the act, and the one most strongly insisted upon by the appellants, is that the act authorizes the exercise of the state's eminent domain for the use and benefit of the United States. But this is hardly a fair statement of the proposition. While it is proposed to convey the right of way, when obtained, to the United States, the improvement is for the use and benefit of the general public, and in a much greater degree for the citizens of that locality. It is not to be occupied and controlled by government agents, like a fort, but is for everybody's use as a great public highway, and the control by the general government is only to regulate that use for the general good, and it matters little by whom

"4 L. R. A.

this is done. The essential character of the work as a local public improvement directly connected with the commercial business of the citizens of the county cannot be taken away from it, even though it has a considerable value to the general government for naval purposes and otherwise. It is apparent that the character of the work cannot be essentially altered by its ownership or control, and it is immaterial whether the United States or the county prosecutes the enterprise, or whether they do so jointly. Nor can it make any difference whether the power of the state or that of the general government is invoked to condemn the right of way. It is conceded that either the United States or the county could singly prosecute the enterprise, and, if either could do it, it would require some good reason for holding that they could not proceed jointly. The appellants contend that in all cases where the eminent domain of the state is exercised in the prosecution of a public improvement, the improvement when constructed, must remain in the control of the local authorities. If this assertion were true, it would afford a sufficient reason for holding that the contemplated undertaking was unauthorized in the form in which it is being prosecuted. But we are clearly of the opinion that this contention is not well founded, as, if the improvement be for a public use and benefit, the state can authorize the exercise of its eminent domain by individuals or by corporations other than municipal, and, if there is no constitutional prohibition, it may be a foreign corporation (*New York & E. R. Co. v. Young*, 33 Pa. 175; *Abbott v. New York & N. E. R. Co.* 145 Mass. 450); and in such cases the control or management of the improvement is not retained by the state. For a more marked instance, see the case of *Re Townsend*, 39 N. Y. 171, where a canal was constructed without the limits of the state, but which resulted in some damage to lands within the state.

Appellants concede that there are several cases holding that the exercise of the state's eminent domain can be for the benefit of the United States, but they contend that in such instances the question of the public use was a legislative, and not a judicial, question; but it is apparent that this can go only to the manner of deciding it, and if it is for a public use the condition is satisfied, however decided. A case very like the one at bar was that of *Re United States*, 96 N. Y. 237, where many of the cases are taken up and considered. There, by an act of the legislature, the United States was granted the right to acquire the right of way necessary for the improvement of the Harlem river and Spuyten Duyvil creek, and for the construction of another channel from the North river to the East river through the Harlem Kills, and ceding jurisdiction. The undertaking was prosecuted jointly by the state and national governments, and the court said that, if either party might proceed in the matter, "it would be very singular if that which either party might do could not with equal propriety be accomplished by both." If such were not the case, it might prevent the consummation of a great public undertaking, such as is contemplated here, on account of the vast expense, if it was to be exclusively

borne by the locality principally benefited, and through the unwillingness of the general government to bear the entire expense where the benefits were so largely local. We are of the opinion that no such condition of affairs was intended by the Constitution makers, and, there being no express provisions in the Consti-

tution prohibiting it, a narrow technical construction should not be adopted to bring it about.

Affirmed

Hoyt, Ch., J., and Dunbar, Anders, and Gordon, JJ., concur.

WISCONSIN SUPREME COURT.

KEYSTONE LUMBER COMPANY, *Appt.*,

Louis KOLMAN, *Resp't.*

(.....Wis.....)

1. A licensee under an unrevoked license to cut and remove timber for which he has paid full value has sufficient title in the timber to support replevin for it when wrongfully cut by a trespasser.

2. For the enhancement by a trespasser of the value of timber which he manufactures into lumber a licensee having the right to cut and remove the timber must repay him in order to recover the lumber or its value, since, if he adopts or ratifies the trespasser's acts in severance of the timber, he must adopt them in full.

(Cassoday, Ch. J., dissents.)

(November 24, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Ashland County in favor of defendant in a proceeding brought to recover possession of lumber. *Reversed.*

Statement by Newman, J.:

Replevin for a quantity of pine lumber. The lumber was manufactured by the defendant from logs which he cut, without authority, from certain lands which the Wisconsin Central Railroad Company acquired in 1884 from the state, under its land grant, and then owned. In 1886 the Wisconsin Central Railroad Company, by an instrument in writing, bargained and sold, granted and conveyed, to the Superior Lumber Company, and to its assigns, the right to cut and remove, for its own use, during the period of twenty years, "all the pine timber standing and being" on the said lands, for a full consideration, of which it acknowledged the receipt. This instrument was executed by the railroad company and its trustees, by its attorney in fact, Charles L. Colby, and sealed with a scroll, but was not signed by the president of the corporation, nor countersigned by its secretary. This license was afterwards duly assigned to the plaintiff. In 1887, by an instrument in writing, executed by the same persons, and in the same manner as the license to the Superior Lumber Company was executed, the Wisconsin Central Railroad Company bargained and sold, granted and conveyed, to the defendant, the same

lands; reserving, however, to itself, its successors and assigns, all the pine timber growing or to grow thereon, with the right to enter thereon and remove the timber, at pleasure. The defendant cut and removed the timber, and manufactured it into lumber. The plaintiff made demand for the lumber, and, on refusal by the defendant to deliver it, brought this action. The property was delivered by the sheriff to the plaintiff, who sold it during the pendency of the action. There was a verdict for the defendant. There was judgment for the defendant for the value of the property at the time of the commencement of the action, with interest from that date, from which the plaintiff appeals.

Messrs. Tomkins & Merrill, for appellant:

The defendant had neither an interest in nor possession of the trees. They did not pass under the conveyance of the land to him; his cutting and removing of the trees in question was therefore, as to the Wisconsin Central Railroad Company at least, a tortious taking, for which replevin in the *cepi* might be properly brought.

Warren v. Leland, 2 Barb. 618.

Even if the conveyance from the Wisconsin Central Railroad Company to the plaintiff was a mere license, still, as the license amounts to a power or authority to do all acts licensed, the licensee, as against all strangers, has all the rights of the licensor and may hold them responsible for any interference with the enjoyment of the privilege given him.

7 Wait, Act. & Def. 218; *Sawyer v. Wilson*, 61 Me. 529; *Gamble v. Cook* (Mich.) 2 Det. L. N. 536.

As fast as timber was cut it became personal property with the right of the possession in the plaintiff.

Spalding v. Archibald, 52 Mich. 365, 50 Am. Rep. 253; *White v. King*, 87 Mich. 107; *Freeman v. Underwood*, 66 Me. 229.

If the plaintiff had a right to the use of the property at will it had a right to replevy it from a wrongdoer.

Tandler v. Saunders, 56 Mich. 142; *Bassett v. Armstrong*, 6 Mich. 897.

Any interest coupled with a right of immediate possession constitutes ownership under the replevin statutes.

Cobbey, Replevin, § 538.

NOTE.—As to the measure of damages for injury to or destruction of trees, see *note* to *Bailey v. Chicago, M. & St. P. R. Co.* (S. D.) 19 L. R. A. 653. See 84 L. R. A.

also the later cases of *Whiting v. Adams* (Vt.) 36 L. R. A. 598; *Gaskins v. Davis* (N. C.) 35 L. R. A. 313; and *White v. Yawkey* (Ala.) 35 L. R. A. 190.

The contract under which the plaintiff claims is something more than a license; it is a grant or contract for a valuable consideration, and irrevocable.

2 Bingham, Real Prop. p. 55; 8 Kent, Com. 425; *Pierrepoint v. Barnard*, 6 N. Y. 291; 2 Bouvier, Inst. 568; *Wood v. Leadbitter*, 13 Mees. & W. 888; *Thomas v. Sarrell*, Vaughan, 381; *Ganter v. Atkinson*, 35 Wis. 48.

The right to immediate possession is all that is necessary to maintain the action of replevin. Dicey, Parties to Actions, 368.

Messrs. Olin & Butler, with *Mr. A. E. Dixon*, for respondent:

In order to maintain the action of replevin for timber cut from unoccupied land, the plaintiff must establish a legal title thereto.

Cobbe, Replevin, § 376; *Hungerford v. Redford*, 29 Wis. 845; *Paige v. Kolman* (Wis.) 67 N. W. 700; *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69; *Wadleigh v. Marathon County Bank*, 58 Wis. 546.

The instrument under which plaintiff derives its right, if any it has, to maintain this action, does not grant or convey to plaintiff the timber, but only "the right to cut and remove" the same during a limited period. Such a license carries no right to maintain replevin.

Gillett v. Treganza, 6 Wis. 848; *Rich v. Zeiladorff*, 22 Wis. 544, 99 Am. Dec. 81; *Martin v. Gilson*, 37 Wis. 360; *Silby v. Trotter*, 29 N. J. Eq. 229; *East Jersey Iron Co. v. Wright*, 82 N. J. Eq. 248; *King v. Merriman*, 38 Minn. 47; *Pfister v. Byrd*, 43 Mich. 14; *Gillerson v. Mansur*, 45 Me. 25; *Balcom v. McQuesten*, 65 N. H. 81.

The Wisconsin Central Company certainly would not be bound by a determination in this case of the nonrevocation of the license. It would still be entitled to claim in its suit against defendant that his plea that the Central Company had no interest in the timber because of its license to the plaintiff here was bad because such license had been revoked.

Johnson v. Wilkinson, 189 Mass. 8, 52 Am. Rep. 698; *Fletcher v. Livingston*, 153 Mass. 388; *Whitmarsh v. Walker*, 1 Met. 818.

Newman, J., delivered the opinion of the court:

The instrument under which the plaintiff claims title to the lumber in controversy is a mere license to cut and remove the timber. This is clear from its express terms. A license to cut timber is assignable, whether made so by express words or not. 18 Am. & Eng. Enc. Law, p. 1081. This license is made assignable by express words. So, the plaintiff had the right to cut and remove this timber, and make it its own, at pleasure, at any time within the limited period, at least, unless the license should be sooner revoked. Whether the license gave such an interest in the timber to the licensee as that it should be deemed irrevocable by the licensor, it is not important to inquire. In either case the title to the timber did not pass to nor vest in the licensee until it should be severed from the land. The mere license to cut and remove the timber did not vest the title to the timber in the licensee. So, until the fact of its severance, the licensee has no title in the timber, such as would support an action of replevin; for, to maintain an

action of replevin, the plaintiff must have the general or a special property in the property replevied, and the right to immediate and exclusive possession, at the time when the action is commenced. In the action of replevin the principal question is the right of immediate possession. Where that right depends upon the title, the issue is one of title. Now, as a mere licensee to cut timber gets no title to the timber until it is actually severed, and this timber was cut by a wrongdoer, and not by the licensee, the case comes to depend on this question, whether the title to the timber, when cut by a trespasser, vests in the licensee, so as to give him sufficient title to maintain replevin against the mere trespasser. This question is not decided by any case in this court to which attention is called, or which has been found. A question which, on a superficial view, may seem to bear some analogy to this question, has been decided by this court. It has been decided that, where timber or minerals have been severed by the owner of the land, the title to the timber or minerals so severed does not vest in a mere licensee, so that he can maintain replevin for them against the owner of the land. *Gillett v. Treganza*, 6 Wis. 348, is a leading case upon that question. The reason is plain. Severance by the owner operates as a revocation of the license, at least *pro tanto*; and the title, not having passed before severance, will not pass by severance after the license has been revoked. But that question has little, if any, analogy to the question in the instant case. This question is whether a licensee under an unrevoked license to cut and remove timber, for which he has paid full value, has sufficient title in the timber covered by his license to support replevin for the timber when wrongfully cut by a trespasser. This question does not seem to have often been passed upon by the courts. The case of *Gamble v. Cook* (Mich.) 2 Det. L. N. 536, seems to be in point. In that case it was held by the supreme court of Michigan that a vendee in a land contract, which gave him the right of possession, and to cut and remove timber, had title in the timber sufficient to maintain replevin for timber cut by a mere trespasser. No doubt, in that case the legal title to the timber was in the vendor until the severance by the trespasser. No reason is perceived why that case is not sound in principle. The trespasser gets no legal title or right in the timber through his wrongful act, as against any person who has a legal right or interest in it. The licensor has no just claim, for he has sold it, and has had his pay. He makes no claim. He is not injured. To preserve the fiction of legal title in him, beyond the severance, can have no other effect than to obstruct justice. In justice, the severed timber should belong to the licensee, who has bought and paid for it. He might have employed the trespasser to cut and remove it. In that case there would be no doubt that the title to the severed timber would be in him. No reason is perceived why, when the timber is cut by one unauthorized, the licensee may not at once assume possession of it; why he may not adopt the act of the wrongdoer, in the severance, as his own, and ratify, so to speak, the unauthorized act,—some what

in analogy to the principle by which the unauthorized acts of agents are ratified or a tort is waived. That view has the merit, at least, of doing complete justice among the parties.

But, if the plaintiff adopts or ratifies the acts of the defendant in the severance of the timber, it must adopt them in full. It must adopt as well that part which carries a burden as that which is to its benefit. In the view which has been taken, the wrongful acts of the defendant have proved, on the whole, to have been a real service to the plaintiff. If the plaintiff adopts this benefit, it should reimburse the defendant what he has reasonably disbursed in its service. The plaintiff should recover the lumber or its value, after paying the defendant the reasonable cost of such enhancement of its value as has resulted from his expenditures upon it. Perhaps the defendant was entitled to retain possession of the lumber until such costs were paid; but it does not appear that his refusal to deliver it to the plaintiff was put upon any such ground.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Cassoday, Ch. J., dissenting:

I agree with that portion of the opinion filed which is to the effect that the written "instrument under which the plaintiff claims title to the lumber in controversy is a mere license;" that "the mere license to cut and remove the timber did not vest the title to the timber in the licensee;" that, until severance, the licensee had "no title in the timber" that "would support an action of replevin;" that, "to maintain an action of replevin, the plaintiff must have the general or a special property in the property replevied, and the right to immediate and exclusive possession, at the time when the action is commenced." But I am compelled to dissent from the conclusion reached to the effect that the plaintiff may, without any such title vested in itself, and with the title vested in the railroad company, maintain this action, merely because the timber was wrongfully severed by the defendant. That this license to cut and remove timber from the land of the railroad company was revocable, and vested no title or interest in the plaintiff, is settled by numerous adjudications of this court. *Hazleton v. Putnam*, 3 Pinney, 107, 54 Am. Dec. 158; *Clute v. Carr*, 20 Wis. 531, 91 Am. Dec. 442; *Duinneen v. Rich*, 22 Wis. 550; *Fryer v. Warne*, 29 Wis. 511; *Strasson v. Montgomery*, 32 Wis. 52; *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32; *Thoenke v. Fiedler*, 91 Wis. 386. Some of these cases held that such a license is not assignable. I do not think the decision in this case is supported by *Gamble v. Cook* (Mich.) 64 N. W. 483, cited in the opinion.

In that case it was held that "the vendee under a land contract, with the right to cut and remove timber, has title sufficient to maintain replevin for timber cut on the land by a mere trespasser." In that case the vendee had paid all the purchase money, and had taken possession of the land, and so was not a mere licensee, as here, but the real owner. Such contract gave the vendee a vested interest in the land and the growing timber, which could have been specifically enforced. *Young v. Lego*, 36 Wis. 894; *Lacy v. Johnson*, 58 Wis. 422; *Lillie v. Dunbar*, 53 Wis. 198. The decision in the case at bar allows the plaintiff to recover on the ground that it waived the defendant's tort, and adopted his wrongful act in severing and removing the timber. But there is nothing in the complaint nor in the record indicating such waiver. On the contrary, the complaint expressly alleges, in effect, that the plaintiff was the owner, and entitled to the possession of the lumber, and that the defendant wrongfully took and unlawfully or wrongfully detained the same from the plaintiff. Besides, the tort (the wrongful act complained of) was not, and could not, in law, be, wrongful as against one not having any title or vested interest in the timber, but was necessarily wrongful as against the one having the legal title and exclusive right to the timber; and the plaintiff could not, as it seems to me, vicariously waive such tort for the legal owner. For aught that appears, the defendant is liable in law to the railroad company for all the timber he so cut and removed. But the decision in this case, as I understand it, only allows the plaintiff to recover on condition that it "reimburse the defendant what he has reasonably disbursed in its service;" that it "should recover the lumber or its value" only "after paying the defendant the reasonable cost of such enhancement of its value as has resulted from his expenditures upon it;" and indicates a possibility of the defendant's being "entitled to retain possession of the lumber until such costs were paid." To carry out these suggestions would seem to require an equitable accounting as to the reasonable value of the defendant's services and disbursements of cutting and removing the timber, and putting the same in the condition in which it was found at the time this action was commenced. Such an accounting would seem to be an anomaly in a straight action of replevin, like this, and does not seem to be contemplated in the verdict and judgment prescribed by the statutes. Rev. Stat. §§ 2859, 2868.

For the reasons hastily and thus summarily given, I am forced to disagree with my brethren.

TENNESSEE SUPREME COURT.

Lucy S. HINES, *Appt.*,

v.

James M. WILLCOX, Jr.

, (96 Tenn. 148.)

1. Oral evidence that a landlord agreed to put the leased premises in safe condition before the contract was made, or that at the time it was made he and his agent represented that they had been put in safe condition as promised, is admissible where the written contract relates only to the obligations and undertakings imposed upon the tenant, and does not in fact include all of these.

2. The question whether an entire contract was reduced to writing, or an independent collateral agreement was made, is one of fact for the jury, where there is any evidence to sustain a contention upon the point.

3. A landlord is liable to his tenant for damages that may result from the unsafe and dangerous condition of the premises leased when that was known to, or with reasonable care and diligence might have been known to, the landlord, but not to the tenant, although the latter examined the premises and did not discover the defect.

(February 4, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Davidson County in favor of defendant in an action brought by a tenant to recover for injuries alleged to have been received by reason of the defective condition of the leased premises. *Reversed.*

The facts are stated in the opinion.

Messrs. H. Parks, E. A. Price, and J. W. Gaines for appellant.

NOTE.—*Liability of landlord for injury to tenant from defect in premises.*

HINES v. WILLCOX is a new departure in the law of landlord and tenant. It places a duty on the landlord which it has not been the rule to place there, and to a large extent relieves the tenant from a duty which has always rested upon him. It makes a general rule of an exception which has only been applied in a peculiar class of cases, which does not include so obvious a defect as existed in **HINES v. WILLCOX**. No active care and diligence to discover defects have generally been placed on the landlord.

Landlord not bound to have premises safe.

The general rule is that the tenant must beware. He must examine the premises before taking them and rely upon his own examination, unless he procures a warranty from the landlord of the safety of the premises. The burden of the examination is placed on him, and not on the landlord.

In **Akerley v. White**, 58 Hun. 362, where the injury occurred through defective stairs, the jury were instructed that if the stairs at the time of the letting were weak to an extent that would be easily ascertained upon inspection, a verdict might be rendered against the landlord; but upon appeal the court held that this instruction imposed upon the owner the duty of active vigilance to see that the premises he was about to rent were in good condition, and was erroneous because the law imposed upon the tenant the risk of such defects in the demised premises as were visible upon inspection.

Where the defect alleged was noisome odors arising from premises adjoining those leased, the court said in the absence of express covenant or of fraud, deceit, or wrongdoing on the part of the landlord, the lessee of real estate must run the risk of its condition. **Franklin v. Brown**, 118 N. Y. 110, 6 L. R. A. 770.

A lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee for their condition, or that they are tenantable and may be safely used for the purpose for which they are apparently intended. **Jaffe v. Harteau**, 56 N. Y. 393, 15 Am. Rep. 438.

In the absence of fraud or deceit or express warranty or covenant to repair, there is no implied covenant that the premises are suitable or fit for 34 L. R. A.

occupation, or that they are in a safe condition for use. **O'Brien v. Capwell**, 59 Barb. 497.

If the landlord has created no nuisance, and is guilty of no wilful wrong or culpable negligence, he is not liable for an injury suffered by any person occupying the premises during the demise. **Donner v. Ogilvie**, 49 Hun. 229.

A dangerous condition of the premises, as a pile of stones near the front door covered with snow, not misrepresented or fraudulently concealed by the landlord, will not render him liable for injuries suffered by the tenant by falling over it. **Jones v. Roberts**, 32 Ohio L. J. 118.

A lessee in an action for rent cannot counterclaim damages for the sickness of himself and family from the escape of sewer gas because of defective plumbing if the lessor is not guilty of any wrongful concealment of the facts. **Chadwick v. Woodward**, 13 Abb. N. C. 441.

A parent of the lessee cannot recover for injuries by a defective door-knob, in the absence of a covenant that the building is safe or that the landlord will make repairs, there being nothing to show that it was a nuisance *per se*. **McNeal v. Emery**, 8 Ohio L. J. 265.

Where there is no express warranty that the premises are fit for the use to which they are to be put, the owner is not liable in case the building falls to the injury of the tenant. **Dutton v. Gerish**, 9 Cush. 89, 55 Am. Dec. 45.

A landlord is not liable for defects known to the lessee at the time of the letting. **Wien v. Simpson**, 2 Phila. 153.

There is one case in a lower New York court in which a rule was adopted, placing a liability upon the landlord.

In **Johnson v. Dixon**, 1 Daly, 173, where a horse fell through the stable floor and was injured, the court held that the landlord having wrongfully permitted the floor to become unsafe, and when his attention was called to it having promised to repair it, which he did not do, he was liable for the injury.

But in a later case upon a similar state of facts the decision was the other way.

In that case the tenant's horse fell through the floor of the stable, and the court says whether the floor was in fact unsafe could have been discovered by the tenant as easily as by the landlord, and that the landlord was not liable for the injury. **Lynch v. Speed**, 23 N. Y. S. R. 90.

Messrs. E. T. Smith and E. McPhail Smith for appellee.

For the arguments, see *Stenberg v. Willcox* (Tenn.) *ante*, 615.

Wilkes, J., delivered the opinion of the court:

This is an action for damages for personal injuries sustained by the plaintiff while occupying the house of defendant, as his tenant. The cause was heard before the court and a jury, and there was a verdict for the defendant, and judgment against plaintiff for costs, and she has appealed and assigned errors.

The plaintiff, with several members of her family, and boarders in the house, was injured by the falling of a defective and unsafe back porch. There are two counts in the declaration, the first alleging, in substance, that defendant contracted that the house should be put in safe and tenable condition before the rental contract was made, and that at the time the contract was closed the defendant's agent represented and stated that it had been put in a safe and tenable condition as had

been previously promised and agreed. The second count alleges, in substance, that the house was in an unsafe and dangerous condition when plaintiff rented it from defendant, and that defendant and his agent knew of this fact and concealed it from her, and that it was not known to her. The pleas were, in effect, a general denial of the truth of the matters alleged, not guilty, and contributory negligence. There was what is termed a "rental contract," signed by the parties, in the words and figures following:

Nashville, Sept. 28, 1892.

A. V. S. Lindsley, agent, has this day rented to M. P. Hines and wife, Lucy S. Hines, the two-story dwelling house on the S. W. corner of Church and McLemore streets for one year from Oct. 1, 1892, to Oct. 1, 1893, for \$50.00 per month, payable monthly in advance. To secure payment of said sum, said M. P. Hines and his wife have this day executed twelve notes, payable to A. V. S. Lindsley, agent, falling due, one Oct. 1, 1892, and one on the first of each month thereafter, till the twelve notes are paid. M. P. Hines and wife further

For the reason that the landlord is not responsible for the condition of the leased premises a subtenant's remedy is against his lessor, and not against the owner, unless the premises are such a nuisance that the owner would be liable to the public. *Quay v. Lucas*, 25 Mo. App. 4.

Upon the general question of the landlord's liability to the tenant's guests, see *note to McConnell v. Lemley* (La. Ann.) *ante*, 609.

There are no implied covenants.

The court does not imply any covenants in a lease. If the landlord does not expressly undertake to make and keep the premises safe he is not charged with that duty.

If the tenant wishes the landlord to take the responsibility of the sewer being sufficient, that provision must be inserted in the lease. *Wilkinson v. Clauson*, 29 Minn. 91.

The leasing of a house for a private residence does not imply a covenant that it is reasonably fit for habitation, and the owner will not be liable if the tenant's family is made sick by defective drains therein. *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 43.

In *Robbins v. Jones*, 15 C. B. N. S. 221, the court says the tenant's remedy, if any, is upon his contract.

In case a building falls and injures the tenant's property the landlord will not be liable for the injury, although he has covenanted to make necessary repairs to the building, since such covenant does not include an undertaking that the building shall not give way. *Leavitt v. Fletcher*, 10 Allen, 119.

In *Frank v. Conradi*, 50 N. J. L. 23, where the tenant was injured by the giving way of a rail on premises which the landlord had undertaken to repair, the court says that the covenant did not mean that the premises would never be out of repair, but that the duty imposed upon the landlord was to properly inspect the premises and make such repairs as a due inspection would show to be necessary. But this cannot be stretched so as to include an obligation to repair what a reasonable examination would not disclose to be in need of repair.

No action for nonrepair.

As part of the rule that there are no implied covenants the landlord is not liable for failure to 84 L. R. A.

repair, unless he has agreed in the lease to make repairs.

A complaint alleging that plaintiff was injured by a fall of certain stairs attached to defendant's building which plaintiff as tenant was entitled to use, and that it was the duty of defendant as owner to keep the stairs in good condition and repair, does not state a cause of action, since, the premises not being occupied by defendant but by the tenants, the duty of keeping the stairs in good repair presumptively rested on them, and not on him, in the absence of a special agreement by him to assume that duty. *Corey v. Mann*, 14 How. Pr. 162.

A landlord is not bound to repair unless upon covenant to do so, and he is not liable for an injury arising from a failure on his part to repair, whether it result to the tenant's goods or to his person. *Ward v. Fagin*, 101 Mo. 669, 10 L. R. A. 147, *Reversing* 28 Mo. App. 116.

In *Willson v. Treadwell*, 81 Cal. 58, where the injury was to a servant of the tenant, the court says the rule that the landlord is not liable to strangers for a failure to repair applies with equal force to the tenant and his employees.

The landlord is not liable for injuries caused by the premises getting out of repair during the term of the lease. *Libbey v. Telford*, 48 Me. 316, 77 Am. Dec. 229.

A landlord is not liable for a defect in a drain which in the course of a tenancy at will is discovered to him, nor for failing to disclose it to the tenant, if the defect is unknown to the latter. *Bertie v. Flagg*, 161 Mass. 504.

The owner who has not undertaken to repair is not under any obligation to take measures to prevent the falling of the building by reason of an excavation made on the property next to it, and he will not be liable for injuries to the tenant caused by such fall. *Brewster v. DeFremery*, 33 Cal. 341.

In the absence of an undertaking to make repairs, the landlord is not liable for any hurt or damage that may accrue to the tenant or to any member of his family through his negligence in failing to perform such a supposed duty. *Little v. Macadaris*, 20 Mo. App. 382, 36 Mo. App. 187.

In *Cleves v. Willoughby*, 7 Hill, 83, the court says the maxim *caveat emptor* applies to the transfer of all property, and the purchaser takes the risk of its quality and condition, unless he protects himself

agree and bind themselves to keep said premises clean and in a sanitary condition, satisfactory to the city authorities. Should any of the above notes remain due and unpaid, A. V. S. Lindsley, agent, reserves the right to re-enter and take possession, or to enter suit for collection of all notes unpaid. A. V. S. Lindsley, agent, also reserves the right to re-enter and take possession of said premises should M. P. Hines and wife fail to keep said property in a good sanitary condition.

[Signed] A. V. S. Lindsley, Agent,
by J. T. Lindsley.
M. P. Hines.
L. S. Hines.

During the rental year, M. P. Hines, the husband, died; and L. S. Hines, his widow, continued to occupy the premises under the same contract previously made with her and her husband, and the injuries occurred after his death. The case has been most ably and elaborately argued on both sides, and a vast array of authorities have been collected and commented upon. We can only notice the

salient features which must determine the decision of the case, leaving many others untouched.

The trial judge excluded from the jury all evidence offered by plaintiff to show that defendant made any promise or agreement to put the premises in good and safe condition before the rent contract was signed, and all evidence as to statements made that the premises had been put in safe and tenantable condition at the time and contemporaneous with its signing. This is assigned as error. In excluding the evidence, the court said it was done because: "(1) It goes to alter the terms of a written lease to plaintiff. (2) It attempts to introduce a warranty of the condition of the premises at the time of the demise, when no such warranty is contained in the lease. (3) Because the complaint made by plaintiff of the condition of the premises had no reference to the condition of the porch, or its insecurity, at or before the time the lease was executed; said complaints relating only to minor matters, such as the accumulation of dirt on the premises, the absence of glass from the windows,

by an express agreement on the subject. Where there is no agreement to put the premises in repair the tenant takes them for better or worse, and the landlord is under no obligation to repair.

If the premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or to the public during the continuation of the lease, unless he has expressly agreed to repair. *Clancy v. Byrne*, 66 N. Y. 133, 15 Am. Rep. 391.

Where the lessor does not covenant to repair demised premises, he cannot be made liable in damages to the lessee for their being out of repair. *Joyce v. DeGinerville*, 2 Mo. App. 566.

In *Norris v. Catmur*, Cab. & E. 576, where a sub-tenant received an injury by a piece of the roof falling upon her head, the court says it is clear that the tenant could have sustained no action against the landlord for nonrepair. The plaintiff can be in no better position than the tenant.

In *Gott v. Gandy*, 2 El. & Bl. 847, 2 C. L. Rep. 382, 33 L. J. Q. B. N. S. 1, 13 Jur. 310, a chimney fell and injured the tenant's goods, and the court held that the duty to repair did not rest upon the landlord from the mere relation of landlord and tenant. *Erie, J.*, says: "The present action is in form of action for a wrong; but it is in substance for the breach of a duty arising from a contract between landlord and tenant. The plaintiffs ask us to interpolate into that contract a term without showing anything from which it might appear that it was intended by the parties that there should be such a term."

In the absence of an agreement by the landlord to repair he is not answerable to the tenant for damages resulting to the latter from the want of necessary repairs. *Laird v. McGeorge*, 16 Misc. 70.

Construction of covenant to repair.

Where the tenant was injured because the floor of a back room on the second story was defectively and insufficiently supported and the lumber in the flooring worn and rotten, and the landlord had covenanted to make repairs, the court held that there was no duty to make the repairs until a reasonable time after notice, and since no notice had been given in this case there was no liability on the landlord. *Sleber v. Bianco*, 78 Cal. 173.

Where the owner had undertaken to repair, and after the tenant had been in possession for five 34 L. R. A.

months the cellar stairs fell under her and she was injured, the court held that, it not appearing that the landlord knew of the defect in the stairs, or that he had been asked to repair, he was not liable for the injury. The court says unless the landlord knew the stairs were unsafe to use, or from the facts and circumstances in the exercise of ordinary care and prudence he should have known of their dangerous condition, he cannot be made liable for a tort. And he will not be liable for breach of his contract unless he had notice of the necessity of such repairs, and then only after a reasonable time had elapsed for him to make the repairs. *Spellman v. Bannigan*, 36 Hun. 174.

The mere fact that the landlord has undertaken to keep the elevator in repair will not give a right of action for injuries caused by nonrepair if the landlord was not notified that repairs were needed. *Sinton v. Butler*, 40 Ohio St. 158.

A landlord who has covenanted to repair is not liable to the tenant in tort for personal injuries arising from the want of repair. *Sanders v. Smith*, 5 Misc. L.

Warranty or representations by landlord.

If at the time of making the lease the owner warrants the safety of the ceiling he will be liable in case it falls upon and injures the tenant's infant child. *Moore v. Steljes*, 60 Fed. Rep. 518.

If the landlord, after discovering the polluted condition of the water of a well, and, without remedying the cause, permits the tenant to continue its use without notifying him of the cause, whereby the tenant is made sick, the landlord will be liable for the damages. Especially when the landlord had particularly warranted the water wholesome when he made the lease. The court said the landlord owed the duty to see that the premises were in a healthful condition, or at least to disclose any fact within his knowledge which tended to make the premises unhealthful and not fit for habitation. *Maywood v. Logan*, 78 Mich. 135.

If the tenant learns before taking the lease that a contagious disease has been in the house, and upon asking the landlord about it is informed that the report is untrue, he has a right to rely upon the landlord's statement, and need not take further precautions to ascertain as to the fact. *Snyder v. Gorden*, 46 Hun. 533.

But the mere fact that the owner represents the premises to be dry and safe from water will not

and the absence of grates from some of the fireplaces in the house. Witness has testified to nothing else. (4) The promise alleged to have been made by defendant's agent to put the place in repair, or the representations that the place had been put in repair, must be held to have reference only to the previous complaints made by the plaintiff." The plaintiff excepted to the action of the court. Taking up these grounds of the trial judge's action, we will examine them in the light of the facts of this case.

The general rule is that parol evidence is not admissible to contradict a written agreement, whether simple or by deed. *Bedford v. Flowers*, 11 Humph. 242; *Ellis v. Hamilton*, 4 Sneed, 512; *Bryan v. Hunt*, Id. 544, 70 Am. Dec. 262; *Price v. Allen*, 9 Humph. 708; *McLean v. State*, 8 Heisk. 22; *Fields v. Stunston*, 1 Coldw. 40; *Stewart v. Phoenix Ins. Co.* 9 Lea, 104; *Weisinger v. Bank of Gallatin*, 10 Lea, 330; *Nashville L. Ins. Co. v. Mathews*, 8 Lea, 508; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed, 571; *Kearley v. Duncan*, 1 Head, 400, 73 Am. Dec. 179. But this rule does not apply

in cases where the parol evidence in no way contradicts or alters the terms of the written contract, but tends to establish an independent or collateral agreement not in conflict with it. *Betts v. Demumbrune*, Cooke (Tenn.) 48; *Leinau v. Smart*, 11 Humph. 308; *Cobb v. Wallace*, 5 Coldw. 539, 98 Am. Dec. 435; *Lytle v. Bass*, 7 Coldw. 308; *Stewart v. Phoenix Ins. Co.* 9 Lea, 104; *Vanleer v. Fain*, 6 Humph. 104; *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 83, notes; *Durkin v. Cobleigh* (Mass.) 17 L. R. A. 270, and notes. Nor does it apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing. 1 Greenl. Ev. 15th ed. § 284a; 1 Starkie, Ev. 367; *Vanleer v. Fain*, 6 Humph. 104; *Dick v. Martin*, 7 Humph. 263; *Mitchell v. Planters' Bank*, 8 Humph. 216; *Leinau v. Smart*, 11 Humph. 308; *Cobb v. O'Neal*, 2 Sneed, 438; *Cobb v. Wallace*, 5 Coldw. 539, 98 Am. Dec. 435; *Bryan v. Hunt*, 4 Sneed, 543, 70 Am. Dec. 362; *Lytle v. Bass*, 7 Coldw. 308; *Bissenger v. Guiteman*, 6 Heisk. 277; *Hicks v. Smith*, 4 Lea, 464; *Smith v. O'Donnell*, 8 Lea, 468; *Hawkins v. Lee*, Id. 42; *Breeden v. Grigg*, 8 Baxt. 163;

give the tenant a right of action in case, by reason of the defective construction of the walls and a period of high water, water is backed up in the sewer and goes through the walls causing damage. *Loupe v. Wood*, 51 Cal. 586.

So, where, previous to the making of the lease, the owner said he would put the water closet and drainage in order, and subsequently said the water closet was in perfect order, whereupon the lease was executed and the tenant brought action to recover for illness caused by defects in the closet, recovery was denied upon the ground that the representations did not amount to an agreement nor to fraud, and that the tenant could maintain no action. *Burstal v. Bianchi*, 65 L. T. N. S. 678.

Fraud or deceit.

The landlord may be liable in case he is guilty of fraud or deceit in effecting the lease.

In *Stevens v. Pierce*, 151 Mass. 207, which was an action for recovery of rent paid, the court says the only remedy was in tort for fraud and deceit in inducing the taking of the lease, or for negligence in failing to inform the tenant, if by reason of a concealed defect which could not readily be discovered and which was known to the owner and not known to the tenant the house was dangerous to those who might occupy it.

But in *Keates v. Earl Cadogan*, 10 C. B. 591, 20 L. J. C. P. N. S. 76, 15 Jur. 428, where the house fell and it was alleged that the lives of the tenant and his family were greatly endangered thereby, the court held that an action of deceit would not lie because of the mere fact that the owner knew that the tenant wanted the place for immediate occupation, and that it was in an unfit and dangerous state, and did not disclose that fact to the tenant.

So, it has been held that a lessee of a building who sustains injury occasioned by the defective condition of the building cannot maintain an action of tort against the lessor founded upon a breach of an agreement to repair the building within a reasonable time. That form of action cannot arise out of a mere breach of contract. *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169.

Concealment of defects.

As a branch of the liability of the landlord for fraud or deceit the question has arisen as to how far it is his duty to disclose defects or to warn of dangers. The rule on this subject seems to be no 34 L. R. A.

stronger than this: If he knows of a defect which is likely to produce injury, the nature of which is such that careful examination by the tenant would not disclose it, he must notify the tenant of it. It is not his duty to search for defects, and if the defect is easily discoverable he need not mention it.

There is no legal presumption that a landlord has knowledge of the particular condition of a house leased by him from the facts that he is the owner, that he resides next door, and that the house has been vacant for several months. *Jackson v. Odell*, 9 Daly, 371.

A landlord is not liable for injuries to the tenant by a snow-slide which destroyed the house, on the ground that he did not warn the tenant of the danger. The court says the evidence wholly failed to show that there was any special and secret danger from snow slides, which was known to the landlord, and which could not have been ascertained by the tenant. *Doyle v. Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223.

A lessor of a building having defective walls is not liable to the lessee, who had full opportunity to ascertain its condition, which was apparent to the most casual observer, from damages arising from the fall of the walls, in the absence of express warranty or misrepresentation. *Davidson v. Fischer*, 11 Colo. 563.

Mere failure of the landlord to disclose defects in the plumbing, of which he has knowledge, will not render him liable as for fraud in case the tenant is made sick by such defect. *Blake v. Ranous*, 25 Ill. App. 486.

There are few instances in which it is the duty of the landlord to disclose to the intending tenant any defects in the subject of negotiation. The rule is that the landlord is not bound to disclose any defects in the structure or condition of the premises that make them unfit for habitation. Defects in plumbing or flues cannot be discovered, perhaps, by any examination the intending tenant can be expected to make, but it has never been held that the landlord is bound under the penalty of fraud to disclose such defects, even though he be aware of them. *Coulson v. Whiting*, 14 Abb. N. C. 63.

Where the tenant was injured by the breaking of a stair which had been sawed by a former occupant of the premises, the court says there can be no liability on the part of the landlord without knowledge of the defect. He must disclose concealed

Waterbury v. Russell, Id. 162; *Brady v. Isler*, 9 Lea, 856; *Barnard v. Roane Iron Co.* 85 Tenn. 189. Parol evidence is admissible as to collateral matters not varying the terms of the writing, such as fraud in the soundness of an article, when the written warranty extends only as to title (*M. Farlane v. Moore*, 1 Overt. 174, 3 Am. Dec. 752; *Lytle v. Bass*, 7 Coldw. 808); or when fraudulent representations were made in negotiating the contract (*Barnard v. Roane Iron Co.* 85 Tenn. 189); or when representations and statements are made as inducements to the contract, and form the basis or consideration of it. *Waterbury v. Russell*, 8 Baxt. 162; *Hogg v. Cardwell*, 4 Sneed, 157. In *Betts v. Demumbrune*, Cooke (Tenn.) 48, the written contract was for the rent of a tavern. It was permitted to be shown by parol that the landlord agreed to erect a kitchen on the ground; that this was an inducement to rent the tavern, and only part of the contract was in writing. In *Vanleer v. Fain*, 6 Humph. 104, it was held that, in a written contract for the hire of a slave, parol evidence could be introduced to show that one of the terms of the hiring was

that the slave should not be removed out of the county. In *Leinau v. Smart*, 11 Humph. 308, there was a written contract for the sale of a tavern, and it was permitted to show by parol, as part of the same agreement, and an inducement to it, that the vendor would close up another tavern he owned in the same town. In *Dick v. Martin*, 7 Humph. 263, parol evidence was allowed to prove an agreement to waive demand and notice of negotiable paper, although made at the time of the indorsement, which was full and dated. In *Mitchell v. Planters' Bank*, 8 Humph. 216, it was permitted to be shown by parol that the cashier of a bank informed the directors that one of the makers had promised the indorser's name on the note, the evidence being treated as part of the *res gesta*. In *Cobb v. O'Neal*, 2 Sneed, 439, there was a written warranty of the soundness of a slave. It was permitted to show by parol that the vendee agreed to look to a third person, and not to the warrantor, in case of a breach, in consideration of an abatement in price. In *Brynn v. Hunt*, 3 Sneed, 543, 70 Am. Dec. 262, it was held that the general rule excluding parol

sources of mischief about the house which no examination can discover if he has knowledge of them. But that exception to the rule does not apply to the case of a saw cut in one of the treads of a staircase, especially where the owner tried the step and it bore his weight, and he thought it would bear anybody's. The tenant having neglected to require any warranty from the landlord, and having had full opportunity to examine the tenement, it was his own fault if he did not see what was apparent on the surface. The law is unusually strict in exempting the landlord from liability for injuries arising from defects when there is no warranty and no actual deceit. *Bowe v. Hunking*, 135 Mass. 340, 46 Am. Rep. 471.

In *Naumberg v. Young*, 44 N. J. L. 331, 48 Am. Rep. 380, which was an action to recover money expended for putting the premises in condition and for losses incurred by inability to use them when the term began, the court recognizes the rule that there is no implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unsafe for habitation, and no action will lie against him for failure to do so, in the absence of express warranty or deceit.

The duty of the landlord to disclose hidden defects does not spring directly from the contract but from the relation of the parties, and is imposed by law. When there are concealed defects attended with danger to the occupant, and which a careful examination will not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them. And this exception applies to the case of an insecure covering to a cess-pool in the yard, which is covered with earth so that grass and weeds are growing over it, and the location of it is not pointed out to the tenant. *Cowen v. Sunderland*, 145 Mass. 383.

But where the tenant was injured by falling into a cess-pool in the yard, which was covered by an iron cover set into wooden frames which had become decayed, the court said it was as much her duty when she hired the house and yard to examine the premises and ascertain whether they were in such repair that she could use them as of the owner. And it was held that she could not recover because the existence of the cover was plainly visible. But the court says, if there is a concealed defect that renders the premises dangerous, which the tenant cannot discover by the exercise of reasonable dili-

gence, of which the landlord has or ought to have knowledge, it is the duty of the landlord to disclose it, and he is liable for an injury which results from the concealment of it. *Booth v. Merriam*, 155 Mass. 521.

A concealed well operating as a cess-pool under a house, being partly filled up and containing water, dead vermin, and filth, from which noxious vapors arise to the injury of the health of the occupants, constitutes a nuisance, and renders the owner who erected the house over it liable for injuries to a tenant who had no knowledge of it. The court says the cause of action is based upon the maxim that everyone must so use his own premises as not to injure others, and that it was the duty of defendant to disclose to the tenant defects in the premises amounting to nuisance known to the defendant and concealed from plaintiff, which would calculate to impair and had impaired the health of plaintiff. *Kern v. Myll*, 80 Mich. 523, 3 L. R. A. 682.

But upon another trial of the case the proof did not support the declaration, and it appeared that before the house was erected, years before the suit was brought, the well had been filled up even with the surface, and during all the intervening time no complaint had been made to the landlord while plaintiff had occupied for three years without complaint, and there was nothing to put defendant on notice of the fact that the filling had sunk and the well become a cess-pool. The court says the landlord was not chargeable with such negligent ignorance as is equivalent to actual knowledge, and a recovery was denied. *Kern v. Myll*, 94 Mich. 481.

In *Wallace v. Lent*, 29 How. Pr. 239, 1 Daly, 481, where the action was for rent, which the tenant refused to pay because the premises were unsafe for occupation and had to be abandoned, it appeared that the landlord knew that they were not fit for occupation by reason of a cause which the tenant could not discover by a mere inspection of the premises, and the court held that when the landlord knows that a cause exists which renders the house unfit for occupation it is a wrongful act on his part to rent it without giving notice of its condition.

Where a vault partly filled with dangerous matter was boarded over so that the tenant could not learn of its existence, although the landlord knew that it was dangerous, the landlord will be liable if

evidence has no application to agreements made subsequent to the execution of the written contract. In *Cobb v. Wallace*, 5 Coldw. 539, 98 Am. Dec. 435, there was a written contract for the hire of a coal barge. It was allowed to prove by parol that it was hired for one particular purpose and trip only, and the question whether the writing embraced the whole contract was for the jury. In *Lytle v. Bass*, 7 Coldw. 303, a note was given for a sawmill. It was permitted to show, as a separate, collateral, substantive agreement, that the vendor warranted the sawmill. In *Bissenger v. Gutteman*, 6 Heisk. 377, it was held that it was competent to show by parol that, at the time a promissory note was executed, it was agreed it should be held for nothing, on the happening of a specific condition. In *Hicks v. Smith*, 4 Lea, 463, there was a mortgage, and it was permitted to show by parol that Thomas should have priority when it was satisfied, though the mortgage did not so provide. In *Hawkins v. Lee*, 8 Lea, 42, it was allowed to add terms to a written contract by parol, to the effect that plaintiff was to work at a particular place, and

not remove his tools therefrom, and other conditions. In *Smith v. O'Donnell*, 8 Lea, 468, it was held that a contract might be part in writing and part in parol, and in such case parol evidence was admissible. In *Breeden v. Grigg*, 8 Baxt. 163, it was held that parol evidence is admissible to prove conditions upon which a written contract was made. In *Waterbury v. Russell*, 8 Baxt. 162, there was a sale of corn, —contract in writing. It was permitted to be shown by parol that the corn was represented to be sound, as an inducement to the written contract. In *Brady v. Isler*, 9 Lea, 357, it was held that parol proof may be allowed to show whether a written contract was in fact made, or whether it was to take effect only on certain conditions. In *Barnard v. Roane Iron Co.* It was held that, in a proceeding by a vendor to rescind a contract for the sale of land on the ground of fraud, parol evidence of the fraudulent representations of the vendee, made in negotiating the contract, is admissible, the purpose being to show that the vendor was entrapped into an agreement that he otherwise would not have made. The general rule, as

he does not disclose the condition to the tenant. *Martin v. Richards*, 155 Mass. 381.

The owner of a dwelling house, who, knowing that it is infected with small pox so as to endanger the health of the occupants, leases it for the purposes of a habitation without disclosing the fact to one who is ignorant of its condition, and who, without contributory negligence on his part, by reason of the state of the house, is attacked by the disease, will be liable for the injury. *Minor v. Sharon*, 113 Mass. 477, 27 Am. Rep. 122.

A landlord who lets premises knowing that they are infected with a contagious disease without notifying the tenant thereof is liable to the latter, in case the disease is communicated, for the damage sustained. *Cesar v. Karutz*, 60 N. Y. 220, 19 Am. Rep. 164.

In an action by a tenant for injuries caused by contracting diphtheria in the landlord's house, the court says it is settled that a landlord may be liable for not disclosing a source of danger known to him to be such and not discoverable by the tenant. But it is not enough that the landlord knows of the source of danger unless he also knows or common experience shows that it is dangerous. He is bound at his peril to know the teachings of common experience; but he is not bound to foresee the results of which common experience could not warn him and which only a specialist would apprehend. The general rule between landlord and tenant is *caveat emptor*. And this rule cannot be eluded by showing that the tenant did not know of a defect, that the landlord did, and then asking the jury to pronounce it a secret source of danger. *Cutter v. Hamlen*, 147 Mass. 471, 1 L. R. A. 429. The court further holds that the landlord is bound to disclose the fact that the drains are in bad condition, and that there has been a case of diphtheria in the house within a short time. The court says there is strong ground for requiring the tenant to insist on a warrant of the safety of drains if he does not wish to take the risk; but that defective drains in combination with diphtheria in the house indicate a special danger of infection from the drains, and that the landlord could not keep quiet under such circumstances.

In *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, where the injury was to the tenant's daughter, it appeared that the landlord knew of the dangerous condition of a portion of the premises which would be frequently used by the tenant and his family, 34 L. R. A.

and failed to disclose the condition to the tenant, although it was so situated as not to be readily discoverable to them, and the court held that because of his failure to disclose his knowledge he was liable for the injury.

In *Schmalzried v. White* (Tenn.) 32 L. R. A. 782, the court held that the duty of disclosing to the tenant hidden defects and secret conditions that contributed to make the property unsafe is not imposed upon the landlord who is ignorant of them without fault or negligence on his part; but it says that this ruling is not intended to conflict with that in *HINES v. WILLCOX*, that the landlord is liable, not only for what he knows of the defects in the premises let, but for what he might have known by the exercise of reasonable care and diligence.

Statutory Liability.

Under the English act of 1885, relating to the housing of the working classes, which requires that the house shall be in all respects reasonably fit for human habitation, the tenant may sue the landlord in case the premises are not reasonably fit for habitation so that the plaster on the ceiling falls and injures her. *Walker v. Hobbs*, L. R. 23 Q. B. Div. 458.

Under the California Civil Code the tenant has the option, in case repairs are needed and they do not exceed in value a month's rent, to make them and deduct the amount from the rent or to vacate the premises, and in case he fails to exercise his option he cannot recover damages for injuries done by the dilapidated condition of the premises. *Van Every v. Ogg*, 59 Cal. 565.

Where a statute required the owner to put the premises in a condition fit for occupation, and the tenant was injured by the fall of the woodshed which a servant of the landlord had assured the tenant was safe, the court held that the lessor would be liable for injuries resulting from defects in the premises known to him and unknown to the lessee if he allowed the lessee to occupy in ignorance of the risk. Whenever the defect is inherent and unknown to the lessor he is not accountable, nor can he be held when he has done all that a reasonably prudent man would have done towards fitting the place for occupation. It is as much the duty of the lessee to satisfy himself of the safety of the premises as it is of the lessor to make them so; and when it would appear from an examination such as an ordinarily prudent man would make be-

well as the different cases in which it does not so apply as to exclude parol evidence, is forcibly stated, and fully commented on in *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 38, and notes; *Durkin v. Cobligh* (Mass.) 17 L. R. A. 270, and notes.

It must be admitted that, in the multitude of exceptions to the general rule, much confusion has arisen, not only in our state, but elsewhere; so that the exact limit to be placed upon the exceptions depends, not only upon the peculiar facts of each case, but also, to some extent, upon the peculiar cast of thought of the individuals composing the court, as is substantially said in *Richardson v. Thompson*, 1 Humph. 154. Nevertheless, the exceptions are as well sustained and based upon authority as is the general rule, and there remains only the application of the rule and its exceptions to each case as it arises. Looking to the case as presented in this record, it is evident at a glance that the written contract set out only relates to the obligation and undertaking imposed upon the tenant, and it makes not the remotest reference to any act to be done, or obligation

assumed or representation made, by the landlord; so that if the landlord agreed to do anything to the premises to make them safe, or represented that he had made them safe, which induced the plaintiff to make the contract, or which was to be a part of the contract, it was not embraced in the writing. Indeed, the record shows that not all the requirements made of the tenant are embraced; for the parol evidence, as well as the note filed, shows that it was one of the vital terms of the contract that Mrs. Hines should bind her separate estate for the payment of the notes, and that she did attempt to do so in the notes. This was an independent, collateral agreement to the contract of rental, and an inducement to make it not embraced in the lease contract which was written. We are of opinion it was error to exclude evidence tending to show that the defendant agreed to put the premises in safe condition, if such were made before the contract was closed, and also evidence tending to show that, at the time the contract was signed, defendant or his agent represented that they had been put in safe condition as promised.

fore venturing to reside in or upon the premises that they were unsafe, and the defect rendering them so is discernible, the lessee is presumed to have had notice of such defect and accepted the risk incident thereto if he occupies the premises. If he could have discovered the defect by examination he was not justified, in view of the fact that he suspected the safety of the premises, in relying on the assurance of the servant that they were safe. *Daley v. Quick*, 90 Cal. 179.

As to neglect to provide fire escapes, see note to *Rose v. King* (Ohio) 15 L. R. A. 160.

Landlord actively negligent.

The landlord is liable for injuries caused by negligence in making repairs. *Mitchell v. Plaut*, 31 Ill. App. 148.

If the landlord undertakes to make repairs, and the tenant is injured by the negligent manner in which they are made, the landlord is liable for the injury. *Callahan v. Loughran*, 102 Cal. 478; *Little v. Macadaras*, 29 Mo. App. 332, 38 Mo. App. 187.

If the landlord undertakes to make repairs, and does it so unskillfully as to subsequently cause an injury to the tenant, he will be liable therefor. *Gregor v. Cady*, 82 Mo. 131.

A landlord whose negligence in making ordinary repairs is the cause of a personal injury to the tenant is liable therefor. *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548.

If the owner in making repairs negligently causes the building to burn he will be liable to the tenant for his injury. *Hine v. Cushing*, 53 Hun. 519.

If the repairs are negligently made the tenant may recover the damages which he suffers because of the defect, if he was ignorant that the premises had not been made safe. *Walker v. Swayzee*, 3 Abb. Pr. 138.

In *Franklin v. Brown*, 21 Jones & S. 474, where the injury was caused by noxious gases which came through the window and which the evidence showed neither party knew of before the signing of the lease, so that there was nothing to show negligence on the part of the landlord, the court says, if guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, the landlord is liable.

Where the owner raised the leased house and did not provide a safe and proper means of entrance to and egress from it and the tenant's wife fell and was injured in attempting to leave the house, the 84 L. R. A.

court held that if the fall was caused because the owner failed to provide any means of egress whatever or through some patent defect in the plan of the contrivance the tenants could not recover, but if the structure was proper but was insufficiently secured and therefore gave way under the attempted use there might perhaps be a recovery. *Smith v. Buttner*, 90 Cal. 95.

If the injury results from a nuisance on the landlord's adjoining property there may be a recovery. *Alston v. Grant*, 3 El. & Bl. 128, 2 C.L. Rep. 433, 23 L. J. Q. B. N. S. 163, 18 Jur. 332.

Where the landlord removes the gas fixtures without plugging the ends of the openings, and subsequently permits gas to be turned into the pipes, by reason of which an explosion occurs and injures the tenant, he will be liable for the injury. *Kimmell v. Burfelnd*, 2 Daly. 155.

In *Meany v. Abbott*, 6 Phila. 256, where the landlord employed a plumber to make certain additions to the building, the court held that he was not liable for the defects in the work when done, on the ground that the plumber was not his servant for whose acts he was liable.

So, if the landlord, with the consent of the tenant, lets the repairs out to a contractor, he will not be liable for injuries caused by the contractor's negligence. *Francisco v. Brinkley*, cited in 3 King's Dig. (Tenn.) 2d ed. § 3515.

Contributory negligence.

The tenant cannot recover if the unsafe condition of the premises was his own fault. *Kahn v. Love*, 3 Or. 206.

If the tenant, knowing that a stairway is dangerous and has not been used for more than a year, voluntarily attempts to use it without adequate cause, she will be guilty of such negligence as to prevent a recovery against the landlord, although he has not complied with his promise to repair it. *Town v. Armstrong*, 75 Mich. 580.

In case the landlord does not comply with his agreement to make repairs, the tenant cannot, knowing that his property will be exposed to injury if left on the premises, take the hazard of leaving it there at the risk of the landlord. If he does leave it there, and the property is injured, he cannot recover from the landlord therefor. *Cook v. Soule*, 56 N. Y. 420.

In *Scott v. Simons*, 54 N. H. 426, the court says that the landlord will be liable if he has negli-

The learned trial judge, however, excluded the evidence also upon another ground; and that was because, in his opinion, the evidence offered did not go to the extent of setting up a distinct collateral agreement to make the premises safe, or an assurance that they had been made safe, but that the evidence only went to show complainants about the sanitary condition of the premises, and promises in regard to the grates and windows and other minor details and assurances only as to them. The most material evidence upon this question is that of plaintiff, which is somewhat indefinite. She does not, in her evidence, mention the porch, and does refer to the windows and grates, and general sanitary condition of the premises; but she also says that the promise was to put the house in good repair,—safe repair. The question as to whether the entire contract was reduced to writing, or an independent collateral agreement was made, was a question of fact; and where there was any evidence to sustain the contention, it was a matter for the jury to determine, and not for the court. *Cobb v. Wallace*, 5 Coldw. 540, 98 Am. Dec. 435; *Stew-*

art v. Phoenix Ins. Co. 9 Lea, 104, 112. We think that it was therefore error in the trial judge to determine these questions, and exclude all evidence in regard to them.

The court charged the jury, among other things, substantially, that if the landlord knew the unsafe condition of the premises, and concealed the fact from the tenant, and that she did not know of their unsafe condition, or could not have known by the exercise of proper care and diligence, then she could recover, etc. It will be noted that the learned trial judge, in this charge, makes the tenant responsible, not only for the facts known to her, but also such as she could have known by the exercise of proper care and diligence; but he only holds the landlord responsible for his actual knowledge, and not for such knowledge as he might have had by the exercise of proper care and diligence. We think the great weight of authority is that, if a landlord lease premises which are at the time in an unsafe and dangerous condition, he will be liable to his tenant for damages that may result, if he knows the fact and conceals it, or if, by reasonable care

gently constructed the premises or negligently suffered them to remain defective after notice that they have become so. But it holds that the evidence did not show that he had done either. The court further says the landlord might be liable to the tenant if after notice of the defect he failed to repair it, but "we think not to one who after being aware of the defect unnecessarily exposed his goods to injury by it."

If the tenant continues to occupy knowing of the dangerous condition of the premises he will be guilty of contributory negligence, and cannot recover for the injury caused by the accident: *Kampinsky v. Hallo*, 62 N. Y. S. R. 265.

If the tenant, knowing of the defective condition of the premises, continues to use them and is injured by the defect, contributory negligence will bar a recovery for the injury. *Sanders v. Smith*, 5 Misc. 1.

In *Cantrell v. Fowler*, 22 S. C. 589, it is said while the landlord would be liable for all injury which the tenant might sustain because of his breach of contract to repair, yet the tenant should not stand quietly by and voluntarily assume the risk of injury, thus contributing to his own loss. He ought to make the repairs himself, and charge the sum to the landlord.

A tenant has no right to use demised premises which he knows to be unfit for occupation in such a way as to cause damage and loss, and then seek to recover damages from his landlord for the injury so occasioned by his own act. *Nichol v. Dusenbury*, cited in 2 Hilt. 223.

In *Arnold v. Clark*, 13 Jones & S. 252, the court says although the representations as to the safety of the premises were false the tenant could not, having knowledge of the falsehood, take the risk of continuing its use and look to the landlord to indemnify him for any loss that he might sustain. And the same would be true in reference to a promise to repair. The measure of damages is what the repairs would cost if made by the tenant, or the loss in the use of the premises while making them, or the difference in rental value with and without them.

And that principle was followed in *Kabus v. Frost*, 18 Jones & S. 72.

Proximate cause.

A landlord is not liable for injuries to a tenant by the fall of plaster which was loose and which he

had promised to repair, if the proximate cause of the fall was the act of an employee of an independent contractor in the room above, who pushed his foot through the ceiling. *Fitzgerald v. Timoney*, 13 Misc. 327.

Measure of damages.

An express contract between landlord and tenant that the former is to repair the demised premises does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the unsafe condition of the premises. The tenant's only remedy is to make the repairs at the expense of the landlord. *Brown v. Toronto General Hospital*, 23 Ont. Rep 599.

In case the owner does not put the building in repair as he agreed to do the tenant cannot recover for the loss of the services of one of his employees, an opera singer, who was made ill by the unsuitable condition of the premises. *New York Academy of Music v. Hackett*, 2 Hilt. 217.

Where the leasing of a house is procured by fraud in statements as to the capacity of the furnace the tenant may retain the premises, and recover his damages, which will be the difference between the rental value of the property as it is and as it would have been had it been as represented. *Pryor v. Foster*, 130 N. Y. 171.

If the landlord refuses to comply with his agreement to repair a dangerous pit fall near the well, and the tenant falls into it and is injured, he cannot recover for the injury, since the damages are too remote. He should have had the repairs made at the expense of the landlord. *Hamilton v. Feary*, 8 Ind. App. 615.

In *Flynn v. Hatton*, 48 How. Pr. 333, it is said the ordinary damages for breach of a general agreement to keep the premises in repair are the expenses of repair and the loss of the use of the premises while the party contracting was in default, and such an agreement in no way contemplates any destruction of life or casualties to the person or property which might accidentally result from an omission to fulfil the agreement.

Distinguishable cases.

Undoubtedly the landlord should not be permitted to shield himself behind his bare statement that he did not know if under all the circumstances it is evident that he should have known of the

and diligence he could have known of such dangerous and unsafe condition, provided reasonable care and diligence are exercised by the tenant on his part. Taylor, Land. & T. 7th ed. § 175; 2 Wood, Land. & T. p. 854, and note; Shearm. & Redf. Neg. §§ 709-711; Cowen v. Sunderland, 145 Mass. 368; Coke v. Gutkese, 80 Ky. 598, 44 Am. Rep. 499; Cesar v. Karuta, 60 N. Y. 229, 19 Am. Rep. 164; Lovell v. Spaulding, 50 Am. Dec. 780, note; Woodf. Land. & T. 12th ed. 707; Godley v. Hagerty, 20 Pa. 387, 59 Am. Dec. 731; Carson v. Godley, 26 Pa. 111, 67 Am. Dec. 404; Edwards v. New York & H. R. Co. 98 N. Y. 249, 50 Am. Rep. 659; Gill v. Middleton, 105 Mass. 477, 70 Am. Rep. 548. The same principle is held in our own case of *Young v. Bransford*, 12 Lea, 244, citing 1 Thomp. Neg. 317; Whart. Neg. §§ 817, 845. See also *Timlin v. Standard Oil Co.* 126 N. Y. 514; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 446; *Maywood v. Logan*, 78 Mich. 135; *Lindsey v. Leighton*, 150 Mass. 285; 12 Am. & Eng. Enc. Law, pp. 687, 691, note. This is not in conflict with the general rule that, in the absence of any stipulation or statement, there is no warranty that the premises are in a habitable condition, and no obligation to repair, as held in *Southern Oil Works v. Bickford*, 14 Lea, 657, and *Banks v. White*, 1 Sneed, 614; but the cases proceed upon the idea that the premises, when leased, are unsafe and that fact is known to the landlord and concealed by him from the tenant, or might have been known by him by the exercise of reasonable care and diligence. The liability does not arise upon any question of contract, but upon the obligation to the tenant not to expose him to danger of which the landlord knows, or could know by reasonable care, nor is it done away with by the fact that the parties examined the premises, and the tenant did not discover the defect if he exercised reasonable diligence. This view of the case was presented in the second count of plaintiff's declaration. Upon this feature of the case the learned trial judge charged the jury, among other things: "If the plaintiff had any right to recover, her right must depend upon what took place after the plaintiff took possession of the premises, and before the accident occurred."

defect. But the cases cited above seem to indicate that the cases are few in which the landlord, not actually knowing of a defect, should be charged with notice when the tenant should not be charged with the same notice. In *Spellman v. Bannigan*, 36 Hun, 174, the expression is used that the landlord would be liable if he knew or "from the facts and circumstances in the exercise of ordinary care and prudence he should have known" of the defect, and in *Booth v. Merriam*, 155 Mass. 321, it is said the landlord must disclose concealed defects of which he has "or ought to have knowledge." In each case the expression is a *dictum*. Of the cases cited in the rehearing opinion in *HINES v. WILCOX* as containing such an expression *Martin v. Richards*, 155 Mass. 331, was a case of illness caused by a concealed vault which had been covered by a platform. The question was as to the admissibility of evidence. The court intimates that there might be a recovery if all the admissible evidence would warrant the jury in finding that at the time of the letting the defendant knew the source of danger, and knew or ought to have known that danger existed. There the facts were all known to the landlord or his agent, and the only question was 34 L. R. A.

Without going further into the case, and without commenting on the vast array of authorities presented by the defendant's attorneys in support of the trial judge's position, some of which are in conflict with the views herein given, we think the judgment of the court below must be reversed, and the cause remanded for a new trial. Appellee will pay costs of appeal.

A petition for rehearing was subsequently filed, in response to which *Wilkes, J.*, on March 5, 1896, handed down the following response, which applies also to *Stenberg v. Wilcoz* (Tenn.) ante, 615:

In these causes petitions to rehear have been filed, and pressed with much earnestness. The trial judge in the court below correctly laid down the law in regard to the tenant, and imposed upon her the risk of the premises, if she knew, or by the exercise of reasonable care and diligence could have known, of their dangerous condition. It is complained that this court imposed upon the landlord a like degree of care in ascertaining whether his premises were in safe condition when he let them. The correctness of the rule and liability of the landlord is not denied when he has actual knowledge of the danger and fails to disclose it, but denied so far as it requires him to exercise reasonable care and diligence to acquaint himself with their condition. The facts assumed by counsel in arguing this point are worthy of notice. In one portion of his briefs he says: "Neither the landlord nor his agents had any notion [we suppose he means notice or knowledge] of the condition of the porch. . . . They so swear, and there is no contradictory evidence." In another portion of his briefs he says: "The premises were old, and, to my belief, the porch was obviously dangerous at the outset." And again: "The porch was, at the outset, obviously, out of fix. No ordinarily careful person would have used it. That is the simple truth of the case." We think the evidence tends to show a state of facts between these two extremes, to wit, that the porch was unsafe when the premises were let, partly from the manner of construction, and partly from age, and that this was either known to, or by reasonable care

whether or not he ought to have known that the covered vault was dangerous. In *State, Baabe, v. Boyce*, 73 Md. 469, the injury occurred on a wharf, as to which there is an inclination to make an exception to the general rule. See note to *McConnell v. Lemley* (La. Ann.) ante, 609. In *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404, the owner constructed the building negligently in view of the uses to which it was to be put. In *Cope v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, it was an admitted fact in the case that the owner knew of the defect.

In *Lindsey v. Leighton*, 150 Mass. 285, where it is said that it was not necessary to show that the landlord had actual knowledge of the defect, that his duty was that of due care, and ignorance of the defect was no defense, the injury occurred on the common stairway of a tenement house, as to which an entirely different rule applies from that applicable to cases where the tenant is in possession of the entire property. See note to *Dollard v. Roberts* (N. Y.) 14 L. R. A. 239.

Moynihan v. Allyn, 162 Mass. 272, was also the case of an injury on a common passage of a tenement house.

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could have been known to, the landlord; but it was not so obviously dangerous as to have deterred an ordinarily careful person from using it, or seeing its danger. It is said that the landlord's liability to his tenant is more restricted than it is to third persons, and this is unquestionably so, in so far as it rests upon the contract between the parties, and want of care in the tenant; but, in this and similar cases, there is a separate and distinct ground of liability, depending, not upon contract or want of contract, but upon the obligation the landlord or landowner is under to his tenant, as well as third persons, not to expose them to danger which he knows or could know by the exercise of reasonable diligence. The rule laid down does not place upon the landlord the obligation of an insurer or warrantor by contract, nor does it impose the extreme duty of constant care and inspection, but it does impose upon him the duty of reasonable care and diligence to inform himself of the condition of the property which he proposes to let; and if, when he leases, he knows, or by the exercise of reasonable care and diligence should know, that the premises are dangerous, it is his duty to make them safe before he leases, or inform the tenant of their condition; and if he does not, he must respond, to any person not in fault, for damages caused by such condition of the premises, whether tenant or third person. Nor does this holding imply, as counsel suggests, that the tenant is thereby entirely relieved from the duty of proper diligence on his part, and that the landlord is virtually made guardian for the tenant. The obligation of the tenant to exercise proper diligence was properly stated by the trial judge, and there is nothing in the ruling of this court that can legitimately bear the construction given to it by counsel to relieve the tenant of such care.

The contention in the *Stenberg Case* is, mainly, that, being a boarder, she was the guest of the tenant, and not a third person in the eye of the law. It suffices to say, upon this point, without noting other considerations, that the evidence shows that the house was let to be used as a boarding house, and recommended by the landlord for that purpose. If it was unsafe for that purpose, which is a quasi-public purpose, and defendant knew it, or could by reasonable care and diligence have known it, he should respond in damages to any person injured on the premises. The boarder is there as much by invitation of the landlord as of the tenant. She is there, not strictly as a guest, but as a third person, legitimately on the premises on business, for the purpose for which they were let. The rule is that, if the landlord is guilty of *delictum* or negligence, he is liable; otherwise, not. And in this view of the case, the tenant and his boarder stand upon the same footing, the contract being out of the way. The tenant may have more extensive rights if she expressly contracts for safe premises, and is assured of their safety; and, on the other hand, her rights may be restricted if she is guilty of negligence in ascertaining for herself the condition of the premises when she rented them, or took them knowing them to be unsafe. The rule, as laid down by this court, imposes reasonable care and good faith on both landlord and tenant, in the absence of

a contract to make the premises safe, or a warranty of their condition; and, keeping this rule in view, the tenant and his boarder are entitled to as much protection against the landlord as is the stranger passing along the street or occupying adjoining premises. It cannot be the law that the owner of an hotel which is in an unsafe condition, known to him to be so, or by reasonable care and diligence he could know, can lease it to a tenant, who exercises reasonable care and diligence, and does not discover the danger, and then escape liability to either the keeper of the hotel, or his family or servants, or the persons who enter the hotel for its accommodation. What the hotel keeper's liability may be at the same time is not a question now before us. While many of the cases cited in the opinion are cases where the liability was held to exist as to third persons, there is no difference between such third persons and the tenant and his servants, the matter of contract and negligence of tenant being out of the way, as is said in *Cowen v. Sunderland*, 145 Mass. 368. There is an exception to the general rule of *caveat emptor*, as between lessor and lessee, "arising from the duty which the lessor owes the lessee. This duty does not spring directly from the contract, but from the relation of the parties, and is imposed by law." We quote from *Wood on Landlord and Tenant* (p. 855): "Where there are defects in the premises not open to ordinary observation, of the existence of which the landlord knows, or ought to know, which are dangerous to the person of the tenant, it is his duty to disclose them to the tenant, and if he fails to do so, and the tenant is injured thereby, the landlord is responsible for all the damages that ensue to the tenant therefrom." Again (p. 869), the same author says: "But, when the premises, at the time when they are leased are in so defective a condition as to be *per se* a nuisance, especially when they are leased for a quasi-public use, the landlord is responsible for injuries resulting either to the tenant or third persons lawfully upon the premises therefrom."

The rule laid down by this court, and (as we think) sustained by authority and reason, is that, in the absence of a contract to repair, or warranty of condition, both the landlord and tenant must use reasonable care and diligence. If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or, knowing their condition, assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe, or if he actually knows they are unsafe, and conceals or misrepresents their condition, then he is liable, the tenant being in no fault. It is not upon the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant, the public to danger which he knows, or in good faith should know, and which the tenant does not know, and cannot ascertain by the exercise of reasonable care and diligence. The cases are numerous which use the expression, laid down in the opinion in this case, that the landlord is liable, not only for actual knowledge, but also for

reasonable care and diligence in obtaining such knowledge,—not only when he knows, but when he ought to know, of the defects, by using ordinary care and diligence. As using this expression, we cite, among others, *Martin v. Richards*, 155 Mass. 881; *State, Bashe, v. Boyce*, 73 Md. 469; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499. In the late case of *Lindsey v. Leighton*, 150 Mass. 288, it was held that it was not necessary to show that the owner had actual knowledge of the defects. His duty was that of due care, and ignorance of the defect was no defense, in the absence of such care. In *Moynihan v. Allyn*, 162 Mass. 272, it was held that it was the duty of the landlord to inform the tenant of any hidden defects, which could not be discovered by reasonable diligence on his part, and of which the defendant ought, for his proper protection, to be informed; citing quite a number of other Massachusetts cases. Mr. Pingrey says, in § 592 of his work on Real Property: "Of course, if there is a concealed defect which renders the premises dangerous, which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for an injury which results from his concealment of it." In § 594 the same author says: It is held that the obligation and liability are the same to the tenant's guest and to his servants, "and the landlord is responsible, unless it appears that such owner did not know, or by reasonable care and diligence could not have known, of the unsafe condition of the premises when he leased them."

Under the principle we have attempted to lay down, the landlord's liability, leaving the contract of lease out of view, is the same to the tenant as to his servant, or his guest, or his customer, or his wife or child, or to the stranger passing along the streets or on the premises for any legitimate purpose. The only case cited by counsel apparently holding a doctrine contrary to that laid down by this court is that of *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767. This case is also reported in 50 Am. Dec. 782, and referred to as a peculiar case, and, as we think, very justly criticised, as placing the party injured in a very anomalous position. The case is clearly out of line with the current of authority. It may be remarked, however, that in that case the court said: "Whether the noxious structures existed at

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the time the lessees entered into the possession of the storeroom does not appear." As illustrative of the application of the rule we have laid down, we cite the following, among other cases, showing when the rule is applied, and as to what persons held applicable: In *Sworids v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, a longshoreman in the service of the tenant sued the owner, and recovered. In *Godley v. Hagerty*, 20 Pa. 887, 59 Am. Dec. 731, a servant of the tenant sued the owner, and recovered. In *Carson v. Godley*, *supra*, a customer of the tenant sued the owner, and recovered. In *Cesar v. Karutz*, 60 N. Y. 229, the owner was held liable to the child of the tenant. In *Coke v. Gutkese*, *supra*, the owner was held liable for injuries sustained by a child of the tenant. In *Martin v. Richards*, 155 Mass. 881, three cases were tried together, and the owner was held liable for an injury to the child and wife of the tenant. In *Minor v. Sharon*, 112 Mass. 477, three cases were tried together, and the owner was held liable for injuries to the tenant's children. In *State, Bashe, v. Boyce*, 73 Md. 469, the owner was held liable for injuries to the servant of the tenant. In *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, the owner was held liable for an injury to the wife of the tenant. In *Nugent v. Boston, O. & M. R. Co.*, 80 Me. 62, the owner was held liable to persons rightfully on the premises. In *Nelson v. Liverpool Brewing Co.* L. R. 2 C. P. Div. 311, the right of the servant of the tenant to sue was recognized. In *Moynihan v. Allyn*, 162 Mass. 272, the right of the child of the tenant to sue was recognized. And Mr. Pingrey, in his work on Real Property, expressly states that there is no distinction in the rule as to the liability of the owner to the tenant or to the tenant's guest, or to the tenant's servant. In each instance he says the rule is the same.

We see no reason or occasion for rehearing the causes upon further arguments or briefs. The petitioners make no new grounds of defense, and lay down no principles that have not already been fully argued by counsel for defendant, and still more fully investigated and considered by the court. It could serve no useful purpose to have further argument along lines that the court does not consider conclusive or material in the case. The court is satisfied with its conclusions, and has no doubt of their correctness when properly understood and applied.

The petition to rehear is denied, and dismissed.

WYOMING SUPREME COURT

GRAND ISLAND & NORTHERN WYOMING RAILROAD COMPANY

v.

Norval H. BAKER *et al.*

(.....Wyo.....)

1. A question arising upon the pleadings which is certified to the supreme court for decision cannot be answered if the facts do not sufficiently appear in the pleadings to authorize a complete determination of it.
2. In determining whether or not county indebtedness violates a constitutional provision that no county shall create any indebtedness exceeding 2 per centum upon the assessed value of the taxable property in it, compulsory obligations imposed by the legislature must be included.
3. The fact that the validity of the debt on which a judgment against a county was rendered cannot be questioned in a proceeding to enforce a tax to pay it does not prevent a resistance of the tax on the ground that it was not authorized by law.
4. A judgment against a county for a claim which should have been paid out of current revenue, but was not because the amount limited by the Constitution was exhausted, and which did not become valid county indebtedness because the constitutional limit of indebtedness had already been reached, or because it was not legally adopted by the people, is not "public debt" within the meaning of a provision of a Constitution limiting the tax rate except for public debt and interest thereon.
5. Recourse to the claims upon which judgments against a county were rendered may be had to determine to what class they belong, and whether or not any limit is imposed upon taxation by which they may be enforced.
6. The expense of maintaining the district court is a county purpose which must be provided for out of the fund raised by the limited tax levy authorized by Const. art. 15, § 5.
7. Compensation to be made to a landowner for land taken by a county for the location of a public road must be paid out of the ordinary county revenue raised by the limited tax provided by Const. art. 15, § 5.
8. A board of county commissioners which can only act as a body in session cannot confess judgment against the county under a statute requiring defendant to personally appear in court in order to confess judgment.
9. A power of attorney to confess judgment cannot be given by a board of county commissioners without statutory authority.

(June 30, 1896.)

RESERVATION by the District Court for Crook County for the opinion of the Supreme Court of certain questions arising in a

proceeding to enjoin defendants from collecting certain taxes which had been levied in Crook county for the year 1895. *Answers favorable to complainant.*

The facts are stated in the opinion.

Messrs. Burke & Fowler and N. K. Griggs for plaintiff.

Messrs. J. L. Stotts and M. Nichols, for defendants:

There is no distinction made by the courts between bonded debt and liquidated debts generally so far as the application of the term "public debt" is concerned. The bonded debt is simply a funded debt and the other a floating debt.

State, Palmer, v. Hickman, 11 Mont. 541; *People, Seeley, v. May*, 9 Colo. 80, 9 Colo. 404; *Law v. People, Huck*, 87 Ill. 385; *Gray v. Bennett*, 3 Met. 536.

In *United States, Butz, v. Muscatine*, 75 U. S. 8 Wall. 575, 19 L. ed. 490, the court states: "The statute of Iowa, that the city of Muscatine shall levy a tax of only 1 per cent a year does not excuse such city from levying a tax to pay a judgment against it, so long as the state Code provides for the levying of such tax."

See *Carroll County Supers. v. United States*, 85 U. S. 18 Wall. 71, 21 L. ed. 771.

The county purposes or taxes for which any certain county, by § 2, chap. 6, Laws of 1867, is limited to 3 mills on the dollar, except on a vote of the people, include only the ordinary expenses of the county, and do not include money to pay principal or interest of a county debt.

McCormick v. Fitch, 14 Minn. 252; *State v. Milwaukee*, 25 Wis. 122; *Cooley, Taxn.* 138.

The limitation of 12 mills for county revenue was to prevent the board of county commissioners from incurring indebtedness by extravagant or reckless management. But the salary of an officer is not an indebtedness of the county which is created by the county board.

State, Wessel, v. Weir, 88 Neb. 35; *State, Rotwitt, v. Hickman*, 9 Mont. 370, 8 L. R. A. 403; *Welch v. Strother* (Cal.) 16 Pac. 22.

A liability imposed by the legislative power of the state does not come under the general rule limiting the creating of public indebtedness.

Grant County v. Lake County, 17 Or. 453; *People, Rollins, v. Rio Grande County Comrs.* 7 Colo. App. 229.

Mr. Chester B. Bradley amicus curia.

Mr. R. H. Vosburg for Weston county.

Mr. J. T. Hoop for Sheridan county.

Potter, J., delivered the opinion of the court:

Plaintiff filed its petition in the district court for Crook county, praying for an injunction

NOTE.—On the question, What constitutes an indebtedness of a municipal corporation within the meaning of provisions restricting it, see *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402, and note.

As to the conclusiveness of a judgment against a municipality in a proceeding by mandamus to compel its payment, see *Howard v. Huron* (S. D.) 28 L. R. A. 483; but attention should be called to the distinction between the conclusiveness of the judgment itself and the right to exceed the limitation fixed for taxes.

pel its payment, see *Howard v. Huron* (S. D.) 28 L. R. A. 483; but attention should be called to the distinction between the conclusiveness of the judgment itself and the right to exceed the limitation fixed for taxes.

against the collection of a portion of the taxes levied in that county for the year 1895. A demurrer was interposed, and upon the hearing thereof the court ordered the cause to be reserved to this court for its opinion upon certain questions certified to be important and difficult. In the year 1895 the board of county commissioners of the county of Crook levied the following taxes: General revenue, 10 mills; general county school, 2 mills; judgment tax, $8\frac{1}{2}$ mills; court-house and jail bonds, 2 mills; funding bonds, $2\frac{1}{2}$ mills,—amounting in the aggregate to 19 $\frac{1}{2}$ mills on the dollar. The only part of the levy complained of in this action is the judgment tax of $8\frac{1}{2}$ mills, which is assumed to have been levied to pay certain judgments rendered against the county. The facts connected with the judgments are not, as the pleadings now stand, sufficiently disclosed to definitely indicate the precise nature of the claims entering into them. We are not informed by the pleadings, either, as to the time when, or the court wherein, such judgments were secured. Inferentially it may appear that they were obtained since the admission of the state, and largely upon warrants issued in payment for current expenses of the county, since the adoption of the Constitution. Indeed, the argument in this court was largely confined to the effect of judgments rendered upon warrants so issued, and the taxing power associated therewith, although the suggestion was advanced by counsel that for all which appeared in the pleadings funding bonds might have constituted the source of the judgments. It would seem that no necessity exists for dispute upon the essential facts. It would have been more satisfactory, therefore, and would perhaps have narrowed the scope of our investigation, had the issues been fully made up prior to the reservation to this court, so as to clearly and without cavil present the questions submitted by the learned court for our consideration. It is not our duty, however, to pass upon the demurrer. Our jurisdiction is limited to a decision upon the certified questions, and we are not requested thereby to direct the ruling which should be made upon the present condition of the pleadings.

The judgment tax is charged to have been illegal and void, and levied without authority; that the same was not levied for the payment of the public debt of the county, or the interest thereon; and the county had exhausted its power to levy taxes for general revenue purposes by a levy of the constitutional limit of 12 mills for such purposes in the year 1895 and each year thereafter since the organization of the state. It is attempted also to attack the judgments upon two grounds: First, that the alleged debts upon which they were obtained were void, as having been contracted, or the evidences of such indebtedness having been issued, in excess of the limit upon county indebtedness established by the Constitution; second, that the said judgments were procured through the consent and confession of the board of county commissioners contrary to law.

The questions certified for our decision are as follows: (1) Is the levy of the board of county commissioners of the county of Crook of $8\frac{1}{2}$ mills of judgment tax, as set forth in plaintiff's petition, and the agreement of

parties thereto attached, in excess of the limitation, as fixed by the Constitution and laws of the state of Wyoming? (2) Separate and apart from each of the propositions herein made, is or is not the defendant entitled to judgment on its agreement with the plaintiff (Exhibit A, plaintiff's petition) for the sum of \$927.66? (3) For what purposes can a tax be levied by the board of the county commissioners in excess of the 12-mills limitation, and under the term "Public Indebtedness and Interest Thereon," as the term is used in § 5 of art. 15 of the Constitution? (4) Can a tax in excess of 12 mills be levied by the board of the county commissioners for the payment of an indebtedness growing out of and by reason of the provisions of chapter 6 of the Laws of 1893, entitled "An Act to Encourage the Destruction of Predatory Wild Animals?" (5) Can a tax in excess of 12 mills be levied by the board of the county commissioners for the purpose of paying warrants issued for salaries of county officers when the revenue of the county derived from taxation in previous years has not proved sufficient to defray its expenses, and such warrants are outstanding and unpaid for the want of sufficient funds? (6) Does the placing of warrants, issued for legitimate county expenses, into judgment, justify the board of the county commissioners in levying a tax in excess of 12 mills with which to pay the same? (7) In case judgment has been rendered in favor of a landowner for damages caused by the location, construction, and opening of a public road through his land, can a tax be levied to pay such judgment in excess of 12 mills provided by law to be levied for all county purposes, the revenue raised by the 12-mill tax being all required and used for county purposes? (8) Has the board of the county commissioners authority and power under the Constitution and laws of the state to confess and authorize a confession of judgments against the county? (9) Can a judgment rendered by the district court of Crook county, having jurisdiction over the person and subject-matter, be attacked collaterally in this case? (10) Cannot the board of the county commissioners levy the district-court tax for the maintenance of the court in addition to the levy of 12 mills for county revenue?

The second question, *viz.*: "Separate and apart from each of the propositions herein made, is or is not the defendant entitled to judgment on its agreement with the plaintiff (Exhibit A, plaintiff's petition) for the sum of \$927.66,"—cannot receive our consideration, for the reason that the facts do not sufficiently appear in the pleadings before us to authorize a complete determination thereof upon the merits of the cause.

For the purposes of convenience, we propose to discuss the legal questions involved in the various questions, without, as in general, a specific reference to any particular question, or the order in which they are presented. A majority of the certified questions do not admit of categorical answers. A careful elucidation of the views entertained by the court covering the subject-matters of the questions ought to, and, we conceive, will, be sufficiently indicative of our opinion upon the questions themselves.

Involved in the questions thus submitted is the construction of the various constitutional provisions affecting the power of counties to incur indebtedness and levy taxes. The gravity of the interests which may depend upon a determination of these questions has not been underestimated, and with a keen appreciation of the responsibility resting upon the courts in such matters it is only after studious and mature deliberation that we have arrived at our conclusions. Upon the argument much attention was devoted by counsel to the policy of the constitutional restrictions upon public indebtedness and taxation, but the courts possess no control over matters of mere policy. If the people of the commonwealth by adopting a Constitution have committed themselves to a mistaken policy, the only remedy is an amendment, by constitutional methods, of that instrument. Within the province of the legislature, recourse must be had to that body for the correction of any errors of policy which may have induced its enactments. The jurisdiction of the courts extends only to the construction and enforcement of the Constitution and laws as they exist. That jurisdiction should be zealously guarded, but not used as a cloak to encroach upon the functions of the other departments of government. The provisions of the Constitution controlling the matters before us are as follows:

Article 15, § 5: "For county revenue there shall be levied annually a tax not to exceed 12 mills on the dollar for all purposes including general school tax, exclusive of state revenue, except for the payment of its public debt and the interest thereon. An additional tax of \$3 for each person between the ages of twenty-one and fifty years, inclusive, shall be annually levied for county school purposes."

Article 16, § 3: "No county in the state of Wyoming shall in any manner create any indebtedness exceeding 2 per centum on the assessed value of taxable property in such county, as shown by the last general assessment, preceding; provided, however, that any county, city, town, village, or other subdivision thereof in the state of Wyoming, may bond its public debt existing at the time of the adoption of this Constitution, in any sum not exceeding 4 per centum on the assessed value of the taxable property in such county, city, town, village, or other subdivision as shown by the last general assessment for taxation."

Article 16, § 4: "No debt in excess of the taxes for the current year shall, in any manner, be created by any county or subdivision thereof, or any city, town, or village, or any subdivision thereof, in the state of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people thereof and by them approved."

Other provisions, which may affect the construction to be given to the sections above quoted, will be referred to as we proceed.

We are to consider the power and authority of a county in this state, first to create indebtedness, and, second, to levy taxes. Prior to the admission of Wyoming as a state, municipal, and county indebtedness in this as well as other territories was limited by congressional enactment to 4 per centum on the value of the taxable property within such corporation or

county, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness. Stat. 1st Sess. 49th Cong. chap. 818, p. 171; Rev. Stat. Wyo. 1887, p. 89. The language of that act is as follows: "That no political or municipal corporation, county, or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness exceeding," etc. Acknowledging this last limitation upon county indebtedness, the Constitution expressly authorized the bonding of the public debt of any county in any sum within the congressional limit of 4 per cent. Article 16, § 3. As a primary proposition it must be manifest that the framers of the Constitution did not propose to afford vitality to any indebtedness incurred in excess of the limitation declared by Congress. In case any county had become so indebted, it was not permitted to issue bonds to pay such excess; and no other constitutional provision refers to it. This may become an important consideration. County indebtedness amounting to, but not exceeding, 4 per cent on the assessed value of taxable property was therefore recognized as valid and enforceable; and, as no limitation was placed by the Constitution upon the power to levy taxes to pay the valid public debt of a county, means were allowed by which the same could be eventually satisfied. It is also clear that in authorizing the funding of county indebtedness in an amount not exceeding 4 per cent, all manner of indebtedness, whether for imposed or voluntary obligations, was understood to be included within the congressional limitation, it being obvious that the intention was to permit the bonding of all legal and valid debts existing at the time of the adoption of the Constitution, and that it was not the purpose to repudiate any valid obligation or liability. Upon future indebtedness another limit was placed by the Constitution. First, it is provided that no county shall in any manner create any indebtedness exceeding 2 per centum on the assessed value of taxable property in such county, as shown by the last general assessment, preceding; second, no debt in excess of the taxes for the current year shall in any manner be created by any county, unless the proposition to create such debt shall have been submitted to a vote of the people, and by them approved. Without reference now to the classes of indebtedness included within these restrictions, if any distinction in that respect exists, it is apparent that, if the indebtedness of a county has reached or exceeds 2 per centum on the assessed value of taxable property, such county is powerless to create any debt in excess of the taxes for the current year, either with or without a submission of the matter to a vote of the people, or their approval thereof. The absolute limit of lawful indebtedness being reached, it cannot be exceeded. If, however, the indebtedness of a county thus restrained is less than such 2 per centum, then there arises the further prohibition against the creation of any debt in excess of the taxes for the current year without first submitting the same to a vote of the people, and thereby securing their approval; but, in

such case, if a proposition of that character is so submitted to and approved by the people of the county, then, so far as concerns the constitutional provisions, such county becomes authorized to create the additional debt, if, together with the existing indebtedness, it will not exceed 2 per centum on the assessed value of the taxable property within the county. Thus the two sections (§§ 8 and 4 of art. 16) are harmonious, and their meaning readily discerned. We apprehend no difficulty has arisen in reference to the obvious purport of the Constitution in this regard. The intention evidently was: First, to place an absolute limit upon the debt included in the provisions; and, second, to forbid any such debt to be created in any year, even within the absolute limit, if in excess of the taxes of the current year, without the sanction of the people of the county; and when the final limit was reached to require the affairs of the county to be conducted practically upon a cash basis.

The more serious question, however, is, What debts are included within these constitutional prohibitions? It is insisted by counsel for defendants that they do not embrace any debts imposed by law, or such as may be termed "compulsory obligations," such as salaries of officers, which are definitely established by the legislature. It is urged that the Constitution requires the legislature to fix the amount of the salaries of county officers, and that when thus fixed the obligation is one which the county has not created; and it is contended that the restriction upon indebtedness applies only to such liabilities as have been incurred by the county authorities voluntarily, and, therefore, that, in determining whether the debt of a county exceeds the limit established by the Constitution, the amount of the salaries of its officers, and warrants outstanding to pay them, are not to be considered; that a county in its corporate capacity, acting through its commissioners, is not prohibited from creating any indebtedness which, exclusive of such imposed or compulsory obligations, does not in the one case exceed the taxes for the current year, in the other 2 per centum upon the assessed value of the taxable property in the county. We have approached this question with some hesitation, as it is impossible not to be impressed with its great significance. The argument briefly adverted to is not without some force, and rests to some extent upon precedent. *Grant County v. Lake County*, 17 Or. 453; *Lewis v. Widber*, 99 Cal. 412. In the case of *Grant County v. Lake County*, *supra*, the supreme court of Oregon, construing the provisions of the Constitution of that state prohibiting a county from creating any debts or liabilities which shall singly or in the aggregate exceed the sum of \$5,000, except to suppress insurrection or repel invasion, held that such inhibition did not imply that all debts and liabilities of a county over the sum named were necessarily obnoxious to the constitutional provision; and in the course of the opinion the learned judge said: "Said provision of the Constitution, as I view it, only applies to debts and liabilities which a county, in its corporate character, and as an artificial person, voluntarily creates." In *Lewis v. Widber*, 99 Cal. 412, the supreme court of California held, under a

constitutional provision prohibiting any county from incurring in any manner or for any purpose any indebtedness or liability exceeding in any year the income and revenue provided for it for such year without the assent of two thirds of the qualified voters, that it referred only to an indebtedness or liability which the municipality has itself incurred; that it limited the power of the municipality as to any indebtedness which it has a discretion to incur, or not to incur; and the opinion is expressed by the court in that case that such are the clear intent and meaning of the provision. The effect of that decision is that if, in expending the revenues of any year, by a municipality in paying salaries of officers and other expenses, the latter including such as have been incurred through the discretion of the local authorities, such revenues are exhausted, salaries and other imposed obligations thereafter are valid, but no other liability can then be incurred; and what more than one half of the qualified voters are powerless to accomplish, the legislature, which might not be strongly representative of the particular municipality, may do; that the legislature is not amenable to the restrictive provisions of the Constitution, and it may fasten numerous burdens in the way of indebtedness upon the people, which the local authorities are without authority to incur unless two thirds of the voters shall acquiesce therein. On the other hand, the courts of other states and the Supreme Court of the United States have reached a different conclusion under somewhat similar constitutional provisions. The Constitution of Missouri provides that no county shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year without the assent of two thirds of the voters thereof, nor, with such assent, to an amount in the aggregate exceeding 5 per cent on the value of the taxable property therein, etc. In the case of *Barnard v. Knox County*, 105 Mo. 382, 13 L. R. A. 244, the county was sued upon a warrant issued for books and stationery bought for the use of the clerk of the county court, which the law required to be furnished. The defense was interposed that the debt was created after the county warrants exceeded the revenue of the year in question. Anticipating such defense the plaintiff had pleaded that the debt was created by law, and was not the act of the county authorities. The supreme court of that state had previously held that there was a distinction between compulsory obligations and debts voluntarily contracted by the county. See *Potter v. Douglas County*, 87 Mo. 240. In the present case the former was expressly overruled, and a contrary opinion expressed. The court says, after quoting the constitutional provision: "The language just quoted is clear and explicit, and construes itself. It is broad and comprehensive as to the character of the indebtedness. It includes indebtedness created in any manner or for any purpose. This strong and comprehensive language admits of no distinction between debts created by a county court and debts created by law. In a sense all county debts are created by law, for the counties possess those powers, and those only, which are conferred upon them by the Constitution

and laws of the state. While it is the duty of the county court to care for paupers and insane persons, and to build bridges and repair roads, still the county court is governed by the statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law, as well as debts incurred by the county clerk for books and stationery." Under a somewhat similar provision in the Constitution of Colorado prohibiting a county from becoming indebted, the Supreme Court of the United States in *Lake County Comrs. v. Rollins*, 130 U. S. 662, 33 L. ed. 1060, in reversing the case of *Rollins v. Lake County*, 34 Fed. Rep. 845. In speaking upon this question said: "Neither can we assent to the position of the court below that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the Constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials, affect the question." The action in which this opinion was delivered was brought upon warrants issued in payment of fees of witnesses, jurors, constables, and sheriff. A clause in the Constitution of Illinois provides that "no county, city," etc., "shall be allowed to become indebted in any manner or for any purpose," etc. In that state it is held that in respect to such prohibition no distinction exists between debts imposed by law and those voluntarily assumed, and that it makes no difference whether the debts are incurred for necessary current expenses or not. *Prince v. Quincy*, 105 Ill. 188, 44 Am. Rep. 785, 105 Ill. 215; *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385. A similar construction is given to the constitutional prohibition against county and municipal indebtedness in Iowa. *Council Bluffs v. Stewart*, 51 Iowa, 385; *National State Bank v. Marshall Independent Dist.*, 39 Iowa, 490; *French v. Burlington*, 42 Iowa, 614. See also *Guthrie v. New Vienna Bank* (Okla.) 38 Pac. 4, where this question is fully and learnedly discussed.

We are not unmindful of the difference in language between the Constitution of this state and that of some of the other states above referred to, but in respect to the present inquiry we fail to observe that the courts have drawn or indicated any distinction by reason of such difference in language. The object in either case is the limitation upon municipal indebtedness. To "become indebted" would seem to be no broader nor to be any more restrictive than to "create a debt." If a county is prohibited from "becoming indebted," we are not able to impart to that language any greater restriction upon the character of the indebtedness than if the prohibition is against the "creation of a debt." If the constitutional limitation operates to restrain the legislature from imposing obligations upon a county in excess of the limitation in the one case, so far as the mere differ-

ence in words is concerned, it would have the like effect in the other case. In the California and Oregon cases it does not appear that there was also a constitutional limitation upon the means of raising the annual revenue, as in the case with us, which might aid or control the construction to be given to the debt limitation. Recurring to our own Constitution, we are required to give that effect to its provisions which will harmonize all the parts bearing upon the question. An inspection of the limitations placed upon indebtedness and taxation will demonstrate with satisfactory clearness the object, purpose, and intent which found expression in the provisions under consideration. We have already adverted to the limitation placed by Congress upon municipal and county indebtedness which controlled while we remained in a territorial condition, and the fact that all debts which could during that period have been lawfully incurred were given recognition, and provision inserted in the Constitution permitting the funding of the same. That no indebtedness theretofore incurred exceeding 4 per centum (the congressional limitation) was thus recognized, clearly displaying a constitutional interpretation of the former limitation, embracing by necessary inference in such limitation all debts for salaries of officers, and other imposed or so called "compulsory" obligations. The Constitution in the same section establishes a smaller limit upon future debts, reducing the limitation to 2 per centum; and, as if to emphasize the intention to compel the strictest economy in the conduct of county and municipal affairs, further required that no debt in excess of the taxes for any year should be created without the approval of the people. Like restrictions are placed upon the creation of debts by the state. In making provision for taxation, the Constitution again resorts to the method of limitation. For county revenue, for all purposes except the payment of the public debts and interest thereon, the rate of taxation is limited to 12 mills. If it is to be assumed that the debt limitation does not include any imposed liabilities, then the tax of 12 mills was merely to provide revenue to satisfy voluntary obligations, if they should amount to enough to consume all the funds raised by such levy for county revenue; and as the imposed obligations would be unpaid, a fund each year might then be provided by a tax without limit to pay them as a part of the public debt. It must be manifest that salaries of public officers, the fees of witnesses and jurors, and such other expenses as may be said to be compulsory, which relate to the ordinary management of county affairs, are properly chargeable to and payable out of the general county revenue; and the conclusion is irresistible that in providing authority to tax for county revenue for all purposes the section unequivocally comprehends the furnishing by that particular tax of funds out of which all obligations ordinarily and properly chargeable to and payable out of the general annual county revenue shall be discharged, unless, indeed, at the time any such obligations are contracted, other provisions are made in pursuance of the Constitution and laws having specific reference to their future payment in another manner and out of other funds, as might be the case of the

creation of a debt in excess of the taxes in any year by consent of the people, the county having authority to incur such a liability. In such case it would not be intended to charge such debt to the ordinary county revenue. Salaries being unquestionably chargeable ordinarily to county revenue, and the tax for county revenue being a limited tax, it would seem to follow that the restriction upon incurring liabilities in excess of current taxes includes such salaries and other claims against a county similarly situated. Had this not been the intention, provision would have surely been made for an additional tax, clearly expressed, to pay such an important class of liabilities as salaries of officers. We are of the opinion that no county board, money being in the general fund, raised by the tax for general county revenue, ever hesitated to allow and pay salaries out of that fund. The limitation upon taxation, then, being upon the power to raise a fund out of which salaries are payable, must not the restriction upon the right to create debts in excess of the taxes include in the term "debts" all ordinary expense of the county, inclusive of salaries? We think so. The evident object of all these provisions was an economical administration of public affairs, which is rendered more emphatic, if possible, by the maximum placed upon the salaries of the various county officials. Article 14.

It is assumed that the board of county commissioners constitutes the county, and that a liability imposed by law is not the creation of a debt by the county, not being within the discretion of the board. It is doubtful whether the board does constitute the county in the strict sense. As an official board it is charged with many duties and invested with numerous powers respecting the management of the ordinary, and particularly the local, affairs of the county. This authority, however, is not exclusive in all matters; it is, after all, not boundless. Some of the important interests of a county are not permitted to be delegated to the board, *viz.*, the matter of compensation to be paid to its public officials; others are under the control of independent officers, such as the collection of taxes, although the board may exercise a qualified supervision over the conduct of the officers charged with such duties. The supreme court of Indiana, in discussing the relation of the board to the county, said: "We know that comprehensive powers are conferred upon county commissioners; we know, too, that they are, in a sense, the county. But, after all, the county is no more than a public corporation created by statute, and deriving its powers from the legislature. If a county is not given power to fix the fees of public officers by statute, it can possess no such power. It adds nothing, therefore, to the strength of the appellee's position to affirm that the board of commissioners is the county. But it is not strictly true that the board is the county. It can by no possibility be true that the board is the county, for in a just sense the inhabitants of the organized locality constitute the county. In strict accuracy the commissioners are public officers representing the county, with powers and duties defined and prescribed by statute. The money which they control is the money of the county, the debts

which they incur are the debts of the county, and the authority they exercise is such as resides in them as the officers and representatives of the county." *Tippecanoe County Commrs. v. Barnes*, 133 Ind. 408. It may be equally as accurate to say that the legislature is the county, within the sphere of its control, as to make that application to the commissioners. In all matters of public concern it would seem appropriate to attach to the legislature the character of representatives of the county itself, whenever it assumes control of any of its interests, either in pursuance of constitutional requirement or otherwise; and that in doing so it acts for the counties in about the same way that the local board does regarding those matters committed to the direction of the latter; and thus, if an obligation is imposed upon the county, it cannot be said to be compulsory to any greater extent than if imposed by the county board. "Municipal corporations" (and in this designation, so far as concerns this discussion, we include counties) "are of a twofold character,—the one public, as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for the citizens." *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783. In fixing salaries of county officers the legislature deals with counties as one of the agencies of government. In respect to its officers and the duties they are required to perform the county is public in character. The Supreme Court of the United States in *Lake County v. Hollins*, *supra*, indicated that from an accurate standpoint the compulsion arising on account of imposed obligations might not be to incur debt. It is evident that such compulsion in all cases does not result in a debt; and rather by way of suggestion than argument, it may be said that the character of debt in excess of taxes as applied to unpaid salaries does not necessarily arise from the enactment of the law providing their amount and times of payment, but that it is possible the allowance of other claims within the discretionary control of the board, and the use of funds in the general fund, or raised by the county revenue tax to satisfy such claims, may so deplete the treasury as to create the inability to pay the salaries or other so-called "imposed" liabilities. Therefore it may not be entirely accurate to say that the debt is created by the legislature, even if any distinction should be thought to exist respecting this matter within the terms of the constitutional provision.

Before leaving this branch of the case, we call attention to some very pertinent remarks contained in the address of the people prepared by a committee of the constitutional convention, submitted to that body prior to its adjournment, and embraced in the record as a part of its proceedings. We quote: "The extravagance in the management of county affairs that has prevailed in the past has been circumscribed and rendered impossible. The restrictions upon taxation and the creation of public debts are such as to necessitate economy in public affairs, and insure to the people the highest excellence in government for the least money." This is strong language, and indicates that the purpose had been to place as

additional restriction upon public indebtedness and taxation. Considering the limitations theretofore in force, the restraint upon taxation under existing territorial laws, and the construction given to the antecedent limitations, it is readily observed that, if the construction given to the Constitution by counsel for defendants is correct, the statements quoted from the address were but delusions, and that, instead of having further circumscribed county extravagance, the limitations were practically removed. We are aware that the address is not to be entirely controlling of the construction; but, in connection with past conditions and events, in the light of which constitutional provisions must be interpreted, such an address may very properly be resorted to as indicating somewhat the intent and object which caused the incorporation of disputed clauses into the fundamental law. Whether the constitutional limitations include all obligations, of whatever character, we cannot, in this case, properly determine, and do not do so. It has been held by some eminent authorities that similar limitations do not cover a debt established against a municipality for a tort. *Bloomington v. Perdue*, 99 Ill. 829; *Chicago v. Sexton*, 115 Ill. 230; *Bartle v. Des Moines*, 38 Iowa, 414. It will be time enough, however, to decide that question when it is clearly presented in a proper case.

We are constrained to express as our opinion that the limitations upon county indebtedness include salaries of county officials, and as well such obligations as are legal and valid and lawfully imposed under the legislation of 1893, respecting the payment of bounties for the destruction of certain predatory wild animals; as the same reasoning in the main applies with equal force to those liabilities. In this connection we expressly refrain from deciding or indicating any opinion whatever regarding the constitutionality of that legislation, or the validity of any claims arising thereunder, irrespective of questions touching the debt and tax limitations. We are convinced that any different construction would be destructive of the plain import and object of the Constitution, and would invite the most reckless and improvident administration of public affairs; and, notwithstanding that the burdens of taxation are now conceived to be oppressive, temperate language would utterly fail to depict the condition which might result if the contention of counsel on behalf of the counties is sound. We do not desire to be understood as impugning in the least the motives or the honesty or patriotism of those at this time or heretofore in charge of county governments. We appreciate the many difficulties of their position, and are aware that in no public office is a higher degree of care, sagacity, and withal of integrity, required, and often displayed, than that through which the affairs of these local agencies of the state are administered. If inconveniences or consequences are to receive consideration, the hardships which may accompany an attempt to confine county indebtedness and taxation within constitutional boundaries cannot approach in all that would be disastrous the effects which might follow if the construction otherwise insisted upon was to prevail. Nevertheless, the courts are powerless to alter the Constitution, and should not attempt to evade its

clear and imperative commands. As has been already suggested, the remedy, if any is deemed to be necessary, resides elsewhere.

We come now to a consideration of the judgments. Assuming that the claims upon which the judgments were rendered were in excess of the limit, it is contended that they cannot be attacked collaterally by the plaintiff taxpayer in this case; that they are conclusive as to the validity of the debt, and therefore constitute a part of the public debt of the county, for which a tax may be levied irrespective of the limit as to taxation for county revenue. The question, so far as this case is concerned, resolves itself into this: Do judgments, assuming them to have been rendered by a court of competent and general jurisdiction, having likewise jurisdiction of the parties, form a part of that public debt of the county for which a levy may be made to provide funds for their payment, although, in fact, the warrants upon which they are founded were issued for current expenses in excess of the taxes for the current year, and in excess of the absolute constitutional limit upon county indebtedness? Is any inquiry into the indebtedness back of and behind the judgments precluded by them? It is apparent that several questions are involved in such an inquiry. Not only are we to determine the meaning and scope of the words "public debt" as used in the section of the Constitution providing for county taxation, but the effect of the judgments as to their conclusiveness or otherwise, and in respect to what matters they are conclusive, if any, becomes a matter for investigation. Upon this branch of the case we are aided materially by the authorities. After judgment upon a claim preferred against a county or municipality, it has been frequently, and where that question alone was involved, uniformly, held, in mandamus proceedings to compel the levy of a tax to pay the judgment, that an allegation that the debt upon which the judgment was rendered had been created in excess of the constitutional limit upon such indebtedness, and was illegal and void, constitutes no defense; that such defense by the county is absolutely precluded by the judgment, as it could have been interposed in the suit wherein the judgment was obtained. *Howard v. Huron*, 6 S. D. 180, 26 L. R. A. 493; *State, Ledger Pub. Co., v. Gloyd*, 14 Wash. 5; *United States v. Ottawa Auditors*, 28 Fed. Rep. 407; *United States v. New Orleans*, 98 U. S. 331, 25 L. ed. 225; *People, Rollins, v. Rio Grande County Commrs.*, 7 Colo. App. 229; *Atina L. Ins. Co. v. Lyon County*, 44 Fed. Rep. 329. And the citizen and taxpayer cannot attack such a judgment any more than the county. *Clark v. Wolf*, 29 Iowa, 197; *Freem. Judgm.* § 178; 2 Black, Judgm. § 584; *Ashton v. Rochester*, 133 N. Y. 187. In the case of *Clark v. Wolf*, *supra*, the court said: "It must be, in the absence of fraud or collusion or the like on the part of the municipal officers, that the legal liability of the county, being once fixed by a valid judgment, the citizen, no more than the county, can afterward resist the collection of said judgment upon the want of power to contract the debt. That stage in the controversy is past." And in the same case those matters which may be contested by the taxpayer, even in case of a valid judgment, are also stated as

follows: "If the officers shall attempt to make a levy not warranted by law (for instance, a greater per cent than the law allows), or to collect the same in an illegal manner, or the like, these are questions between the citizen and the corporation, and do not touch either the validity of the debt or the correctness of the judgment which is intended to be satisfied."

The distinction thus mentioned we regard as clearly existing. The validity of the debt was, or could have been, fully litigated in the suit in which the judgment was secured. That question is therefore absolutely concluded as against a collateral attack, both as concerns the county and a citizen or taxpayer thereof; but it does not necessarily follow that the county may levy, or the judgment creditor may insist that it shall levy, a tax to pay the same not authorized by law. The cases holding that a power to contract a debt includes authority to pay it, and, where a tax is essential for such purpose, the authority and duty to tax do not contravene this view. None of those cases, as I understand them, announce a contrary doctrine.

Having determined this much, the inquiry arises, How far may a county go in its annual tax levy? For county revenue for all purposes the annual levy must be confined within 12 mills, and this is inclusive of school tax. For the payment of its public debt and the interest thereon there is no limit. The legislature of the state, in amending the territorial statutes requiring the annual levy, conformed them to the Constitution, authorizing an annual levy of not to exceed 8 mills for general school purposes, and prescribing that an annual tax should be levied for county revenue for all purposes; but providing that the aggregate tax for county revenue, including general school tax, should not exceed 12 mills on the dollar (exclusive of state revenue), excepting from such limitation the payment of the public debt and interest thereon. Laws 1895, p. 237, chap. 102. Prior to the enactment just alluded to, the laws in force anterior to statehood remained unaffected by any later legislation, but were, of course, modified by the constitutional clauses referred to. Those earlier statutes prescribed certain rates of taxation for various purposes connected with county revenue, and placed a maximum limitation of 16 mills upon county taxation, which was held by this court to be exclusive of the general school tax. When the Constitution took effect, it immediately reduced the maximum limit to 12 mills, and included therein the general school tax. It is now urged that the judgments in question constitute a part of the public debt of the county, to pay which the county may levy a tax irrespective of the taxation for county revenue; and our attention is directed to § 1798 of the Revised Statutes of 1887. That section is found in the chapter devoted to the powers and duties of county commissioners, and was enacted prior to the admission of the state, and continued in force, unless in conflict with the Constitution. It provides, in substance, that when a judgment shall be rendered against the board of county commissioners of any county, or against any county officer, in an action prosecuted by or against him or them in his or their name of office, where the same shall be payable by the

county, no execution shall issue thereon, but the same shall be paid by a tax levied and collected for that purpose, as in the case of other county charges; and when so collected shall be paid by the county treasurer to the person to whom the same shall be adjudged upon the delivery of a proper voucher therefor. The argument is that, as the judgments must be paid by a tax, and they are part of the public debt, as to which no limitation applies, the tax complained of is legal, without regard to the nature of the claims merged in the judgments. On the other hand, it is earnestly insisted that the judgments do not form a part of the public debt to pay which unlimited taxation is permitted. Counsel for plaintiff contend, first, that bonded indebtedness alone is what is intended by the term "public debt" in the section of the Constitution referring to county taxation, and it seems also to have been urged that no indebtedness which did not exist at the time of the adoption of the Constitution is included. We cannot entirely agree with the position taken by either counsel. It is obvious that debts incurred since the adoption of the Constitution, if lawfully existing, are not excluded. To exclude them would have the probable effect of preventing subsequently organized counties from paying their legitimate public debts, although the same could not have existed at the time the Constitution was adopted. There are other reasons, however, which suggest the unsoundness of that contention. We are further of the opinion that the public debt which is excepted from the general tax limitation is not confined to bonded indebtedness. The same words "public debt," are used in § 8 of article 16, permitting the bonding of the public debt of the county existing at the time the Constitution was adopted; and it is clear that in the latter section the words were not exclusive of indebtedness other than bonded, but that they comprehended all manner of lawful debts, not exceeding the congressional limitation of 4 per centum; and such has been the legislative and public construction placed upon that section. We are unable to attribute any narrower meaning to those words as used in § 5 of art. 15, relating to taxation. It is not confined to bonds, but may involve ordinary warrants, and other evidences of indebtedness, if properly and lawfully issued; and may also include judgments, but not necessarily so. To illustrate: If a county's indebtedness is within the constitutional limitation, and in pursuance of law it creates a debt in excess of the current taxes by the consent and approval of the people, which, together with existing indebtedness, does not exceed the amount within which it may lawfully become indebted, such debt will not only be legal, but, although it may be evidenced alone by warrants, will constitute a part of the public debt, and to pay the same a tax is permissible, the same as in the case of bonded indebtedness. If judgments are rendered upon such warrants, or upon bonds, the debts themselves being lawful public debts of the county, the judgments will partake of the same character. On the contrary, in case warrants or other evidences of indebtedness are issued for ordinary current expenses in excess of the taxes for the current year, without the consent or approval of the

people, or in case the maximum limit has been reached, then, with or without such approval, such indebtedness is clearly not a part of the public debt, but the same has been incurred for current expenses, which in the case of such a county cannot in any event exceed the revenue for such year. There is no method by which such liabilities can have imparted to them voluntarily the character of public debts. If a judgment is obtained upon any such claim, the fact must yet remain that it represents a liability incurred for current expenses which should have been confined within the limits of the current taxes, to provide for the payment of which the Constitution has afforded only a limited power of taxation.

The statutory provision with reference to the payment of a judgment by tax does not contemplate a tax in excess of the limitation, and did not permit a tax for that purpose in excess of the statutory limit anterior to the adoption of the Constitution. Much less could the legislature contravene the positive restrictions of the Constitution. If the judgments are rendered upon claims which should have been paid out of the revenue raised by the tax which is confined to 12 mills, they must be paid, if at all, by a tax levied for such purpose; the aggregate tax for county revenue not to exceed the maximum limit. The judgments being valid, the legality of the debt is settled until such judgments are set aside in some direct proceeding, and therefore, within the limitation for county revenue, a tax may be levied to pay the same. This we apprehend to be the plain intent of the Constitution. Any other course would amount to an evasion of its terms. A different construction would authorize such a management of county affairs as to exhaust the county revenue each year, to incur additional obligations ordinarily payable out of such revenue, permit prosecution of such claims to judgment, and the levy of a special tax to pay them; and this could be repeated annually, thus completely evading, if not operating to effectually nullify, the constitutional limitation. The effect would be, as all must concede, to provide a greater revenue each year for current expenses than the Constitution intended to authorize when it confined the same to 12 mills on the dollar. This would accomplish by indirection that which cannot be done directly, which, generally at least, is not allowable. The views thus expressed we believe to be in accord with the authorities. As it is apparent that under the law requiring a judgment to be paid by tax the latter must, if levied, be confined with other taxes within existing constitutional limitations, it necessarily follows that to determine the limitations the claims placed in judgments must be inquired into. The statute authorizes a tax to pay such judgments "as in the case of other county charges." The funds to pay other county charges for ordinary expenses are raised by a limited tax. As the statute with respect to a judgment does not fix its class, and does not authorize a special tax irrespective of statutory or constitutional limitation, it is obvious that we must have recourse to the claims themselves to determine to what class the judgment belongs, and whether any limit is imposed upon taxation, by which they may be enforced.

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The application of the converse of this proposition has not been infrequent. In the case of *Rolls County Ct. v. United States*, 105 U. S. 735, 26 L. ed. 1221, the court said: "While the coupons are merged in the judgment, they carried with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt." This language was used in a cause wherein it was sought by mandamus to compel the levy of a tax to pay a judgment. The opinion in that case also recognizes that courts are powerless to require a tax to be levied, even to pay a judgment in excess of the constitutional or legislative limitation upon the taxing power. The same learned court in another case of like character, in speaking upon this question, said: "So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. . . . We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize." *United States v. Macon County Ct.* 99 U. S. 591, 25 L. ed. 333. "But mandamus will not lie to compel the levy of a tax in excess of the legal limitation." *Cooley, Taxn.* 2d ed. p. 738. The following authorities are also in point: *Brownsville Tanning Dist. Comrs. v. Longue*, 129 U. S. 493, 32 L. ed. 780; *Arnold v. Hawkins*, 95 Mo. 569; *Black v. McGonigle*, 103 Mo. 192; *Trull v. Madison County Comrs.* 72 N. C. 388; *French v. New Hanover County Comrs.* 74 N. C. 692; *Carroll County Supers. v. United States*, 85 U. S. 18 Wall. 71, 21 L. ed. 771; *Re House Roll* 234, 81 Neb. 505; *Clark v. Davenport*, 14 Iowa, 494; *Iowa Railroad Land Co. v. Sac County*, 39 Iowa, 137; *Sterling School Furniture Co. v. Harvey*, 45 Iowa, 466; *State, Shackleton, v. Guttenberg*, 39 N. J. L. 660; *Union P. R. Co. v. Buffalo County Comrs.* 9 Neb. 449; *Osborne County Comrs. v. Blake*, 25 Kan. 357; *State, Reed, v. Marion County Comrs.* 21 Kan. 419; *Grand County Comrs. v. King*, 14 C. C. A. 421, 67 Fed. Rep. 202, 32 U. S. App. 1; *Desty, Taxn.* § 41. The case of *Osborne County Comrs. v. Blake*, *supra*, closely approaches the one at bar. The question there presented was whether a county board, after having levied the full amount of taxes for current expenses which it had by law any power to levy for that and previous years, could in a certain year levy an additional tax to pay a judgment rendered upon county warrants which had been previously issued to pay county current expenses for the same years. An express statutory provision required a judgment to be collected by tax as in case of other county charges, and the general limitations upon taxation were statutory, instead of constitutional. The right to levy such a tax was denied, the Kansas supreme court saying: "The judgment shall be collected by means of a tax, in the same manner as other county charges are collected; and other county charges, when collected by means of a tax, can be collected only by means of a limited tax. . . . A judgment rendered upon a claim against a county is simply one of the items which the county board takes into

consideration in levying a tax for county charges, or for county expenses, or for current expenses. . . . All the statutes upon the subject seem to contemplate that the county board will not create, nor allow to be created, liabilities against the county faster than the legal and proper taxes will pay them. But suppose the county board should allow liabilities to be thus created, then may all the creditors of the county convert their claims into judgments, and then compel the county board to levy county taxes vastly beyond the limits prescribed by § 181? We think not." The Supreme Court of the United States, in *Brownsville Taxing Dist. Comrs. v. League*, *supra*, held that, it appearing from the petition that the bonds upon which the judgments were rendered were issued under an abrogated statute, and were consequently void, and that no power to tax to pay them was possessed by the taxing district, because such power was given only by the statute which had ceased to exist, mandamus to levy tax to pay the judgments would not be awarded. The Constitution excepts from the limit for taxation for county revenue purposes, not the payment of judgments, but the payment of the public debt. We are unable to class a judgment in all cases irrespective of the nature of the obligation merged therein, as a public debt within the purview of the section of the Constitution in question. The Constitution clearly and forcibly distinguishes between those liabilities which are payable out of the general and ordinary revenue and those for which provision must otherwise be made. It was not intended that a county powerless to legally contract debt which could not be paid out of the current revenue, because of its exhaustion in paying other expenses, could nevertheless by incurring such debts be permitted to employ unlimited taxation to defray those expenses which the Constitution declares must be provided by a limited tax. Our attention has been called to the case of *Theiss v. Hunter*, before the supreme court of Idaho, 45 Pac. 2. Although the text of the decision in that case is not before us, extracts therefrom, found in No. 14 of volume 1 of Selected Corporation Cases, indicate that it was held that municipal indebtedness incurred during a given fiscal year cannot be paid out of the income or revenue of any future year, unless it be especially raised for the payment of such indebtedness, on the ground that the evident intent of the Constitution of that state was to make the revenue or income collected each year pay such year's indebtedness, unless by the assent of two thirds of the qualified voters, given as provided by law, other indebtedness was authorized. It follows from what has been said that to raise a fund to pay salaries of county officers, and valid liabilities under the act with reference to bounties for the destruction of predatory wild animals, a tax in excess of 12 mills in any year for county revenue is not allowable, unless the debt therefor has been created in the manner provided in the Constitution, and any legislation conformable thereto, by a county possessing authority to incur such indebtedness.

The tenth certified question inquires if the board of county commissioners cannot levy

the district court tax for the maintenance of the court, in addition to the levy of 12 mills for county revenue. What we have already said disposes of this inquiry. We fail to observe anything in the Constitution or statutes which authorizes a levy for court expenses in excess and exclusive of the limited tax of 12 mills for county revenue.

With respect to the seventh question, we assume the damages to have been recovered in a proceeding to determine the compensation to be paid the landowner by reason of the exercise by the public of the right of eminent domain, and the consequent taking of some of the land for public purposes. We regard this as not entirely free from doubt, but are inclined to the opinion that the damages thus assessed are payable out of the ordinary county revenue; and the result would be that, if the county is unable to make the compensation, it is powerless to complete the location of the road, which might result in the taking of private property without just compensation. If the damages are recovered as for a tort, another inquiry would arise, which, in this case, we refrain from deciding.

The final question requiring the opinion of this court affects the right of the board of county commissioners to confess and authorize a confession of judgments against the county. A decision upon that question is not free from difficulty. We are practically without precedent, and resort must be had to our rather meager statutory provisions covering the subject of confession of judgments, as well as to those prescribing the duties and powers of the board of county commissioners. "A person indebted or against whom a cause of action exists, may personally appear in a court of competent jurisdiction and with the assent of the creditor or person having such cause of action, confess judgment, whereupon judgment shall be entered accordingly." Rev. Stat. 1887, § 2668. In such case it is required that the debt or cause of action be stated in the judgment or writing to be filed as pleadings in other actions. § 2669. "An attorney who confesses judgment in any case shall, at the time of making such confession, produce the warrant of attorney for making the same, . . . and the original or a copy of the warrant shall be filed with the clerk." § 2671. In the first case, under § 2668, the debtor must personally appear. The members of the board of county commissioners individually are not authorized to allow claims against the county. The board of commissioners, at any meeting, is given authority by statute to settle and allow all accounts against the county, and when so settled and allowed they may issue county orders therefor as provided by law. Rev. Stat. 1887, § 1901. County orders are required to be signed by the chairman of the board, and attested by the clerk, under the seal of the county. Section 1807, as amended by chapter 33, Laws 1893. The meetings of the board are to be held in public. § 1802. The authority over county affairs is thus vested in a board which is composed of three persons, although a majority constitute a quorum, and may act. The board can only act at a meeting of the board. Doubtless some detail matters may be attended to by one or more of

the commissioners outside of a meeting by previous authority of the board, or such act may in some cases, perhaps, be ratified, but the allowance of claims must be at some time the act of the board as such. The county is constituted, by law, a body politic and corporate, and its powers as such corporate body are exercised by a board of county commissioners. Such powers are to be exercised, and the duties devolving upon the board are to be discharged, in the manner provided by law. We do not understand that the members composing the board are authorized to act as a board except when together in session. Their act is then not individual, but as a body, acting as a unit. *McCortle v. Bates*, 29 Ohio St. 419. Whatever authority, if any, is possessed by the commissioners, to confess a judgment against the body corporate and politic—the county—must reside in them as constituting a board, rather than as individual officers. As such a board, required to act as a body, we are unable to conceive that it can personally appear in court, as required by § 2668. No statutory provision exists empowering one or more of the commissioners or any other official to so personally appear, and in the name of the county enter confession of judgment. In the absence of some such provision in the present condition of the law concerning judgments by confession, we are clearly of the opinion that the board of commissioners are without authority to personally appear in court and confess a judgment against the county. It would seem to follow that, being powerless in that respect, the board, even as a body, cannot authorize some person to do so. Such authorization could only be accomplished, however, by the execution of a warrant of attorney. No express power to execute such an instrument is granted by statute, nor do we observe any authority given the board from which such power can be implied. In discussing this matter it is perhaps needless to state that we refer only to confession of judgments in its strict sense, and do not refer to actions regularly brought, in which issues are duly framed, and upon hearing or trial, by admission of the lawful representative of the county in such suits, the court may be satisfied of the justness of the claim sued upon, and thereupon enter up judgment. Such an action is not dependent upon the statutes governing confession of judgments, but is in reality a judgment rendered upon trial and proof. We tender this explanation that any possible confusion respecting the decision of the court may be avoided. This, I believe, disposes of all the questions.

Groesbeck, Ch. J., and Conaway, J., concur.

STATE of Wyoming, *ex rel.* Charles E. BLYDENBURGH,
v.
Charles W. BURDICK, Secretary of State.
(.....Wyo.....)

1. The grouping of candidates for pres-

NOTE.—As to name appearing more than once on official ballot, see also *State, Bateman, v. Bode* (Ohio) *ante*, 498; also *Fisher v. Dudley* (Md.) 12 34 L. R. A.

idential electors is to be made by the county clerk, and not by the secretary of state, under Laws 1890, chap. 80, § 104, providing that the names of such electors presented in one certificate shall be arranged in a separate group, but the secretary must so certify the names and description of the candidates as to convey to the clerk all knowledge requisite to such grouping.

2. The name of a person as candidate for elector of President and Vice President cannot appear in more than one place upon the official ballot under Laws 1890, chap. 80, § 104, which provides for no party headings or columns set apart for separate parties, but requires the ballot to name the party or principle represented by a candidate in connection with his name.

3. The name of a candidate nominated by certificate of electors in place of a person previously nominated in the same way, but who has declined, should be given the same place upon the ballot that the prior nominee would have been entitled to.

4. The exclusion from the signers of a certificate of electors nominating candidates by Laws 1890, chap. 80, § 89, of those persons who have joined in a certificate nominating other candidates for the same office, does not apply to persons who have participated in the nomination of other persons through primaries, but only those who have joined in nominations by certificate.

5. The validity of a nomination made by a chairman of the state committee of a political party with 100 associates to fill vacancies in the list of presidential electors nominated in the same manner, when not in violation of statute, cannot be contested by the committee of an entirely distinct political party.

(October 20, 1893.)

APPLICATION for a writ of mandamus to compel defendant to change his certificate to the county clerks of the names of the candidates for presidential electors to be voted for at a coming election. *Denied*.

The facts are stated in the opinion.

Mr. Walter R. Stoll for relator.

Messrs. Lacey & Van Devanter for respondent.

Potter, J., delivered the opinion of the court:

The relator, chairman of the Democratic State Central Committee, brings the present action, seeking thereby the allowance of a writ of mandamus to compel the secretary of state to rescind or modify the form or character of his certificates to the several county clerks respecting the candidates for electors of President and Vice President of the United States. The respondent certified such nominations in the following manner and order: the names of three candidates of the Republican party, simply naming them with the word "Republican" following each of their names; the names of Patrick J. M. Jordan, John Sims, and Daniel L. Van Meter, with the word "People's" accompanying the names of Jordan and Sims, and the words "Democrat and People's" following the

L. R. A. 586; and *Todd v. Election Comrs.* (Mich.) 29 L. R. A. 330.

name of Van Meter; the names of three Prohibition candidates; and lastly the names of John A. Martin and Patrick J. Quealy, with the word "Democrat" following each of their names. The petition discloses: That at the regular Democratic state convention George H. Cross, John A. Martin, and Patrick J. Quealy were nominated for presidential electors, and at the regular state convention of the People's party Francis M. Matthews, Charles H. Randall, and Daniel L. Van Meter were nominated for such office. All of these nominations were duly certified to the respondent by the respective chairmen and secretaries of such conventions. That within the time allowed by the statute, Cross, one of the Democratic nominees, and Randall and Matthews, two of the nominees of the People's party, duly declined. That in pursuance of the authority expressly conferred upon it by the convention making the original nominations the state committee of the Democratic party filled the vacancy caused by the declination of Cross by the nomination of Daniel L. Van Meter. That neither any convention or committee of the People's party attempted to fill the vacancy occasioned by the declinations of Matthews and Randall, nor took any action concerning the matter, and that the People's party convention had not empowered its state committee to fill such or any vacancies. It further appears that on the 8th day of October one John W. Patterson, who had been appointed by the said convention of the People's party as the chairman of the state committee of that party, delivered to the respondent a certificate of nomination purporting to nominate for the office of presidential electors to fill the vacancy in the list of People's party candidates caused by the declination of Matthews and Randall, respectively, Patrick J. M. Jordan and John Sims; it appearing from the record that in the body of such certificate it was recited that "the undersigned and the said Patrick J. M. Jordan and the said John Sims so nominated to fill such vacancies represent the People's party;" and that the same was verified by said John W. Patterson, who made oath that the statements contained in the certificate were true, and described himself in his affidavit as the chairman of the state committee of the People's party. The said certificate was signed by 100 electors, including said Patterson. The relator in his petition charges that this certificate of nomination was void. The allegations to support such charge, summarized, are to the effect that the nominations mentioned therein were not made by the People's party; that the laws of this state contemplate and expressly require that vacancies occurring in the ticket of any political party nominated in regular convention shall be filled only by the convention itself or by the party committee duly authorized; that the certificate was not filed within the time required for original nominations; and that no number of electors can supplant or supersede the action of an organized political party; and the electors whose names are subscribed to the certificate in question were not authorized to represent the People's party, or act in its behalf. It was also averred that a large number of the persons whose names were signed to the certificate had joined in nominating at least

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three other candidates for the same office by attending and participating in the primaries of the Republican party. This last-mentioned allegation is general in character. It is neither stated when they so attended and participated, or in what the participation consisted, nor are the particular individuals referred to indicated. The petition avers that the certificate of the respondent is illegal and wrong in two respects: First, in failing to certify the name of Daniel L. Van Meter in the same group and in conjunction with the names of Martin and Quealy, the other Democratic candidates; and second, in including the names of Jordan and Sims in the group of the candidates for electors of the People's party. The prayer of the petition is that a writ of mandamus issue directing the respondent to rescind his certificate, and to issue therefor new ones, placing the name of Van Meter in the group of Democratic candidates, and omitting the names of Jordan and Sims from the group of the candidates of the People's party, or requiring him to so modify his certificates already sent out that the same result may be accomplished.

The case was heard upon the petition and the various certificates of nominations for the office of presidential electors filed in the office of respondent. From the record outside of the petition it appeared that on the 25th day of September—several days before the chairman and secretary of the convention of the People's party filed their certificate of the nominations made by that party at its said convention—a certificate of nomination, signed by 100 electors representing themselves as members of the People's party, was filed, making original nominations of candidates for electors to represent the principles of the People's party, naming as the nominees thereof the same persons who were nominated at the state convention of that party, *viz.* Matthews, Randall, and Van Meter.

The duty of the secretary of state with respect to the certification of nominations filed in his office is defined by the provisions of § 93 of chap. 80 of the laws of 1890, as follows: "Not less than twenty-five nor more than thirty days before an election to fill any public office, the secretary of Wyoming shall certify to the county clerk of each county within which any of the electors may by law vote for candidates for such office, the names and description of each person nominated for such office as specified in the certificate of nomination with the said secretary." If the respondent has complied with this duty, then the writ prayed for should not be allowed. It is contended that he has failed to perform the duty in the two particulars already mentioned. Upon the hearing, although it was not conceded by counsel for relator that the names of Jordan and Sims were entitled to be certified in any manner whatever, the chief contention seemed to be narrowed to the proposition that they were not properly certified as People's candidates, and in one group with Van Meter; but that, if certified at all, some words, such as "Independent" or "Electors," should be used to indicate that they were nominated by certificate of electors. The argument respecting the grouping of the Democratic nominees, and including therein the name of Van Meter in the certif-

cate of the secretary, was based upon the requirements concerning the official ballot. Section 104 of chapter 80 of the Laws of 1890 provides that "all ballots prepared under the provisions of this act shall be white in color and of a good quality of paper, and the names shall be printed thereon in black ink. Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act and no other name. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of President and Vice President of the United States presented in one certificate of nomination, shall be arranged in a separate group, every ballot shall also contain the name of the party or principle which the candidates represent as contained in the certificate of nomination. At the end of the list of candidates for each office shall be left a blank space large enough to contain as many written names of candidates as are necessary to fill such office. And on the ballot may be printed such words as will aid the voter to vote, as 'Vote for one,' 'Vote for two,' 'Vote for three,' 'Yes,' 'No,' and the like." It is not required of the secretary that he prepare the official ballots. With this he has nothing whatever to do. That duty resides with the county clerk of each county. Under our system of voting the elector is required to place a cross opposite the name of each candidate for whom he desires to vote; and, although the names of candidates for electors presented in one certificate of nomination are required to be arranged upon the ballot in a separate group, one cross will not suffice to vote for the three, or for the group thus arranged, but the voter, if desiring to vote for three, as he may do, is required to place a cross opposite the name of each one of the three. At the time of orally announcing the conclusion of the court it was stated that the secretary was not required to group the candidates for electors at all, and that, if he did so, his arrangement into groups was not binding or conclusive upon the officers charged with the duty of preparing the ballots. This statement was made in view of the rather meager provisions affecting the duty of the secretary, and the nature of a mandamus proceeding; and it seemed that, unless it was clearly the duty of the respondent to group the candidates, he ought not to be directed by a writ of mandamus to do so. The statute does not expressly require that he shall certify such candidates in the manner in which they are required to be arranged upon the ballot; and, so far as the name of Van Meter is concerned, that is the extent of the prayer of relator. But we are somewhat apprehensive that a misunderstanding of the views of the court may arise from what was said when its conclusion was announced, without some further explanation. While it is true, as above suggested, that there is no express provision requiring the secretary to do more than certify the names and description of each person nominated, as specified in the certificate of nomination, it is likewise true that those candidates for presidential electors presented in one certificate of

nomination are entitled to be arranged upon the official ballot in a separate group, and that the officer charged with the duty of thus arranging them can have no other source of official information than the contents of the certificate of the secretary. It would, therefore, seem reasonably clear that in the performance of the duty devolving upon the secretary he should so certify the names of such candidates and their description as will convey to the county clerk all requisite knowledge. The relator and his counsel assumed that this could only be accomplished by the proper grouping of the candidates in the certificate of the secretary. We are not, however, prepared to assent to that view. If the information sufficient for the appropriate performance of the duty of the county clerk can be given in other ways than by grouping,—and we apprehend that may be practicable,—then it would be erroneous to say in the absence of an express requirement to that effect, that the secretary is under official obligation to place the candidates in groups, as they are entitled to appear on the ballot, and by this method alone to certify the necessary information to the county clerks. The alternative writ commanded the respondent to thus group the names, or show cause to the contrary. In case the writ should be made peremptory, the same command would continue, notwithstanding the duty to afford proper information could as well, and perhaps even better, without trespassing upon the discretion of the county clerks, be capable of performance in another manner. The soundness of the contention of the relator, moreover, depends upon the correctness of his theory that the name of Van Meter should appear upon the ballot in a group to be comprised of his name and the other two Democratic nominees. If that is not a right to which he is entitled, then assuredly the respondent is not required to certify his name in such a group in any event, and we will not rest our conclusion entirely upon the fact that the respondent might employ different methods, but will inquire into the proposition thus insisted upon by the relator. It is manifest that the issues in this case do not directly involve the preparation of the ballot; but that matter bears a close relation to the obligations imposed upon the secretary, and as affecting his duties it may very properly be considered.

It was decided by this court in the case of *Savin v. Pease* (Wyo.) 42 Pac. 750, that as to any office other than elector for President and Vice President a candidate nominated by more than one party for the same office was not entitled to have his name appear upon the ballot more than once, and we can see no reason for departing from that rule. The opinion in that case out of abundant caution expressly stated that whether or not a different rule would apply as to presidential electors was not decided. The reason for the principle adopted in *Savin v. Pease* arose out of our system of ballots and voting; the requirement that a cross must be placed opposite the name of each candidate for whom the elector desired to vote; the impossibility of voting a straight ticket, or for any number or group of candidates representing the same party or principle, by a single mark or cross; and as a consequence,

the probability of mistake and confusion should the name of any candidate be printed in more than one place as a candidate for the same office. Are those reasons, and is the rule deduced therefrom in the case of other offices, inapplicable to the office of presidential elector? The one difference existing in the law between that and other offices is that the names of those candidates for presidential electors presented in one certificate of nomination shall be arranged upon the ballot in a separate group. In view of the further provision of law affecting alike all candidates upon the ballot that one cross votes for but one individual, and that the name of the presidential nominee nowhere appears on the ballot, we are unable to distinguish the case of such candidates from that of candidates for any other office in the respect under consideration; otherwise any person or group of persons nominated by more than one party would be entitled to as many places upon the ballot corresponding with the number of parties nominating them, or certificates lawfully filed of such nominations. The same group of three persons might be presented by several parties, and the entire group be given as many places upon the official ballot. Such a result could only cause much confusion, and throw doubt upon the correctness of the returns of the votes cast. We are clearly of the opinion that the law does not contemplate the printing of the name of one person as candidate for elector of President and Vice President in more than one place upon the ballot. Daniel L. Van Meter was regularly nominated by the People's party, and the certificate thereof duly filed. He has not declined that nomination. There is certainly no authority to remove his name from the People's party group. His nomination by that party was made long prior to its adoption by the Democratic party. His name being entitled to but one place upon the ballot, and no one possessing the right to ignore his first nomination in the preparation of the ballot, it necessarily follows that his name is not imperatively required to be also printed in the same group, and in conjunction with the other Democratic candidates. He is described as Democratic as well as People's, and this description indicates to the voter that he has been nominated as representing both parties. An arrangement of the ballot in which all appropriate groups could be maintained, and yet the name of Van Meter immediately precede or follow the names of the other Democratic candidates, thus bringing the three into closer proximity, would certainly not violate the letter or the spirit of the law; but that matter has been left to the discretion of the county clerks, which, unless the statute is departed from, is not subject to the control of the courts. These views find support in *State, Sturderant, v. Allen* (Neb.) 62 N. W. 85, and *Miller v. Pennoyer*, 28 Or. 364. Had someone, not already a candidate of another party, been nominated to fill the vacancy caused by the declination of George H. Cross, the name of such nominee would be entitled to a place in the same group with the original associates of Cross. A reasonable construction of the statutory provision would clearly require the name of one thus substituted to be given the same place upon the ballot that the name of the candidate who had declined would have been entitled to.

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The next question submitted involves the status of the nominations of Jordan and Sims. One ground of objection is that a large number of the persons purporting to sign the certificate of nomination had joined in nominating at least three other persons for the same office by attending and participating in the primaries of the Republican party. Independent of the very general character of the allegation, we are of the opinion that the provision of the statute (Laws 1890, chap. 80, § 89), attempted to be thus invoked is prohibitory only of the same person joining in a certificate of nomination by electors of more than one person for the same office. The last part of the clause containing the provision referred to provides that, if any person does so join, his name shall not be counted upon either certificate, and the context clearly indicates that it was only intended to forbid one from joining in more than one elector's certificate making a nomination for the same office. Whether anyone shall have so joined can then easily be ascertained by the officer with whom the certificates are required to be filed. It is, however, contended that 100 electors cannot supplant a regularly organized political party, and are not authorized to place in nomination any candidate as representative of such a party. The position taken is that a party nomination is permitted to be made only by a party convention. Counsel for relator stated upon the hearing that they were until that time unaware that the People's nominees had first or at any time been nominated by an electors' certificate; and it was conceded by such counsel that, if a vacancy occurs in the nominations made by such an electors' certificate, it might be filled in the same manner. The papers upon which the cause was submitted conclusively show that 100 electors had nominated by certificate in due form said Randall, Matthews, and Van Meter as candidates of the People's party or representing the principles of that party, and that filing preceded the certificate of the officers of the convention. The resignation of Randall and Matthews declined by clear and express language only the nominations conferred by the state convention of the People's party; but included in their respective statements of declination was a direction to the secretary of state to omit their names from the official ballot sufficiently indicating an intention upon their part to entirely withdraw as candidates for presidential electors. It is at least certain that the respondent has not certified their names, and that no person or party is insisting that his action in that regard was erroneous. A vacancy, then, occurred in the list of candidates for the office in question, presented by the said certificate of electors. That vacancy at least was filled by the certificate which is now attacked, naming Jordan and Sims. It is not necessary therefore, for this court to decide whether or not a vacancy in nominations made by a regular convention of a political party can be filled by an electors' certificate, even though, as in the case at bar, such political party has not again acted in the matter by convention, and the convention making the original nominations, has not empowered any committee to fill vacancies. Indeed, the contention seemed to have narrowed to an attack upon the action of the respondent

in grouping the names of Jordan and Sims with that of Van Meter, and using in connection with their names the party name "People's," without any qualifying words to indicate that they were not presented by a party convention. So far as concerns the objection to their being grouped with Van Meter, what has already been said is sufficient, bearing in mind that the latter-named person was originally nominated by the certificate of electors conjointly with Randall and Matthews, for whom Jordan and Sims were afterwards substituted.

It is, however, very seriously insisted on behalf of the relator that the respondent is not authorized to certify the designation of "People's" in connection with the names of these substituted candidates, but that he should use some other word of description, or add to that so used, which would clearly indicate that they were nominated by certificate of electors; and in support of that view we are referred to the case of *Philips v. Curtis* (Idaho) 88 Pac. 405, which gives countenance to that proposition. That case, however, is founded upon a statute which, although quite similar in some respects to our own, and particularly so concerning the making of nominations, is radically different in others, which must have considerable bearing upon the question. In that state the method of preparing the ballot follows that of most of the states using the Australian system. Their statute expressly requires that "the width of the ticket shall be divided into as many equal parts by lines the whole length of the ticket, . . . as there are political principles or parties represented by the candidates each of said parties or divisions to have a heading or caption designating the political principle or party represented by the several candidates." The ballot in that state therefore is arranged in separate columns, the candidates of each party being contained in one column with the name of the party or principle at the head. In the case cited we are led to infer from the opinion that the People's party, although holding a convention, and making certain nominations, had failed to mention any one as a candidate for state senator; and Philips, who had been nominated for that office by another party, sought to have his name placed upon the ticket of the People's party under a nomination made by a certain number of electors, the certificate thereof designating him as People's party candidate. The effect would be, if his prayer had been granted, that his name would have gone upon the regular People's party ticket, and in the column upon the ballot set aside for the ticket of that party, and with the other candidates regularly nominated by a convention of that party. It was held that the certificate authorized his name to go upon the ballot as an independent candidate only, and that any number of electors could not secure the name of any candidate which they saw fit to indorse to be placed upon the ticket of any party. It will be observed, whether it is important or not, that the candidate seeking the aid of the court in that case was already named upon the ballot in the ticket of another party. The same comments are applicable to the case of *Atkeson v. Lay*, 115 Mo. 585, which was not cited by counsel,

but has come to our notice. While according to each of those courts our entire respect, if the conclusions arrived at in the cases cited are not at all depending upon the character of their ballot, we would hesitate to follow them in their application to a statute such as that in force in this state. We are inclined, however, to the opinion that there is a well-defined distinction between those cases and the one at bar. In this state, any convention or primary meeting held for the purpose of making nominations to public office, and also a specified number of electors, may nominate candidates for public office to be filled by election. Laws 1890, chap. 80, § 84. A convention or primary meeting is defined as "an organized assemblage of electors or delegates representing a political party." § 85. Nominations made by a convention or primary meeting are required to be certified in writing containing the name, residence, and business of the person nominated, and in not more than five words, the party or principle which such convention or primary meeting represents. It is required to be signed by the presiding officer and secretary of the convention or primary meeting, and verified by them in a certain manner. § 86. Candidates for office may be nominated otherwise than by convention or primary meeting, as follows: A certificate containing the name of a candidate for the office to be filled with such information as is required to be given in certificates of nominations by convention shall be signed by electors, etc. When the office is to be filled by the electors of the entire state, the certificate must be signed by not less than 100 electors. Such certificates may be filed in the same manner, and with the same effect, as a certificate of nomination made by a party convention. § 88. Provision is made for declining a nomination, at least twenty-five days before election (§ 95); and, in case of vacancy occurring for any reason, the same may be filled in the manner required for original nominations. § 96. In case the nomination thus vacated has been made by a party convention, which has delegated to a committee the power to fill vacancies, the same may be filled by such committee. § 97. It was urged by counsel for respondent that the language of § 96, *vis.*, "may be filled in the manner required for original nominations," expressly permitted a vacancy to be filled in either of the ways provided for the making of original nominations, irrespective of the manner in which the original nomination in the particular instance had been made; that is to say, either by convention (or committee, if authorized), primary meeting, or certificate of electors. Whether or not the language or purport of the statute goes to that extent we do not, as already intimated, express any opinion, as we find in this case the vacancies to have been filled in the same manner as the original nominations were made and presented.

In an earlier part of this opinion we adverted to the method of making up the ballot, from which it appears that there are no party headings thereon, nor columns set apart for separate parties; but the ballot is required to contain, in addition to the names of the candidates, the name of the party or principle repre-

sented by them respectively as contained in the certificate of nomination. It must be observed that the certificate under which the controversy arises as to the right to use the word "People's" is not arraigned by any persons or authority representing the People's party. No one claiming any allegiance to that party is here complaining of the act of Chairman Patterson and his associates. The complaint comes from the chairman of the state committee of an entirely separate political party. While he probably has the right to prefer such a complaint, and have the matter adjudicated, nevertheless we are confronted with the fact that at the instance of one not affiliated with the People's party in any manner, so far as the record discloses, we are asked to judicially deny the right of more than 100 electors, including the one highest in authority in the party in this state, describing themselves as the representatives of that party, from giving the party name to their candidates. If this certificate had come in conflict with other nominations made by the same party in regular convention, a very different question might arise. In the case at bar, however, we have before us the broad question whether, in any case, the secretary of state is at liberty to respect the designation of a political party or principle mentioned in a certificate of nomination by electors, when the certificate is signed, sworn to, and presented by the state chairman of such party, and in its body alleges that the signers represent the party, in the absence of any other existing nomination by such party for the same office; or whether he is bound to disregard such description, or add something to it, not found in the certificate, indicating the manner in which the nominations were made. There can hardly exist a doubt but that our legislation on the subject of elections is more or less imperfect, which fact invites conflict, and possibility of confusion; but the courts cannot supply omissions in the law. Anticipating, or perhaps having experienced, controversy along this very line, many of the states have explicitly regulated the manner in which party nominations may be made. There is nothing of that character in our law. We have searched the election law in vain to discover any limitations upon party nominations. There is not a clause or line anywhere requiring or tending in that direction that a political party can only present nominations for public office through the medium of party conventions or primary meetings. The writer of this opinion believes that a wise regulation in that regard, and legislation explicitly defining the status of nominations by certificate of electors, would be desirable; but there is no such legislation at present, and the courts have no authority to place restrictions upon those matters when the legislature has left them open. A convention of delegates, or even a mass convention, is, after all, but a representation of some political party; neither constitutes the party itself; and until the appropriate department has limited or restricted the method by which a party may be represented, and through what character of representation it may act, we do not consider it within the province of the courts to do so. If there is any doubt about a matter of this character, then that construction of the statute should be adopted

which will accord to the citizen the greater liberty in casting his ballot. *People, Eaton, v. District Court*, 18 Colo. 26. It has been held that, where two factions of the same political party have held separate conventions, and certified nominations, using the same political designation, the secretary of state is without authority to decide which of the two is entitled to the party name, and is required in such case to certify both sets of nominations, giving to each the political designation found in the certificate of nomination. *People, Eaton, v. District Court, supra*; *Phelps v. Piper*, 48 Neb. 724, 33 L. R. A. 53; *Shields v. Jacob*, 88 Mich. 164, 18 L. R. A. 780. In Kansas a nomination by electors designating their single candidate as the nominee of the Miners' and Laboring Men's party was recognized as a party nomination, and the court says: "We think that each political party has a perfect right to select its candidates as it pleases, and have their names printed under its party heading; that there is nothing in the law nor in reason preventing two or more political parties, whether acting through conventions or by petitions, from selecting the same individuals for one or more of the offices to be filled." *Simpson v. Osborn*, 52 Kan. 328. In Minnesota the supreme court upheld as party nominees certain candidates named by a mass convention, in opposition to rival candidates presented by a delegate convention of the same party; one of the reasons assigned being the entire absence of any statutory provision regulating the manner in which political parties should proceed in organizing conventions or making nominations. *Manson v. McIntosh*, 58 Minn. 525, 28 L. R. A. 605. To hold that the provisions of the statute authorizing a convention to make nominations, and defining a convention as an organized assemblage of electors representing some political party or principle, necessarily confines a political party to proceedings by and through a convention, especially in view of the other provisions affecting nominations by electors' certificate, or by petition, as it is sometimes popularly termed, would require the judiciary to interpolate something which has been omitted, perhaps purposely, from the statute. In the case at bar no convention of the People's party has acted as to two candidates for electors subsequent to the declination of two persons named in convention as well as by petition. No committee was given authority to act. The chairman of the state committee, with 100 associates, present the certificate in question as alleged representatives of the party. If a party may, under any circumstances, act otherwise, than by convention or primary meeting, no lawful or reasonable objection can be urged to such action in the case and upon the facts before us. We conclude, therefore, that the respondent was not bound to disregard the political designation accompanying the names of the candidates Jordan and Sims in the certificate nominating them, that a fair and reasonable construction of the statute does not require him to add to or qualify the party name thus used. No such duty being imposed upon that officer, it does not rest upon the court.

The writ prayed for must be denied.

Conaway, J., concurs. Groesbeck, Ch. J., did not participate in the decision.

NEBRASKA SUPREME COURT.

Andrew DEBNEY, *Pisf. in Err*

v.

STATE of Nebraska.

(45 Neb. 856.)

*1. The crime of murder is regarded as having been committed at the time when the fatal blow or wound is inflicted, although the death occurs on a subsequent date; and the party is to be tried by the laws in force at the time the injurious act is done.

*2. It is not reversible error to give an er-

*Headnotes by NORVAL, Ch. J.

NOTE.—Time when homicide is deemed to be committed.

As to the locality of crime committed by shooting or striking across state boundary, see note to State v. Hall (N. C.) 28 L. R. A. 59.

This note is limited entirely to the consideration of the question of time, and does not include any cases involving the jurisdiction of the court, or the question of place, although in many cases the time and place of the commission of the crime would seem to be treated as analogous, the weight of authority being in favor of the doctrine that the crime is committed where the blow is struck, the shot fired, or the poison administered, and therefore it would seem that if the place where the blow is given determines the place or jurisdiction of the court, the crime may equally be said to be committed at the time the blow is given, the shot is fired, or the poison is administered.

There is, however, very little direct authority upon the question involved in this note, the courts as a general rule seeming to assume that the place where the crime is committed determines the time of the commission of the offense. The *dicta* of the courts in many cases wherein the point raised was purely one of jurisdiction lead to this supposition.

With respect to the question of time, it has been held that murder is a complex term denoting several facts of which the death of the party is one of the most essential. The mortal stroke or the administration of poison does not constitute the crime, unless the sufferer dies thereof within a year and a day. *Com. v. Parker*, 3 Pick. 550, 558. This principle may be said to be the settled rule of law, the authorities as a whole supporting it.

In *United States v. Guiteau*, 1 Mackey, 498, 596, it was held that murder was committed within the District of Columbia when the felonious blow was struck there, notwithstanding the consequent death happened without the District and in one of the states.

So, in *People v. Gill*, 6 Cal. 637, where the blow was given before, but the death ensued after, the passing of the California statute of April 16, 1856, which provided that upon trials for crimes committed previous to its passage the party should be tried by the laws in force at the time of the commission of such crime, the court holding that the death must be made to relate back to the unlawful act which occasioned it, and that as the party died in consequence of the wounds received on a particular day, the day on which the act was committed, and not the one on which the result of the act was determined, was the day on which the murder was properly charged.

And again, in *Green v. State*, 66 Ala. 44, 41 Am. Rep. 744, it was held that the crime of murder consisted in the infliction of the fatal wound coupled 34 L. R. A.

roneous instruction where it could not have prejudiced the complaining party.

3. Held, that the eighth instruction, defining the term "deliberation," was as favorable to the accused as he was entitled to have given.

4. Instructions given to a jury should be construed together; and if, when so considered as a whole, they properly state the law, it is sufficient.

5. Held, that the twenty-fourth paragraph of the charge to the jury, upon the subject of intoxication, is applicable to the evidence adduced on the trial.

6. Evidence held to sustain a conviction for murder in the first degree.

with the requisite contemporaneous intent and design which legally rendered it felonious,—the subsequent death of the injured party being the result or sequence, rather than a constituent elemental part of the crime, the giving of the blow constituting the felony, the blow alone being the act of the party, the death only a consequence of such act.

Again, in *Stout v. State*, 76 Md. 817, it was held that by the inflicting of a mortal wound then and there, the accused expended his active agency in producing the crime, no matter where the injured party might languish, or where he might die, if death ensued within the time and as a consequence of the stroke or poison given, the grade and characteristics of the crime being determined immediately that death ensued, and that the result related back to the original felonious wounding or poisoning, the giving of the blow that caused the death constituting the offense.

And so in *State v. Gessert*, 21 Minn. 302, it was held that it was for his acts that the defendant was responsible, such acts constituting his offense, the death which characterized those acts not being his act but the consequence thereof.

Again, in *Com. v. Maclooin*, 101 Mass. 1, 7, 100 Am. Dec. 89, the court in support of the theory that the deed is committed at the time when the fatal blow, etc., is given, stated that the injury and death were as much the continuance, operation, and effect of the unlawful act as if the deed had proved instantly fatal, the unlawful intent attending and qualifying the act until its final result.

And in *Riley v. State*, 9 Humph. 648, 668, it was held that the blow given was the act of the party, and the death was only the consequence of the blow.

So, in *State v. Carter*, 27 N. J. L. 490, the time that the blow was given was looked upon as the time of the commission of the offense. That case, however, was one dealing with the question of jurisdiction.

And in *People v. Adams*, 8 Denio, 190, 45 Am. Dec. 468, which was also a case relating to jurisdiction, the court held that a crime was committed in the state of New York at a time when a party, though out of the state, put in motion his act by an innocent third party acting under him within the state.

Again, in *Burns v. People*, 1 Park. Crim. Rep. 182, 185, the court said that if a party assaulted, after a felonious attempt, died within a year and a day, the same act, which till his death was an assault and a misdemeanor only, though aggravated, was by that event shown to have been a mortal wound, the event, strictly speaking, not changing the character of the act, but relating back to the time of the assault, and the same act which might be a felonious assault only, had the party not died, was shown by that event to have been a mortal wound and the crime a capital felony.

7. When the county attorney finished his closing address to the jury, some of the bystanders, without the knowledge or connivance of anyone connected with the prosecution, applauded, which was quickly suppressed by the presiding judge, and who administered a rebuke to the persons making the applause. Held, that the record failed to disclose that the defendant was prejudiced by the demonstration.

(October 1, 1896.)

ERROR to the District Court for Nance County to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

Messrs. Reid & Morgan, M. V. Mondy, and Albert & Reeder for plaintiff in error.
Mr. A. S. Churchill, Attorney General, for the State.

Norval, Ch. J., delivered the opinion of the court:

An information was filed by the county attorney in the district court of Nance county, charging the plaintiff in error, Andrew Debney, with murder in the first degree. The prisoner was found guilty as charged, and was by the court sentenced to be hanged, which judgment he seeks to reverse by this proceeding. It appears from the record before us that the plaintiff in error and his wife, Catherine

And in *state v. Hall*, 114 N. C. 909, 919, 28 L. R. A. 59, it was stated that if a party standing in one state shoots at another in a neighboring state, until the act consummates a crime there is simply an attempt, but when the party is wounded by such shot the crime in its completeness exhibits itself.

So, in *State v. Bowen*, 16 Kan. 475, the court stated that although the crime was not complete until death, yet the death simply determined the character of the crime committed in giving the blow, and referred back to and qualified that act.

And it has been held that the offense of shooting at another is committed in the state of Georgia when one in the state of South Carolina, without malice aforethought, but not in self-defense, or under other circumstances of justification aims and fires a pistol at another, who at the time is in the former state, even though the ball misses him and strikes the water in that state near the boat which he occupies. *Simpson v. State*, 92 Ga. 41, 23 L. R. A. 243.

In *Archer v. State*, 106 Ind. 426, 428, the court pointed out the conflict in the authorities as to whether death was part of the crime of murder, some authorities maintaining that death was the mere consequence of the crime; others holding that it was part of the crime, for the reason that there was no murder until death occurred, which must be within a year and a day, but the court did not pass upon the question, as in that case, which was one of murder, the defendant's acts were substantive criminal wrongs, forming essential parts of the crime, and the point was wholly jurisdictional in its character.

And the same conclusions would seem to have been arrived at by the court in the case of *State v. Kelly*, 76 Me. 381, 49 Am. Rep. 620, although that was a case of jurisdiction.

So, it would seem that the court, in *State v. Blunt*, 110 Mo. 332, 337, looked upon the offense as committed at the time the blow was given, inasmuch as it stated that the fact that death occurred a short time after the county boundary had been reached, was a mere incident and result of the crime previously committed in another county. But that case related solely to the question of jurisdiction.

And the same principles form the basis of the court's decision in passing upon the court's jurisdiction in *Ex parte McNeeley*, 36 W. Va. 84, 15 L. R. A. 223, a poisoning case, where the death occurred within the state, but in that case as jurisdiction was expressly conferred upon the state court by statute, the court upheld the prosecution in the state where the death occurred.

Although the case of *State v. Ryan*, 18 Minn. 371, was one wherein the sufficiency of the indictment was attacked, the defendant being indicted and convicted of murder in the first degree, under the laws in effect at the time charged in the indictment, which alleged the killing of the deceased on a 34 L. R. A.

given date, and while the state laws had changed the penalty prior to the finding of the indictment, the court held the indictment sufficient as charging that the deceased died on the day of the act committed, prior to the finding of the indictment, and the passing of the law changing the death penalty.

Again, in *Com. v. Stafford*, 12 Cush. 619, the court would also seem to lean to the opinion that the crime is committed when the poison is administered at various times, death or murder being the result. In that case, however, the question was one of practice relating to the allegation of the crime in the indictment, as being caused by injuries inflicted on different days.

In a case wherein the defendant was convicted of manslaughter under § 5844 of the United States Revised Statutes, which makes it manslaughter for a captain, engineer, pilot, or other person employed on a vessel, by his misconduct, negligence, or inattention to his duties, to cause the death of any person, the court stated that the offender was guilty, not when the misconduct or negligence occurred, but where that misconduct bore fruit by causing the death of a human being. *Re Dele*, 4 Fed. Rep. 193, 193.

In *Hex v. Hargrave*, 5 Car. & P. 170, in a case of manslaughter against the prisoner as principal in the second degree, the court stated that the giving of the blows which caused the death constituted the felony, and that the languishing of the deceased was no part of the offense.

And again, the case of *Reg. v. Lewis*, 7 Cox, C. C. 277, *Dears & B. O. C.* 123, 126, 26 L. J. M. C. N. 8, 104, 8 Jur. N. S. 523, would also seem to support the theory that the offense was committed at the time the blow is given, although that case was one entirely relating to the question of jurisdiction.

In *Reg. v. Holland*, 2 Moody & R. 351, the court stated that if the prisoner wilfully and without justifiable cause, inflicted the wound which ultimately caused the death, he was guilty of murder, and that it made no difference whether the wound was in its nature instantly mortal, or whether it became the cause of death by reason of not being properly cared for, the real question being whether in the end the wound inflicted was the cause of death, the court considering the ultimate death as the consequence of the blow.

In the case of *Chapman v. People*, 39 Mich. 35, 369, 361, 362, in answer to the argument that the murder was considered in law as occurring when the blow was given which resulted in death, the court looked upon death as an essential ingredient in homicide, and that until it occurred there was no such crime, no murder being then committed, there being no doctrine of relation which could alter the date or the time of the death, and no rule which could anticipate the death and complete the crime earlier,—especially where there was no statutory provision to the contrary.

E. W.

Debney, being unable to live happily together, a separation took place. Subsequently a reconciliation was brought about, and after a time a second separation occurred. Afterwards, on the 4th day of July, 1893, the accused went to the place where his wife was stopping, in Nance county, and asked her if she would go home with him, and she replied she would not. He then inquired if she never intended to go with him, and, upon receiving a negative answer, he drew his revolver, and shot at his wife five times, three of the balls penetrating her body. After she fell to the ground, he jumped upon her, and stamped her head and breast. From the wounds thus inflicted, Mrs. Debney died, in Platte county, on the 9th day of the same month. The verdict of the jury found the prisoner guilty of murder in the first degree, but did not fix the penalty.

The first question argued by counsel is whether the accused was entitled to the benefit of the amendment to § 8 of the Criminal Code adopted by the legislature of 1893, fixing the punishment for murder in the first degree at death or imprisonment in the penitentiary for life, in the discretion of the jury. The act of the legislature containing the aforesaid amendment of the Criminal Code contained no emergency clause. Therefore, under the provisions of § 24, art. 3 of the state Constitution, it did not become operative until three calendar months after the adjournment of the session of the legislature at which it was enacted. The twenty-third legislative assembly finally adjourned on the 8th day of April, 1893, and it is contended by counsel for plaintiff in error that the act to which reference is made above went into effect at the expiration of three calendar months from such adjournment, or on July 9, 1893, the day on which the death of Mrs. Debney occurred. On the other hand, the attorney general argues that the amendment did not go into effect until August 1, 1893: in other words, that the "three calendar months" begins to run at the expiration of the months within which the legislature adjourned *sine die*. In our view, it is unnecessary—indeed, it would be quite out of place—to decide at this time between these conflicting positions of counsel, or to review their arguments or the authorities cited in support thereof, since the time when the amendment of 1893 to § 8 of the Criminal Code went into force does not on the record arise in this case, unless the crime with which the plaintiff in error is called upon to answer was committed on July 9, the day Mrs. Debney died, and not on the 4th day of the same month, when the fatal wounds were inflicted. Undoubtedly, the concurrence of both the wounds and the consequent death were necessary for the consummation of the crime of murder, for, until death ensues, the crime is not complete. The question has been frequently before the courts for adjudication. Where is the crime committed when the wounds or blows, and the death resulting therefrom, occur in different counties or states? And the great weight of the decisions holds that, independent of any statutory provision upon the subject, the crime is committed and is punishable in the jurisdiction where the fatal wound or blow is given; in other words, that it is not the place of the

death, but the place where the criminal act is perpetrated, to which the jurisdiction to try and punish is given. It was the inflicting of the fatal wounds by the prisoner, coupled with the requisite contemporaneous intent or design, which constituted the felony; the subsequent death of Mrs. Debney being a result or sequence rather than a constituent element of the offense. The doctrine is stated thus by Mr. Bishop, at § 51 of volume 1 of his work on Criminal Procedure: "The true view appears to be that the blow is murder or not, according as it produces death within a year and a day or not; and therefore, in all cases, an indictment lies in the county where the blow was given." To the same effect, see 1 Whart. Crim. L. 292; Kerr, Homicide, § 226; *Rea v. Hargrave*, 5 Car. & P. 170; *Green v. State*, 66 Ala. 44, 41 Am. Rep. 744; *State v. McCoy*, 8 Rob. (La.) 545, 41 Am. Dec. 801.

In *Riley v. State*, 9 Humph. 646, it was held that the venue is proved in a murder case by establishing that the mortal blow was inflicted in the county in which the prosecution is brought, without proving the county where the deceased died. *Green, J.*, in delivering the opinion of the court, says: "For, although, at common law, it was said the offense was not complete until death, yet it would be doing violence to language to say that the offense was committed in the county where the death happened, although the strokes were given in another county. . . . East says the common opinion was that he might be indicted where the stroke was given. That alone is the act of the party. He commits this act, and the death is only a consequence."

United States v. Guiteau, 1 Mackey, 498, was a prosecution for the murder of President Garfield. In that case the fatal shot was fired in Washington, in the District of Columbia, from which the president died three months later, at Elberon, in the state of New Jersey. Guiteau was indicted and tried for the crime in the District of Columbia. The point was made in the case that the court had no jurisdiction on the ground the crime was committed at the place where the death occurred. The court, in an opinion by Justice James, held that the murder was committed within the District of Columbia, since the fatal wound was given there, although the consequent death happened without the District, and in one of the states.

State v. Kelly, 76 Me. 331, 49 Am. Rep. 620, was a prosecution for murder. The wound which produced the death was inflicted within the limits of Ft. Popham, a fort of the United States, from the effects of which wound death ensued at Phippsburg, outside the limits of the fort. It was held the crime was committed where the mortal blow was given, and not where the person died. The court, in the opinion, observes: "But, it is said that, although a mortal wound may be inflicted within a fort, still, if the person wounded dies elsewhere, the crime must not be regarded as having been committed in the fort, but at the place where the person dies, and that in such a case the courts of the latter place have jurisdiction. It is undoubtedly true that the courts of the latter place do sometimes have jurisdiction; but we are satisfied that, when this is so, it is not because the crime is to be regarded as hav-

ing been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime."

State v. Carter, 27 N. J. L. 499, was an indictment for murder. The blows were struck in Hudson county, New York, from which the injured party died in New Jersey, where the prosecution was brought. Vredenburg, J., in speaking for the court upon the question of jurisdiction, uses this language: "The only fact connected with the offense alleged to have taken place within our jurisdiction is that, after the injury, the deceased came into and died in this state. This is not the case where a man stands on the New York side of the line, and, shooting across the border, kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the state as where he stands in it. Here no act is done in this state by the defendant. He sent no missile or letter or message that operated as an act within this state. The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then, for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter, in its various degrees, in one place; murder, in its various degrees, in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture, in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel."

In the case of *State v. Bowen*, 16 Kan. 475, Brewer, J., after reviewing the authorities bearing upon the question, says: "It seems to us, without pursuing the authorities further, reasonable to hold that, as the only act which the defendant does toward causing the death is in giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least, that those movements do not, unless under express warrant of the statute, change the place of offense; and that, while

it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act."

In *State v. Gessert*, 21 Minn. 369, it appeared that the defendant was indicted for murder in Washington county, in that state, by feloniously stabbing and wounding one Savazyo, in said county, from which he died in the county of Pierce, in the state of Wisconsin. The indictment was demurred to, on the ground that it did not charge the commission of an offense in Washington county. The court sustained the indictment. Berry, J., in passing upon the question of jurisdiction, said: "It is for his acts that defendant is responsible. They constitute his offense. The place where they are committed must be the place where his offense is committed, and therefore the place where he should be indicted and tried. In this instance the acts with which defendant is charged, to wit, the stabbing and wounding, were committed in Washington county. The death which ensued in Pierce county, though it went to characterize the acts committed in Washington county, was not an act of defendant committed in Wisconsin, but the consequence of his acts committed in Washington county."

If the crime is deemed committed in the county where the fatal wounds were given, as the authorities hold, it follows that the offense was committed when such wounds were inflicted. True, the death occurred at a subsequent date, but it relates back to the time the mortal injury was received. The accused committed all the acts constituting the offense on July 4: the death which ensued in Platte county, on July 9, merely characterized his acts. The crime of murder consists in intentionally and unlawfully causing the death, and, while it is true that the crime is not complete until death occurs, yet it is incorrect to say that the death is an element in the crime. It is merely a necessary condition to it. The elements of the crime are the acts of the perpetrator, such as the malice, intent, and the wound or blow. The crime was committed when the mortal wounds were inflicted, and he is to be tried by the laws then in force.

A case precisely in point is *People v. Gill*, 6 Cal. 687. The defendant was indicted for the crime of murder. After the blow, but prior to the death of the victim, a change in the statute was made by the legislature. A conviction was had under the amended law, and upon a review of the case the supreme court held the crime to be of the date of the blow, and governed by the law then in force. The chief justice, in the course of his opinion, observed: "The blow was given before, but the death ensued after, the passage of the last statute. The death must be made to relate back to the unlawful act which occasioned it, and as the party died in consequence of wounds received on a particular day, the day on which the act was committed, and not the one on which the result of the act was determined, is the day on which the murder is properly to be charged."

Complaint is made of the giving of the twelfth instruction, which reads as follows:

"(12) You would in this case be warranted in convicting the defendant of murder in the first degree, and it would be your duty to do so, if you find the following facts from the evidence and beyond a reasonable doubt: First, that Catherine Debney is dead, and that she died in the county of Platte and state of Nebraska on the 9th day of July, A. D. 1898, or at some time prior to the 21st day of November, 1898, which is the date of filing the information in this case; second, that said Catherine Debney died from the effects of wounds and injuries inflicted on her by the defendant in the manner and by the means specified in the information; third, that the defendant inflicted said wounds and injuries upon the said Catherine Debney unlawfully, and with the purpose and intent to thereby kill her, and that the said wounds and injuries were so inflicted by the defendant of his deliberate and premeditated malice; fourth, that the said wounds and injuries were so inflicted by the defendant upon the said Catherine Debney in the county of Nance and state of Nebraska on the 4th day of July A. D. 1898, or at some time prior to her death." The criticism, and the only one, suggested upon the foregoing instruction,—that it assumes that the death occurred within a year and a day from the time the mortal blow was inflicted,—is without merit. It is firmly settled by our own decisions that the court has no right in its instructions to assume that any essential element of a crime has been established. It is for the jury alone to pass upon the facts and the credibility of the witnesses. *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835; *Long v. State*, 23 Neb. 83. But the rule stated above has not been violated or infringed by the instruction already quoted. It does not assume that the death occurred within a year and a day after the injury was received, but it was left for the jury to determine from the evidence whether or not, beyond a reasonable doubt, Mrs. Debney died after the wounds were given, and before the filing of the indictment.

Exception was taken to the eighth paragraph of the court's charge, as follows: "(8) Deliberation means the act of deliberating or weighing or considering the reasons for and against a choice or measure. In the sense in which the word is here used, an act is done deliberately or with deliberation when it is done in cool blood, and not under the influence of violent passion, suddenly aroused by some real or supposed grievance. A person who does an act, not in the heat of sudden passion, but after having coolly weighed or considered the mode and means of its accomplishment, does it deliberately." The foregoing definition of "deliberation" is substantially within the rule announced in *Craft v. State*, 8 Kan. 450. It is true, this court, in *Simmerman v. State*, 14 Neb. 570, criticised the definition given in the Kansas case in so far as it held it was necessary for the accused to have considered the different means for the accomplishment of the killing. And in the case at bar the instruction informed the jury that the weighing of the mode and means of the accomplishment of the act was essential to deliberation. Whether this was correct or not it is unnecessary to determine, for, if it was erroneous, it was more favorable to the accused than he was entitled to.

34 L. R. A.

Error cannot be predicated upon the giving of an instruction where it could not have prejudiced the complaining party. *Converse v. Meyer*, 14 Neb. 190; *O'Hara v. Wells*, Id. 403; *Labaree v. Klosterman*, 33 Neb. 150; *Hoggenkamp v. Hargreaves*, 39 Neb. 544; *Hurlbut v. Hall*, Id. 890; *Jolly v. State*, 43 Neb. 857.

The twenty-fourth instruction, given by the court on its own motion, reads thus: "(24) While it is a general rule of law that voluntary intoxication is no excuse for the commission of crime, still, in cases of this kind, drunkenness, if proved, may be considered by the jury for the purpose of determining whether the accused, at the time of the alleged killing, was capable of forming a wilful, deliberate, and premeditated purpose to take life. And if, in this case, although you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that, at the time he inflicted the fatal injuries, he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, then such killing would only be murder in the second degree. If, however, the defendant took intoxicants to steady his nerves for the commission of the crime with which he is charged, then his intoxication would neither excuse the crime nor reduce it from murder in the first degree to the second degree." The criticism directed against the foregoing is twofold: First, that it imposes the burden of proving intoxication upon the defendant; and, second, that the last clause of the instruction is not based upon the evidence.

As to the first objection, we remark that counsel for the prisoner are correct when they say that the law does not cast the burden of proving intoxication upon the defense, but that it was sufficient if the jury from the evidence entertained a reasonable doubt upon that point. It must be borne in mind that intoxication is not a justification or an excuse for crime, but evidence of intoxication is admissible in some cases for the purpose of showing no crime has been committed, or to show the degree or grade of the offense where the crime charged, *e. g.* murder, consists of different degrees. In a prosecution for murder, it is competent for the jury to consider evidence of intoxication as tending to show that the act was not premeditated, and that there was not such deliberation as was necessary to constitute murder in the first degree. *Smith v. State*, 4 Neb. 278. By at least four instructions, the jury were informed that the accused should be acquitted unless from the evidence they found that every element of the crime was established beyond a reasonable doubt. The fifteenth paragraph of the charge is in this language: "(15) By the law of the land, every person is presumed to be innocent of crime; and the defendant in this case is entitled to the benefit of this presumption as evidence in his favor, and in order to convict him of the crime alleged in the information, every fact necessary to constitute such crime must be established by the evidence beyond a reasonable doubt. If, after a full and fair consideration of all the evidence in the case, you entertain any reasonable doubt upon

any single fact or element necessary to constitute the crime of murder in the first degree, it is your duty to give him the benefit of such doubt, and acquit him of that crime; and if, upon a like consideration of the evidence, you entertain a reasonable doubt as to the existence of any single fact or element necessary to constitute the crime of murder in the second degree, you should give him the benefit of such doubt, and also acquit him of that charge. You should likewise acquit him of the charge of manslaughter, if, upon a full and fair consideration of the evidence, you entertain a reasonable doubt of the existence of any fact necessary to constitute that offense." The foregoing was a full and clear statement of the law upon the question, and put, and properly, the burden upon the state to make out its case at every point beyond a reasonable doubt, although it would have been more appropriate to have used the word "degree" instead of "crime." To convict of murder in the first degree, it was necessary that the act be done with deliberation and premeditation; and, if the evidence left any reasonable doubt upon the minds of the jury as to whether there was any deliberation or premeditation, they knew from the charge that they could not convict him of the highest degree of murder, and they knew, too, that it was not incumbent upon the accused to prove his intoxication at the time the mortal wounds were given, since they were told that the state was required to establish every fact or element necessary to constitute the crime by the evidence beyond a reasonable doubt. This is not a case of conflicting instructions, nor does the instruction criticised undertake to impose the burden of showing intoxication upon the defendant, but the rule upon that point was covered by the general instructions upon the burden of proof. The doctrine is well settled that instructions must be construed together; and if, when so considered, the law is properly stated, it is sufficient. *St. Louis v. State*, 8 Neb. 406; *Murphy v. State*, 15 Neb. 383; *Lincoln v. Smith*, 28 Neb. 762.

There was sufficient evidence before the jury upon which to base the latter portion of the twenty-fourth instruction. The evidence discloses that the defendant often drank liquors to excess, and, when under the influence of intoxicants, he is cross and rough; that after he first saw his wife on the morning of the tragedy, and before its occurrence, he drank liquors. The defendant testified that, on the day of the shooting, he took the priest to Genoa. "I was drinking outside. It was carried out in pails. I got 25 cents worth of beer, and 25 cents worth of rum." The inference could properly be

drawn from the testimony that defendant drank "intoxicants to steady his nerves for the commission of the crime." The instruction was applicable to the evidence.

It is also urged that the evidence is insufficient to sustain the verdict. The evidence is uncontradicted that the defendant purchased a revolver a short time before the homicide, and that he inflicted the wounds from which his wife died. The accused relies upon the defense of insanity. After a second reading of the record, we are fully satisfied that the defendant at the time fully comprehended what he was doing; that his mind was clear; and that, with deliberation and premeditation, he committed one of the most atrocious murders that has come under our observation. The evidence bearing upon the defense of insanity was fairly submitted to the jury under proper instructions, and the verdict has settled that point against the defendant. The assignment that the verdict is unsupported by the evidence must be overruled.

Finally, it is insisted that the defendant did not have a fair and impartial trial, on account of alleged misconduct of the audience in attendance upon the trial. It appears that, at the close of the argument of the county attorney to the jury, the spectators applauded by stamping of feet and clapping of hands, which applause was immediately suppressed by the presiding judge, who rebuked the persons for making the same. It was also shown that the applause was without the knowledge or connivance of those connected with the prosecution. The record fails to disclose what was said by the prosecutor in his closing address, nor does it appear from the showing made that the applause was in approval of the sentiments expressed by the county attorney. The incident complained of occurred in the presence and hearing of the trial judge, and he is better enabled than we to determine the effect, if any, the applause had upon the jury. By overruling the motion for a new trial, containing an assignment relating thereto, submitted upon the affidavits both on behalf of the accused and the state, the trial court must have been of the opinion that the demonstration was not of such a character as to influence the verdict, and no prejudice being shown, its determination will not be interfered with. *Edney v. Baum*, 44 Neb. 294; *State v. Dusenberry*, 112 Mo. 277.

The accused has been accorded a fair trial, and, no prejudicial error appearing in the record, the judgment is affirmed.

January 10, 1896, fixed for the execution of the sentence imposed by the trial court.

CALIFORNIA SUPREME COURT (Department 1)

Joseph YOOH, *Resp't.*,

v.

HOME MUTUAL INSURANCE COMPANY, *App't.*

(111 Cal. 503.)

1. Gasoline kept as part of the usual stock of merchandise will not avoid a policy in which a written description of the property insured names such stock "as is usually kept in country stores," although a printed condition declares that the policy shall be void if certain articles, including gasoline, are kept, used, or allowed on the premises.
2. Written parts of an insurance policy will control printed parts, and in case of repugnancy the latter must be disregarded.
3. An "agreement indorsed," permitting otherwise prohibited articles to be kept on insured premises, is made where the articles are included in the written description of the property insured.
4. Untrue answers to questions in an application for insurance do not constitute a concealment or misrepresentation by the insured which will make the policy void, where the misstatements were written by the insurance agent without any direction or knowledge of the insured.
5. Leading questions may be permitted where the only objection is that they are irrelevant and immaterial.

(Beatty, Ch. J., dissents.)

(March 11, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Orange County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Van Ness & Redman, for appellant:

The policy expressly provided that it should be void if gasoline was allowed or kept upon the premises, and as it was so kept, *ipso facto*, liability upon the part of the defendant ceased.

Civ. Code, §§ 2611, 2612; *Cerf v. Home Ins. Co.* 44 Cal. 320, 18 Am. Rep. 165; *Commercial Ins. Co. v. Mahlman*, 48 Ill. 313, 95 Am. Dec. 543; *Beer v. Forest City Mut. Ins. Co.* 39 Ohio St. 109.

In *Lancaster F. Ins. Co. v. Lenheim*, 89 Pa. 497, 33 Am. Rep. 778, the effect of policy clauses similar to those in the case in hand was considered, and the conclusion reached that they were not inconsistent or repugnant, and that the prohibitory clause was of controlling effect.

The statement concerning the number of rooms in the building was material, and if false, and made by the insured, it avoided the policy.

If the truth had been known by the company

a higher rate of premium would have been charged, and this, in and of itself, determines materiality.

Ryan v. Springfield F. & M. Ins. Co. 46 Wis. 671; *May, Ins.* § 184; Civ. Code, § 2565.

It was explained that the rate of premium to be charged and collected was dependent upon the number of rooms in the house, and Brooks admits his signature to the application in which that number is falsely stated. This would seem to make a clear case of a knowingly false statement by an authorized agent, and for such statement the principal is liable.

Stockton Combined Harvester & A. Works v. Glen's Falls Ins. Co. 98 Cal. 557.

By signing the application he adopted it and warranted it as true, and by such adoption and warrant the same result ensues as if he had in the first instance made it.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 984; *Richardson v. Maine Ins. Co.* 46 Me. 394, 74 Am. Dec. 459.

Misrepresentation as to a material fact will avoid the policy, even although innocently made.

May, Ins. 2d ed. p. 218; *Phillips, Ins.* § 387; *Flanders, Ins.* p. 337; *Carpenter v. American Ins. Co.* 1 Story, C. C. 57; *Continental Ins. Co. v. Kasey*, 25 Gratt. 266, 18 Am. Rep. 681.

Petition for rehearing in banc.

The decision in department is not sustained by a single authority, and is opposed to authorities cited, but not referred to, in the opinion.

Lancaster F. Ins. Co. v. Lenheim, 89 Pa. 497, 33 Am. Rep. 778, note; *Cobb v. Insurance Co. of N. A.* 17 Kan. 493; *Birmingham F. Ins. Co. v. Krieger*, 83 Pa. 64, 24 Am. Rep. 147.

Messrs. Victor Montgomery and William T. Kendrick, for respondent:

Gasoline was an article of merchandise usually kept in a country store, and was customarily kept in the store building, but in a separate room from the other stock.

The description of the property, which, as we have seen, includes gasoline, is in writing, and the provision "all while contained in above-described building" is also in writing, and if the printed portion of the policy does absolutely forbid the keeping of it there, the printed clause so forbidding is repugnant to the written clause and therefore of no force or effect.

Civ. Code, §§ 1653, 1441; *Wood, Fire Ins.* 2d ed. § 206, p. 491; *Pindar v. Kings County F. Ins. Co.* 36 N. Y. 648, 98 Am. Dec. 544; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. 353; *Elliott v. Hamilton Mut. Ins. Co.* 13 Gray, 189; *Reynolds v. Commerce F. Ins. Co.* 47 N. Y. 597.

The burden of showing the written representation was upon the appellant, and if there is any doubt or uncertainty the construction must be in favor of the insured and against forfeiture.

Wood, Fire Ins. 2d ed. § 63.

Dungan was in fact the agent of the com-

pany. The information furnished by him was at the request of the company's authorized agent, it was for the company's benefit, and the company paid him for the information.

Bartford F. Ins. Co. v. Josey, 6 Tex. Civ. App. 290; *Commercial U. Assur. Co. v. Elliott* (Pa.) 13 Atl. 970.

Dungan had acted as foreman while the house was being built, it had been recently completed and he knew as much about the house as Mr. or Mrs. Brooks did.

Burke v. Bours, 92 Cal. 108; *Insurance Co. of Pennsylvania v. O'Connell*, 84 Ill. App. 857; *Arff v. Star F. Ins. Co.* 125 N. Y. 57, 10 L. R. A. 609.

Dungan's knowledge as to the number of rooms in the house was the company's knowledge.

Reynolds v. Iowa & N. Ins. Co. 80 Iowa, 568.

At the time the application was made out the insured had no notice as to the scope of Freeman's authority to employ Dungan to make a diagram of the building for the use of the company. The act was within the general scope of his apparent authority and is binding upon the company.

Wheaton v. North British & M. Ins. Co. 76 Cal. 415; *Furnum v. Phoenix Ins. Co.* 88 Cal. 246, and cases therein cited on page 357.

In filling out the printed form of the application furnished by the company, Freeman acted for the company and his act in writing down a false statement without Brooks' knowledge would not avoid the policy even though Brooks did sign the application without reading.

Continental Ins. Co. v. Pearce, 89 Kan. 896; *McComb v. Council Bluffs Ins. Co.* 88 Iowa, 247; *Germania L. Ins. Co. v. Lunkenheimer*, 127 Ind. 586; *Follette v. United States Mut. Acci. Asso.* 107 N. C. 240, 12 L. R. A. 815; *Wheaton v. North British & M. Ins. Co.* 76 Cal. 415; *Beebe v. Ohio Farmers' Ins. Co.* 98 Mich. 514, 18 L. R. A. 481.

The misrepresentation referred to in the policy is a wilfully false or intentional misrepresentation.

National Bank v. Union Ins. Co. 88 Cal. 497; *Wheaton v. North British & M. Ins. Co.* *supra*.

The company through its agents Freeman and Dungan made a personal inspection of the building, and had actual knowledge of the number of rooms contained therein.

Under such circumstances the company is estopped from denying its liability on the policy.

Dwelling House Ins. Co. v. Brodie, 53 Ark. 11, 4 L. R. A. 458.

Harrison, J., delivered the opinion of the court:

The defendant issued its policy of insurance against fire to Mrs. W. H. Brooks, the assignor of the plaintiff, in the sum of \$4,000, upon a frame building occupied as a country store, and also upon household furniture and the stock of merchandise, "such as is usually kept in country stores," while contained in said building. Before the expiration of the policy the insured property was totally destroyed, and the present action is brought to recover for the loss thereby sustained. The defendant

alleged, as grounds of defense, that the insured kept for sale and allowed gasoline upon the premises, in violation of the terms and conditions of the policy, and that, in her written application for the policy, she made a material misrepresentation in reference to the building to be insured. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff. From the judgment entered thereon, and an order denying a new trial, the defendant has appealed.

The policy was made out upon a printed form, in which, after the agreement of insurance, there were printed certain conditions to be observed by the insured, and certain limitations upon the liability of the insurer. In the insurance part of the policy the defendant insured Mrs. Brooks for the term of one year against all direct loss or damage by fire, "except as hereinafter provided," and intermediate this part of the policy and the printed conditions and limitations were written, with pen and ink, the description of the property upon which the insurance was made. One of these printed conditions was as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, gasoline, Greek fire, etc." Testimony was given at the trial tending to show that gasoline is one of the articles of merchandise usually kept in country stores, but that it is customary to keep it in a room or building by itself. It was also shown that, during the month prior to the fire, the insured would, in the daytime, bring small quantities of gasoline—one or two cans—from a building on another lot, which was used for storing it, into a room within the insured building, and adjacent to the store, for the purpose of selling it at retail to her customers. Upon this evidence the defendant requested the court to instruct the jury: "If, from the evidence, you find that, during the period between the delivery to plaintiff of the policy of insurance in this action sued on and the fire, gasoline was at any time for several days kept for sale in the building described in the policy, or in any part of said building, your verdict should be for the defendant." The court refused this instruction, but told the jury: "If you find, from the evidence in this case, that gasoline was, during all or any portion of said time between the issuance of said policy and the said fire, an article of merchandise usually kept in country stores, then and in such case the fact that the insured did keep for sale or allow gasoline, if she did, either by herself or agent, allowing or keeping such article on the insured premises—that is, habitually—is no defense to this action." It is urged by the appellant that, in giving this instruction, and also in refusing to give the one asked by it, the court erred.

A contract of insurance is to be interpreted by the same rule as is any other contract. It must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable. If it is reduced to writing, the intention of the parties is to be ascertained

from the writing alone, if possible. The whole contract is to be taken together. When it is partly written and partly printed, the written parts control the printed parts, and, if there is any repugnancy between the two, the printed part must be disregarded. It may be explained by reference to the circumstances under which it was made. In cases of uncertainty it is to be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, §§ 1686-1684. Applying these rules to the contract in the present case, it must be held that it was the intention of the defendant to insure gasoline, if it was an article usually kept in country stores, and that, if such was its intention, it was no violation of the policy for the insured to keep gasoline upon the premises as a part of the stock of merchandise. When the defendant agreed to insure a stock of merchandise "such as is usually kept in country stores," it must be presumed to have known the character of the merchandise which is usually kept in country stores, and that gasoline was one of these articles, and, consequently, that its policy covered all such merchandise. *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 194; *Pindar v. Kings County F. Ins. Co.* 36 N. Y. 648, 98 Am. Dec. 544. The court would have no judicial knowledge of the character of merchandise which is usually kept in country stores, and it was therefore competent to offer evidence upon that point, for the purpose of enabling it, when interpreting the language of the policy, to understand the matter to which it related, and the circumstances under which it was made. *Elliott v. Hamilton Mut. Ins. Co.* 13 Gray, 189; *Whitmarsh v. Conway F. Ins. Co.* 16 Gray, 359, 77 Am. Dec. 414; *Archer v. Merchants & Mfrs. Ins. Co.* 43 Mo. 484; *Maril v. Connecticut F. Ins. Co.* 95 Ga. 604, 30 L. R. A. 885; *Fraim v. National F. Ins. Co.* 170 Pa. 151; Wood, Ins. § 64; May, Ins. § 239. When it was shown that gasoline is one of the articles which is usually kept in country stores, the court correctly held that it was a part of the subject of the insurance, and that the insured did not violate the policy by keeping it in stock. The defendant, when it issued the policy in question, knew the character of a country store, and that Mrs. Brooks kept it for the purpose of retailing to her customers all of the articles kept by her, and that the gasoline which she kept was to be disposed of by retail in the same way as the other portion of her stock. To give to the policy the construction now claimed by the defendant would be to hold that, although it agreed with her to insure all the stock she usually kept in her store, yet, if she continued to keep that stock, she forfeited all rights under the policy. The clause in the policy above quoted, and which is relied on by the appellant, cannot be construed as having this effect. The qualification therein which excepts the policy from becoming void, viz., "unless otherwise provided by agreement indorsed hereon," is found in the policy itself. The subject matter of the risk—the stock of merchandise "such as is usually kept in country stores,"—was written on the policy by the insurer; and, as the defendant must be deemed to have intended thereby to insure all such articles as are usually kept in a country store,

it must be held that this was an "agreement indorsed" upon the policy which removed the exemption from liability that would otherwise have existed. *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124. If there be any repugnancy between the written phrase "such as is usually kept in country stores," and the printed clause, "any usage or custom of trade or manufacture to the contrary notwithstanding," the former controls the latter, as being the more deliberate expression of the contracting parties. *Fraim v. National F. Ins. Co.* 170 Pa. 151; Civ. Code, § 1651.

Counsel for appellant has cited the case of *Lancaster F. Ins. Co. v. Lenheim*, 89 Pa. 497, in support of his contention; but this case seems to stand by itself. Mr. Freeman, in his note to the case (38 Am. Rep. 778), says that the case "is utterly opposed to the decisions in all the other states, and that it is quite difficult to reconcile it with previous decisions in the same state." A subsequent case in the same state (*Fraim v. National F. Ins. Co. supra*) appears to be at variance with the rule in the *Lenheim Case*. It may also be observed that the opinion of the court in the *Lenheim Case* rested materially upon the fact that, in the policy then before it, the condition exempting the insurer from liability for loss where turpentine was kept, was "in immediate connection" with the clause by which it insured the property specified, "except as hereinafter provided," whereas, in the present case, the words "except as hereinafter provided" are in direct proximity to the words "loss or damage by fire" which is insured against and may be regarded as a limitation upon the causes of fire against which the insurance is made, rather than as a qualification of the contract of insurance. In subsequent portions of the policy there are certain causes of loss for which the insurer expressly declares that it will not, under any circumstances, be liable; and it is more reasonable to construe these as the matter referred to by the phrase "except as hereinafter provided," than those provisions in which it is declared that in certain contingencies the policy shall be "void."

The policy sued on contains the following provision: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof." It is alleged, in the answer, that the policy was issued upon the written application of the assured, in which it was stated that the building to be insured contained less than fifteen rooms, whereas, in fact, it contained twenty rooms; and that the materiality of this representation consisted in the fact that the rate of premium for the risk assumed was greater for a building of twenty rooms than it was for a building with fifteen rooms. It was sufficiently shown at the trial that the building contained more than twenty rooms, but it was also shown that the statement in the application that there were less than fifteen rooms was written therein by the agent of the defendant from information which he had obtained at his own instance, and without any direction on the part of the insured, from one Dungan, the carpenter who had built the house; and it was not shown that

either the assured or her husband had made any statements or representations to the agent in reference thereto. The defendant offered in evidence a document signed by Mr. Brooks which is claimed to be the application. This document is indorsed: "Daily Report of Policy Issued for the Home Mutual Insurance Company. Instructions to Agents." The face of the policy is headed, "Questions," with the following direction, evidently intended for the agent of the defendant, *et c.*: "By having the following questions so fully answered that the company can get a clear idea of the risk, and can verify rates, the agent will avoid much unnecessary correspondence." Under this are various printed questions, numbered consecutively to twenty-five, and beneath these printed questions there was written, upon a blank line on this printed page: "(26) Less than fifteen rooms." The agent of the defendant testified that, before he presented this document to Mr. Brooks for signature, he had written these words in the application from information which he had obtained from Dungan, and he did not testify that he made any inquiry of Mr. Brooks concerning the number of rooms in the house. Mr. Brooks testified that, when the application was presented to him for his signature, he signed it without reading it, and that, when he signed it, he had no knowledge that these words were there. It does not clearly appear whether the matter referred to in these words was the subject of a question which was intended to be put to Mr. Brooks, and to which no answer was written in the application, or whether the words constitute a statement written by the agent of the defendant for the information of his principal. It is quite as consistent with the evidence on this point that the jury should have found that these words were written by the agent for the information of the company, as that they were an answer to any question put to Mr. Brooks by the agent. In the line numbered 24, the questions, "Have you personally examined the risk?" and "Do you recommend it?" are evidently questions which were to be answered by the agent, and he testified that the answer to the next question, "Has the risk been recently rejected?" to which the answer "No" is written, was not discussed by him with Mr. Brooks.

The court instructed the jury, in substance, that if Mr. Brooks, in applying for the policy, made a written representation that the building contained less than fifteen rooms, they should find for the defendant; but, if they should find that the facts contained in the application respecting the number of rooms were obtained by the defendant from Dungan, and from the diagram or plans furnished by him, and that Brooks made no representation personally in the matter, but signed the application without knowing what it contained as to the number of rooms, it did not constitute a defense. This instruction properly directed the jury in their deliberations upon their verdict, and their verdict thereunder is justified

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by the evidence. Whether Mr. Brooks made any representations to the agent concerning the number of rooms in the house was to be determined upon a direct conflict of evidence; and, if the jury believed that he did not, his signing the application with the ambiguous phrase, "Less than fifteen rooms," without knowing that it was there or the purpose for which it had been inserted, cannot be construed as a written representation by him that the building contained less than fifteen rooms. The rule that one who signs an instrument which contains terms of obligation upon himself is not absolved from such obligation by showing that he signed the instrument without reading it, has no application like the present, where the instrument signed contains no words of obligation, and the clause invoked against the signer does not purport to be a statement by him, or in answer to a question put to him. The policy sued on does not refer to this application, or in any way incorporate its contents into the conditions upon which the contract of insurance is made: but the appellant sought by extrinsic evidence to connect the two instruments, and make the one dependent upon the contents of the other. In such a case the evidence should be very clear that the statements in the application relied on to defeat the action were made by the applicant, and that, at the time of making them, the applicant knew that they were to form the basis of the policy to be issued to him. *Dunbar v. Phenix Ins. Co.* 72 Wis. 492; *Schwarzbach v. Ohio Valley Protective Union*, 23 W. Va. 668; *Combs v. Hannibal Sav. & Ins. Co.* 48 Mo. 148, 97 Am. Dec. 333; *Rowley v. Empire Ins. Co.* 36 N. Y. 550; May, *Ins.* §§ 144 *et seq.*

Certain rulings of the court at the trial were excepted to by the appellant, but we are of the opinion that no error was committed in these rulings. The question asked of Freeman, "In whose handwriting was the statement, 'Less than fifteen rooms?'" was subsequently stated by him to be in his own handwriting. The question whether Brooks stated to him that there were less than fifteen rooms in the building was clearly leading, and was properly excluded upon that objection. Whether Brooks made such a statement was a material point of inquiry, and it would have been competent for the defendant to ask of Freeman whether any statement was made by him on that subject, and, if so, what it was; but the defendant omitted to make such inquiry. Equally proper was it for the plaintiff to show by Brooks that he did not make such statement, and that, at the time he signed the application, he was not aware that the statement was there. The only objection to these questions was that they were irrelevant and immaterial, and this objection was properly overruled.

The judgment and order are affirmed.

We concur: Garoutte, J.; Van Fleet, J.

Rehearing in banc denied, Beatty, Ch. J., dissenting.

NORTH DAKOTA SUPREME COURT.

STANDARD OIL COMPANY, *Appt.*,

v.

Mike ARNESTAD *et al.*, *Respts.*

(.....N. D.....)

***Sureties who sign a bond for the fidelity of a firm as agents for the obligee are not liable for funds misappropriated by one of the members of such firm after the dissolution of the partnership and the retirement of the other partner from the business of such agency. And this is the rule notwithstanding the fact that the obligee knew nothing of such dissolution.**

(November 20, 1896.)

A PPEAL by plaintiff from a judgment of the District Court for Cass County in favor of defendants in a proceeding brought to enforce a bond which had been given by defendants for the fidelity of a firm which had been appointed to act as agents for the sale of plaintiff's goods. *Affirmed.*

The facts are stated in the opinion.

Mr. Melvin A. Hildreth, for appellant:

The defense of a dissolution of partnership is an affirmative defense, and must be proved by a preponderance of the evidence.

The statements and declarations of partners as to their status or dissolution, or any change in their relationship, should be closely scrutinized when others may be injuriously affected by the establishment of any fact which such declarations or statements may tend to prove. They are interested witnesses.

Clinton Lumber Co. v. Mitchell, 61 Iowa, 182.

In this state the common-law rule that the contract of suretyship shall be strictly construed does not apply.

Rev. Code, § 4653.

The principle that the dissolution of a partnership releases the sureties upon a bond covering the acts of the partners, applies only where the bond covers the acts of the partners as partners only, and in those cases knowledge of the dissolution was generally brought home to the plaintiff. The case at bar is distinguishable, first, in that the bond herein is a joint and several bond and extends to the individual acts of Arnestad and Eggerud, or either of them or their employees, or the employees of either of them, or anyone to whom they or either of them, may intrust the business of the company while acting as the agents of the plaintiff; and second, the plaintiff had no knowledge of the alleged change in this partnership.

See *Palmer v. Bagg*, 36 N. Y. 528; *Hayden v. Hill*, 52 Vt. 259.

The act itself of intrusting plaintiff's goods to Arnestad & Lindstrom by the firm of Arnestad & Eggerud without notifying plaintiff and without plaintiff's consent, was an act of misappropriation of plaintiff's goods which

brings them squarely within the terms of the bond, as partners.

Palmer v. Bagg, 64 Barb. 641; *Bates*, Partn. § 655, p. 688, and cases therein cited.

Mr. F. W. Ames, for respondents:

The principals in the bond are Mike Arnestad and Ole Eggerud, copartners as Arnestad & Eggerud, and it is their fidelity, and that of their employees, and those to whom they may intrust the business of the appellants, that are expressly undertaken by the respondent sureties; the expression, "or either of them," as shown by the tenor of the whole bond imports nothing more than an intention to be responsible for the acts of either during the existence of the partnership.

2 Brandt, Suretyship & Guaranty, 2d ed. § 118; *Simson v. Cooke*, 8 J. B. Moore, 588; *Hawkins v. New Orleans Printing & P. Co.* 29 La. Ann. 134.

A surety cannot be held beyond the express terms of his contract.

Rev. Code, 4651; *Miller v. Stewart*, 23 U. S. 9 Wheat. 630, 6 L. ed. 189.

A surety who guarantees that a firm composed of particular individuals will do certain acts or discharge certain duties, cannot be held liable where there is a change in the firm, although the firm name is not changed.

Dupee v. Blaka, 148 Ill. 453; *Barnett v. Smith*, 17 Ill. 565; 1 Brandt, Suretyship & Guaranty, 2d ed. § 118, etc.; *Crane Co. v. Specht*, 39 Neb. 123; *Theobald*, Principal & Surety, 72; *Simson v. Cooke*, *supra*; *Kipling v. Turner*, 5 Barn. & Ald. 261; *Penoyer v. Watson*, 16 Johns. 100; *Shaw v. Vandusen*, 5 U. C. Q. B. 353; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423, and cases cited; 3 Kent, Com. 124; *Backhouse v. Hall*, 6 Best & S. 507; *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174.

The fact that plaintiffs were not notified of the change is immaterial.

Birch v. De Rivera, 24 N. Y. S. R. 770; 3 Parsons, Cont. 505.

Corliss, J., delivered the opinion of the court:

The object of this suit is to hold the defendants, as sureties upon a bond, liable for the embezzlement of one of the principals in such obligation. The Standard Oil Company, the plaintiff herein, having selected as its agents at Mayville, in this state, the firm of Arnestad & Eggerud, required of them a bond with sureties as a condition of shipping them its goods, to be handled by them as such agents at that point. In response to this demand the bond in suit was executed by the firm, and by defendants Hanson and Gullicks as sureties. The sole question before us relates to the liability of the sureties. Their only defense is that the bond secured the honesty of only the firm, and that before the embezzlement in question took place Eggerud had withdrawn from the firm, and that at the time the money sued for was misappropriated the business of such agency was being carried on by Arnestad and Lindstrom.

*Headnote by CORLISS, J.

NOTE—The opinion of the court and the briefs in the above case seem to present very fully the authorities on the point in question as to the effect 34 L. R. A.

of a bond for the fidelity of a partnership, so that no attempt will be made to annotate the case.

As the construction of the bond is involved, we deem it necessary to quote it in full:

"Know all men by these presents: That we, Mike Arnestad and Ole Eggerud, copartners as Arnestad & Eggerud, principals, and John P. Hanson and C. Gullicks, sureties, are held and firmly bound unto the Standard Oil Company in the sum of five hundred dollars (\$500), lawful money, to be paid to the Standard Oil Company, its executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, severally and collectively, firmly by these presents. The condition of the above obligation is such that if, through the neglect, carelessness, or inattention to the business of the said company by the said Arnestad & Eggerud, or either of them, or any of their employees to whom they may intrust the business of the said company, the company shall sustain any loss or damage, then the said Arnestad & Eggerud, and parties hereto subscribed as sureties, shall indemnify the said company to the amount of this bond; and the subscribing parties also firmly bind themselves to sustain and pay the Standard Oil Company, not to exceed the amount of this bond, any loss resulting to the said company through the theft or fraud on the part of the said Arnestad & Eggerud, or anyone to whom they may intrust the business of the company. The direct purpose of this bond is to secure and indemnify the said company against any loss from shortage on account of stock not being properly accounted for, and loss on account of funds belonging to the said company being misappropriated by the said Arnestad & Eggerud, or either of them, or anyone to whom they shall intrust the business of the said company. If the said Arnestad & Eggerud shall faithfully and accurately perform the duties as agents for the Standard Oil Company, and shall correctly account for all stocks or funds belonging to the said company which shall be intrusted to him or his employees acting in his stead, whose acts he herein directly assumes, then the above obligation to be void; otherwise to remain in full force and virtue."

It is urged that by the use of the words "or either of them" the parties intended to cover the individual defalcation of either member of the firm as well after the dissolution of the firm as before. But we are unable to discover any justification for such a construction of the instrument. We think that these words were employed (unnecessarily employed, it is true) to express what the law would have implied had they been omitted; i. e., that both partners need not join in the wrongful act to render all parties to the obligation liable. The bond was given to secure the plaintiff from loss growing out of the agency held by the copartnership, and there is nothing in its language to indicate that the parties were contracting with reference to a possible dissolution of the partnership, and the continuance of the agency by one of the firm. Other provisions of the bond indicate the exact reverse. The instrument declares that "the subscribing parties also firmly bind themselves to sustain and pay to the Standard Oil Company, not to exceed the amount of this bond, any loss resulting to the said company through the theft or fraud on the part of said Arnestad

& Eggerud, or anyone to whom they may intrust the business of the company." Again, the bond provides that, "if the said Arnestad & Eggerud shall faithfully and accurately perform the duties as agents for the said Standard Oil Company, and shall correctly account for all stock or funds belonging to the said company which shall be intrusted to him or his employees acting in his stead, whose acts he herein directly assumes, then the above obligation to be void," etc. It is evident that the words, "to him or his employees acting in his stead, whose acts he herein directly assumes," were intended to express the plural instead of the singular. In preparing the bond, a blank was probably used which had been so worded as to apply to a single agent. Looking at the whole instrument, and interpreting it in the light of surrounding circumstances, we are unable to find in it any purpose on the part of the obligors to give, or on the part of the obligee to exact, security for the act of either partner after the partnership as such had ceased to act for the plaintiff. Had this been the object of the parties, an explicit provision to that effect could, and certainly would, have been incorporated in the bond. We are therefore forced to fall back upon the inquiry whether the law will imply any promise on the part of the sureties to be responsible for Arnestad's honesty after he had ceased to be associated with Eggerud in the business. On this point we have no doubt. A surety who engages to be responsible for the honesty of a firm may be entirely influenced by the consideration that one of the partners is a man of integrity, and of such strength of character, and such shrewdness and watchfulness in business affairs, that the risk of dishonesty from the action of the other partner, in whom the surety may place no trust, is reduced to the minimum. The sureties in this case may have been willing to become bounden for the fidelity of Arnestad & Eggerud while acting as a firm, and yet at the same time not willing to incur the hazard of obligating themselves as sureties of the partner Arnestad alone. Based upon such considerations as these, the rule of law has long been established that the surety, standing upon the very letter of his contract, may insist that he cannot be held for aught that is done after the dissolution of the firm, for which alone he became responsible. *Backhouse v. Hall*, 6 Best & S. 507; *Dupee v. Blake*, 148 Ill. 453; 2 Bates, Partn. §§ 648-655; *Birch v. De Rivera*, 24 N. Y. S. R. 770. See also *Penoyer v. Watson*, 16 Johns. 100; *Crane Co. v. Sprech*, 39 Neb. 123; *Manhattan Gaslight Co. v. Ely*, 39 Barb. 174; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423; *Barnett v. Smith*, 17 Ill. 565; 24 Am. & Eng. Enc. Law, pp. 764, 765. The case of *Dupee v. Blake*, 148 Ill. 453, so far as the principle of law is concerned, presents the same features as the case at bar. The court there said: "The rule is that, if a surety engages for an individual, the engagement is understood to extend to the acts of that individual alone, and will not continue if he takes in a partner. In other words, the surety for a single individual is not liable for a partnership of which such individual is a member. A surety who guarantees that a firm composed of particular individuals will do certain acts or dis-

charge certain duties cannot be held liable where there is a change in the firm, although the firm name is not changed. As the surety's liability is *strictissimi juris* and cannot be extended by construction, his guaranty to a partnership is extinguished if any partner is taken into or retires from the partnership, unless it appears from the terms of the instrument that the parties intended the guaranty to be a continuing one without reference to the composition of the firm. A party may be induced to become surety for the individuals who compose a firm because of his confidence in their integrity, prudence, accuracy, and ability as business men, but he cannot be presumed to have intended to become responsible for the possession of such qualities by some third person, who may be afterwards taken into the firm without his knowledge or consent. It is often in the power of one partner, by want of discretion or integrity, to ruin another."

Our attention has been called to certain decisions which it is urged with great earnestness are opposed to the authorities already cited, and we are requested to follow them as enunciating the sounder doctrine. These decisions are *Palmer v. Bagg*, 56 N. Y. 523, 64 Barb. 641; *Hayden v. Hill*, 52 Vt. 259. But, in our judgment, these cases are plainly distinguishable from the case before us for final settlement. Their facts were different from the facts of this controversy in vital particulars. The sureties there had become responsible for the honesty of an individual agent. As the court very properly held, such sureties took the risk, not only of their principal's honesty, but also of the dishonesty of those whom he might employ in any capacity to assist him in the prosecution of the business of the agency. Should he hire a subagent as an assistant, the sureties would still be bound. And so they would remain liable if he should see fit to give such assistant an interest in the property of the business of the agency, provided the obligee did not deal with the new firm as agents, and thus extinguish the original agency. The sureties in those cases undertook to guarantee the fidelity of the agent to his trust, and therefore necessarily agreed to be responsible for whatever he should do himself or through his agents and employees. They agreed to assume the risk of his integrity and his business judgment in employing assistants in any capacity. It is upon this ground that all these decisions relied on by counsel for plaintiff proceed. In *Hayden v. Hill*, 52 Vt. 259, the court said on this point: "(1) The report shows that Mitchell took in one Clapp as a partner, and that said agency was managed, and funds therefor received, during a portion of the time, by the partnership; and it is claimed that a portion of the funds from sales and leases of the property were received by Clapp, and never actually came into the hands of Mitchell. But the report further states that the plaintiff never recognized such partnership, and dealt solely with Mitchell. He refused even to receive a note indorsed by the partnership name. If the plaintiff had seen fit to have consigned the property to the partnership, and dealt with it in such manner that the firm of Mitchell & Clapp would have been the responsible parties in the accounting, these defendants, as sureties

for Mitchell on the bond, could not be liable to respond for the laches of the firm, for it would be the default of a different party from that for which they were bound. Mitchell was at liberty to employ such agency as he chose to assist him. He could pay assistants a stipulated salary, or compensate them with a portion of the profits of the business. It was a matter of indifference to the plaintiff, so long as Mitchell fulfilled all the stipulations of his agreement. If he employed unfit agencies, and thereby the property was squandered and lost, it was, so far as this plaintiff is concerned, the default of Mitchell alone, and he and his sureties must respond. If the fact that defendant took in a partner in conducting the business of the agency did enhance the risk of these defendants, as the sureties of Mitchell, it was not induced or recognized by the plaintiff, and was a matter over which the defendants had quite as much control as the plaintiff. We think that the referee was right, under the circumstances of the case, in finding that Mitchell was 'responsible for the acts of Clapp,' as for any other agent or assistant that he employed, in conducting the business of the agency; and that money that came to the hands of Clapp in the conduct of this business by legal intentment came to the hands of Mitchell. *Palmer v. Bagg*, 64 Barb. 641." And in *Palmer v. Bagg* [56 N. Y. 525], the court said: "We do not think this sufficient to change the relations between Fanning and the plaintiffs. The latter did no act creating or recognizing any change. The agencies or means which Fanning employed to dispose of the machines after receiving them did not necessarily interfere with the relations between him and the plaintiffs. . . . He might employ other persons to aid in the selling and pay them wages or a percentage, or a share of profits as partners. So long as the plaintiffs confined their dealings with him under the power of attorney, they would not be affected by any arrangements he should make." In neither of these cases did it appear that the obligee had dealt with the firm. Had this appeared, a different question would have been presented, for then the sureties could have claimed that their bond did not cover a partnership agency, but only an individual agency. And it is apparent from the language of the courts in these cases that this fact would have constrained them to hold that the sureties were not liable.

Finally, it is said that it does not appear that the plaintiff knew of the withdrawal of Eggerud from the firm, and that hence it follows that the old firm, as a firm, was still liable to the plaintiff for the funds misappropriated, no matter by whom they were embezzled. Upon this foundation plaintiff builds up the argument that, inasmuch as the principals in the bond are liable, so are the sureties. But this reasoning entirely misapprehends the nature of the obligation of the sureties in this case. By signing the bond, they did not, in effect, assert to the plaintiff that they would be bound whenever the principals in the bond were liable in any way to the plaintiff, whether because of their having embezzled the property, or by reason of the doctrine of estoppel which would seal their lips against a denial of

liability. They merely agreed to become responsible for the fidelity of the firm so long as each of the members of the firm should remain in the business. They contracted to be bound for the acts of Arnestad so long as they could have the protection resulting from the association of Eggerud with him in the same business. But they did not guarantee the integrity of Arnestad alone, unwatched and influenced by Eggerud, who may have been the only person in whom they reposed any trust. If the plaintiff was ignorant of the change in the firm, so were the sureties; and, if the sureties have a right to stand upon the terms of their contract, then it behooved the plaintiff to ascertain at its peril whether all the persons for whom the sureties had become responsible still remained at the helm of the business of the agency. On this point the decision of the court in *Birch v. De Rivera*, 24 N. Y. S. R. 770, is decisive. The court there said: "The fact that the plaintiffs were not notified of the change is immaterial. They may have an action against the firm as it existed before the change because of failure to notify them of such change, or to publish the dissolution. That proceeds upon another principle, namely, the presumption attached to continuous firm dealings without notice. The guarantor, how-

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ever, is not responsible for the state of facts which might justify a recovery against the original members. There is no evidence here that he was aware of the change. He seems to have been as much without notice as the plaintiffs themselves. But were it otherwise, we may say, in the language of Lord Blackburn, 'Nothing is stated to show either that the defendant was under any obligation to inform the banking house of that fact or that he took any steps to conceal it.' At all events, his contract is to guarantee a copartnership firm composed of certain persons, and that contract cannot be altered or extended without his consent." See also *Backhouse v. Hall*, 6 Best & S. 507.

We are unable to agree with counsel for plaintiff that there is not sufficient evidence of the dissolution of the firm of Arnestad & Eggerud. The evidence on the point is very satisfactory. Nor do we find anything in the case to rebut it. The deficit sued for having resulted from misappropriation of funds by Arnestad after Eggerud had retired from the business, the district court was right in rendering judgment for the sureties on the bond. It follows that such judgment must be affirmed, and it is so ordered.

All concur.

END OF CASES IN BOOK 34.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the 3d Quarter of the Judicial Year Beginning with October 1, 1896, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. PERSONAL CAPACITY.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Legislative bodies.

Failure to enter the yeas and nays on legislative journals, as required by the Constitution on the second and third readings of a statute authorizing municipal indebtedness, is held fatal, although the speakers certify that the act was ratified. (N. C.) 487.

A proposal to hold a constitutional convention is held to be properly submitted to popular vote and to be properly made by joint resolution, and not in the form of an ordinary law. (N. D.) 97.

The distinction between a concurrent resolution of the legislature and a law is maintained in a case which holds that such a resolution ratifying an appointment by the governor is not "express authority of law," within the constitutional provisions requiring such authority for any contract which can create a claim against the state. (Cal.) 262.

A rule of procedure requiring two thirds of the members of a branch of a municipal government in order to dispense with a reading of a proposed ordinance is construed to mean two thirds of the members voting, if they are a majority, and if a majority constitutes a quorum. (Md.) 469.

Eminent domain.

Payment into court of the amount of an award appealed from in eminent domain cases is held insufficient to satisfy a constitutional provision that just compensation must be paid or secured before the property is taken or injured. (Pa.) 439.

A railroad is held to be public and entitled to the exercise of eminent domain, although built for a few miles from a sawmill, through a timbered region where all who choose are entitled to ride upon it as passengers or to have freight transported over it, even if the number exercising the right is very small. (Or.) 868.

The authority given to a street railway company to cross any railroad is held limited to the right to cross on streets or highways where other provisions confine the street railway route to the established streets and highways. (Pa.) 572.

Licenses.

The constitutionality of a statute imposing the burden of a state license fee of \$35 upon itinerant vendors of goods, and requiring a deposit of \$500 as security, and then requiring a local license fee in every place in which goods are sold equal to the amount of tax on the value of the stock of goods at the ratio of the last tax assessment, is sustained, although the act is oppressive. (Vt.) 100.

Taxes and assessments.

Money of a nonresident deposited in a bank within a state, although mingled with trust funds, is held to be property within the state so as to be subject to the New York transfer tax act. (N. Y.) 235.

While expressing the opinion that the legislature has power to tax domestic judgments in favor of and owned by nonresidents, a Kansas case holds that the statutes mentioning judgments among other classes of personal property to be taxed do not include judgments owned by nonresidents. (Kan.) 810.

Bonds of foreign corporations when deposited within the state, although owned by a nonresident, are held to be property within the state subject to the New York transfer tax act. (N. Y.) 232.

A distinction between bonds and stocks of a domestic corporation which are in the possession of a nonresident decedent at the time of his death in another state is made by holding that the stock, but not the bonds, constitutes property within the state subject to a transfer tax. (N. Y.) 238.

A taxation of the average amount of live stock received each week by dealers and usually sold one day after receiving is sustained under the Maryland statutes, although they intend to export a part of them and actually do export about two thirds of all that they receive. (Md.) 309.

A stipulation in a mortgage that the mortgagor shall pay all taxes upon the premises is held not to bind him to pay taxes required of the mortgagee under a subsequent statute. (Mich.) 308.

A constitutional limitation of the tax levy

by a county is held to constitute a defense against such a levy for the enforcement of a judgment against a county, although the validity of the debt on which the judgment was rendered may be conclusively established thereby. (Wyo.) 835.

The exemption of the roadbed of a railroad company from city taxation is held not to extend to the whole of a strip of land 1,500 feet wide used as a coal and ore terminal, although a large part of it is covered by tracks; but on a sale of such a yard to satisfy tax liens the purchaser takes subject to the easement of the tracks. (Pa.) 564.

A special assessment for special benefits on property in a levee district is held to be within a constitutional provision that all property must be taxed according to its value, and therefore a tax on the land alone and partly by acreage instead of value is invalid. (Tenn.) 725.

Poll tax.

The right to sell nontaxable property to enforce payment of a poll tax under the Mississippi Constitution, declaring that such tax is a lien only upon taxable property, is denied, and the provision for poll taxes is said to be intended more as a clog upon the franchise than as a means of revenue. (Miss.) 472.

Municipalities.

Land within the limits of a town, although never divided into building lots, is held subject to municipal taxation when near railroad depots and shops, with convenient access to highways and only a short distance from the business portion of the town, so that it enjoys police protection and the other benefits of the town. (Ky.) 193.

A local option law providing that cities may, if they choose, adopt certain charter provisions, is held unconstitutional, under provisions prohibiting special laws as to cities and requiring laws as to them to be uniform throughout the state. (Minn.) 777.

A city contract for a water supply during the term of twenty-one years, made in the exercise of discretionary power given by the legislature, is held valid in Kansas. (C. C. App. 8th C.) 518.

The power of the court to cancel a contract for a municipal water supply because of the inadequacy of the stipulated source of supply is denied, but reformation of such a contract is held to be within the power of the court under the Pennsylvania statute. (Pa.) 92.

The right of a municipal corporation to erect waterworks of its own is held subject to an implied exception where it has contracted with a private corporation for a water supply, and in such case if it wishes to own a waterworks plant it is held necessary for it to proceed as the statute authorizes it to do to acquire that of the private company. (Pa.) 567.

Counties.

An act to incorporate a county is held void under a constitutional provision requiring a uniform system of county governments. (Nev.) 602.

Power to make county bonds payable in gold coin of the present standard, weight, and fineness, is held not to be included in the power conferred by statute to issue bonds

without mentioning the kind of money in which they shall be paid. (Tenn.) 541.

The prohibition of county aid to any individual, association, company, or corporation is held inapplicable to aid given to the state or the United States for a public improvement (Wash.) 817.

A donation of county funds made to secure the location of a state institution for the feeble minded within the county is upheld against the claim that it was not for a public purpose and that it violated the rule of uniformity as to taxation. (Wis.) 181.

Township.

A township is held to be a municipal corporation within the meaning of a statute authorizing the refunding of indebtedness by the issue of bonds. (Kan.) 674.

Officers.

The next election of the people prescribed by the California Constitution for the expiration of commissions granted by the governor to fill a vacancy is held to mean the next election provided for filling the particular office vacant, and not necessarily the next succeeding general election. (Cal.) 41.

A statute to provide a bipartisan police board by giving each member of a common council the right to vote for but two of four members, and limiting the choice to persons belonging to the party having the highest or the next highest representation in the council, is held void. A majority of the judges agree that a minority of the council which is thus given power to choose half the commissioners is not a city authority, within a constitutional provision allowing the legislature to designate the authority which can appoint local officers. (N. Y.) 408.

The liability of a supervisor for public money lost by the failure of a bank in which he had deposited it is sustained on grounds of public policy, although he acted in good faith and without negligence. (N. Y.) 678.

Civil service rules.

A statute preferring veterans to all other persons except women in appointments in the civil service is sustained, although it gives them some advantage over other persons. (Mass.) 58.

Voters and elections.

Nominations made by a political club were refused recognition as those of a county convention when the participants did not regard themselves as a convention and had not been chosen as delegates or any of the usual steps been taken for a convention. (Mont.) 815.

In another similar case in the same state the attempt of twenty-one persons to form a new party and then at the same time successively hold a county convention and a state convention without any previous steps taken for a convention was held unavailing. (Mont.) 813.

Nominations of presidential electors, made by the chairman of the state committee of a political party with 100 associates by certificate, are held valid under the Wyoming statute when made in lieu of candidates previously named in the same manner who had declined, and when an objection is raised only by the committee of a different political party. (Wyo.) 845.

The attempt of a nonresident candidate for Vice President to prevent the use of his name on a state ticket for presidential electors nominated at a certain state convention in Kansas is held ineffectual, although the statute provides that a person named as a candidate may cause "his name to be withdrawn from nomination." In this case there was no attempt to decline the national nomination, or even to withdraw as a candidate within the state. (Kan.) 146.

A statute prescribing a property qualification for voters at city elections is sustained, in the absence of any constitutional provision to the contrary, although the Constitution provides no other qualification for any male citizen of full age than that of residence. (Md.) 55.

The addition of the party name after a candidate's name written on a ballot in the same way that such designations follow the printed names of candidates is held not to destroy the legality of the ballot when it was clearly not intended as a distinguishing mark. (Cal.) 45.

The power of the legislature to prevent the appearance of the name of any candidate for an office more than once upon an official ballot is sustained against the claim that it infringed the rights of electors. (Ohio) 498.

The two thirds of the voters voting at an election whose assent is necessary to authorize municipal indebtedness is held to mean two thirds of all the votes cast for any purpose at the election. (Ky.) 256.

The right to examine the records of the electoral board is held to be limited to so much of the records as relates to the appointment and removal of judges and commissioners of election and registers or the ordering of a new registration. (Va.) 144.

Courts.

Two of the three members of the Tennessee court of chancery appeals, in the absence of the other, are held to have authority to consider and decide cases, although there is no provision of law on the subject. The case seems to be without direct precedent. (Tenn.) 538.

A conflict between the rules of an appellate and a lower court is considered in a case which holds that a judgment rendered against a party in the absence of his counsel in accordance with a rule of the court, but when the court knows that the counsel is engaged in the supreme court in obedience to the rule of the latter court, is held invalid. (Pa.) 593.

An action for personal injuries the parties to which reside and the cause of which arose in another state is sustained under the Federal Constitution guaranteeing equal privileges and immunities to the citizens of the several states. (Wis.) 503.

Interstate commerce.

Overruling the prior decision in the same

state, it is held that state laws prohibiting the running of railway trains on Sunday, if enacted in good faith in the exercise of the police power and without discrimination against interstate or foreign commerce, do not violate the Federal Constitution. (Va.) 105.

Public highways and grounds.

A grant to a subway company of the right to lay a subway for electric wires under streets is held to be invalid because made for private business, where no obligation is shown as to who should be permitted to use it. (Mo.) 869.

The right of a city to permit a permanent freight house to be built by a railroad company on a public levee is denied because public grounds are held in trust for the public. (Minn.) 184.

The vacation of a part of a street at some distance from one's property is held, reviewing the authorities, not to give him any right of action, as the injury is common to the public, where ample means of access remain. (Ind.) 769.

Equitable estoppel is sustained against a claim to a public park by virtue of a dedication on a recorded plat where the original owner has always continued in possession without claim by the public except as it may be implied from failure to tax it for some years, after which he makes a new plat describing the land as his own, makes expenditures upon it, builds a sidewalk under order of the common council, and his second plat is expressly adopted in an act incorporating the city. (Wis.) 733.

Milk test.

The tuberculin test of cows from which milk is supplied to a city is held to be within the power of municipal authorities to provide by ordinance. (Minn.) 318.

Garbage.

An ordinance prohibiting the transportation of garbage without a license is sustained as an exercise of the police power, but held inapplicable to such rejected food as may be utilized for other purposes so long as they do not constitute a nuisance. (Conn.) 279.

Schools.

A reservation of the right to dismiss a school teacher, stamped across his contract of employment, is held ineffectual to give the directors power to dismiss him arbitrarily, where the statute gives power to dismiss for incompetence, improper conduct, or inattention. (Tenn.) 548.

State university.

The power of the legislature to designate where a department of the state university shall be located is denied under a constitutional provision giving the general supervision of the university to a board of regents. (Mich.) 150.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The performance of one's own contract which he has hesitated or refused to perform is held a sufficient consideration for a promise to him by a third person who will be benefited by the performance. (Mass.) 83.

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An agreement by the father of a bastard child to convey property to the mother in consideration of her release of her right to compel him to assist in maintaining the child is sustained against the contention that the promise

is based solely on a past consideration. (Conn.) 360.

A contract not to engage in the same business in the locality, made by one who sells his business, is held to be broken by his taking stock in or helping to organize or manage a corporation to carry on such business. (N. C.) 389.

The generic term "money" is held to cover everything that by common consent represents property and passes as money in current business transactions; therefore the payment of a debt or judgment during the late civil war in confederate money, if accepted, is regarded as full settlement. The authority of an agent to receive it in such a case is upheld if it was then generally received in business transactions as the current money of the country. (Fla.) 268.

Bills and notes.

The fact that the president of a corporation who pledges its negotiable note for his own debt was the officer who signed it is not held to prevent the taker from being a bona fide holder, if the note was payable to a third person who had indorsed it. (N. Y.) 69.

The indorsement of a firm name on his own note to the firm, made by one partner who discounts it for his own benefit, is held to give notice of any lack of authority to make the indorsement. (Pa.) 728.

Bonds.

The bond of the cashier of a national bank "for and during all the time he shall hold the said office" is held to cover defaults in years subsequent to that in which it is given, although the by-laws of the bank provided for his election annually and he was in fact appointed by resolution every year. (C. C. App. 8th C.) 477.

The rule that a surety's responsibility is to be strictly interpreted is applied by a decision that sureties on a bond for a firm as agents are not responsible for misappropriation by one member after the dissolution of the firm and the retirement of the other party from the agency, even if the pledgee knew nothing of such dissolution. (N. D.) 861.

Banks.

The credit of checks and drafts by a bank to a correspondent after the latter has failed but before the other knows of that fact is held ineffectual to prejudice the rights of a depositor of such paper, when it was received fraudulently by the insolvent bank. But such credit before the actual failure of the bank was held to bar the depositor's right to reclaim the paper or its proceeds. (Tenn.) 532.

A credit by one bank to another of a draft made on the same day that the latter bank failed was presumed, in favor of the general creditors seeking a *pro rata* distribution of the assets of the insolvent bank and against the original depositor of the draft therein which was fraudulently received by the insolvent bank, to have been made before, and not after, the failure. (Tenn.) 536.

Insurance.

Gasolene constituting a part of the usual stock kept in a country store is held properly kept on insured premises notwithstanding a printed condition prohibiting it, where the

written description of the insured property specifies such stock as is usually kept in such stores. (Cal.) 857.

A new question as to the right of the beneficiary of a certificate on the life of an insane person to notice of his failure to pay assessments is decided in favor of such right after notice of the condition of the insured and a request for such notice. (Pa.) 436.

A policy of insurance issued by a foreign company in another state is held to be within the scope of the New York statute giving a married woman the right to assign a policy of insurance on her husband's life, with his written consent, when it is issued for her benefit. (N. Y.) 175.

The intentional killing of an insured person by a third person without the former's connivance or foreknowledge is held to be an accident within the meaning of an insurance policy, and the omission of the word "death" from a clause excluding liability for intentional injuries inflicted by any other person, when it is used in other excepting clauses immediately contiguous, is held to leave the insurer liable in case of the murder of the insured. (Pa.) 801.

A decision respecting perpetual insurance holds that a provision making the company liable forever to the assured, his heirs, and assigns, and that any assignment of the policy shall be brought to the office of the company to be entered and allowed, does not give the company any right to refuse to enter and allow an assignment solely because it has decided not to consent to the transfer of old policies. (Pa.) 159.

An insurer against loss by reason of liability for rent under a lease while the building is untenable because of fire is held not to be relieved by the tenant's receiving from his landlord a part of the proceeds of the landlord's insurance, at least when the combined amounts will not wholly reimburse the tenant. (Pa.) 600.

Lease.

The washing away, by unprecedented ravages of a river, of land leased for a landing, so that only a mere fragment of the lot, unavailable for such use, was left, is held to extinguish the obligation to pay rent. (C. C. App. 6th C.) 550.

The lease of the roof and outside of a party wall on a building for the purpose of advertising by means of a stereopticon is construed in a case which holds that there is no eviction by reason of the fact that the value of the wall for advertising purposes is destroyed by the fact that the roof of the adjoining building is leased to another person and a screen erected thereon for advertising purposes. (Pa.) 575.

Carriers.

The relation of a steamboat company to a passenger occupying a stateroom is held to be that of an innkeeper, and the carrier is held liable as an insurer for money stolen from the passenger's clothing during the night while his stateroom door was locked and his windows fastened. (N. Y.) 682.

A constitutional provision that common carriers shall not contract for relief from their common-law liability is held to preclude a stipulation limiting the value of animals car-

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ried and requiring notice of injury before they are unloaded or mixed with others, in order to recover damages. (Ky.) 685.

The contract of a baggage transfer company to transport baggage from a residence to a railroad depot is held to be fully performed, so that the liability terminates, when the baggage is delivered to the agent of the railroad company at the depot. (Ala.) 187.

Telegrams.

Overruling an early decision in that state, a Missouri case now holds that a stipulation against liability for mistakes in unrepeatable telegrams is not valid so far as it applies to cases of negligence. (Mo.) 492.

A rule of a telegraph company not to deliver messages outside of a $\frac{1}{4}$ mile limit is held ineffectual to excuse the company for delay in delivering a message when the rule was not known to the sender or mentioned by the

agent receiving the message about dark, who said it could be delivered that night. (Tenn.) 481.

Notice by letter.

Notice by registered letter, when authorized, is held complete by due registration, but not until the letter is numbered as required by postal regulations, although the postmaster may have received it properly addressed and stamped and given a receipt therefor. (Iowa) 466.

Law of place.

A contract to pay money to a loan association situated in another state at its place of business is held to be governed by the laws of that state, although it has an agency at the place where the borrower resides, through which the contract was made. (Pa.) 595.

See also *infra*, VII., as to place of remedy.

III. CORPORATIONS AND ASSOCIATIONS.

Authority to lease a railroad, given by the statutes of another state, is held ineffectual to sustain the lease of a railroad contrary to the policy of the state in which the road is situated. (Pa.) 577.

The foreclosure of a railroad mortgage, instituted in behalf of another company which had obtained a majority of the stock of the company and also of the mortgage bonds, was defeated by showing that the corporation buying the stock had obtained control of its affairs and rejected business which would have produced income, and diverted the income received to other purposes than the payment of interest on the mortgage, thereby causing a default. (N. Y.) 76.

Liability of a stockholder under statutes which make it contractual and not penal is held to be a part of the assets which go to a receiver of a corporation. (Pa.) 787.

The right to credit payments of dues in a building and loan association, made by a stockholder upon a loan which is tainted with usury, is denied on the ground that this would release such a shareholder from his portion of the losses. (Tenn.) 201.

The judgment of a sister state as to the assets, debts, and amount of assessments necessary in winding up a mutual insurance company is held to be conclusive on a stockholder in another state as to such assessments. (Mich.) 694, 701.

But an assessment on premium notes, made

by a receiver of a mutual insurance company under a decree of the court, is held not to be an adjudication binding on the courts of another state as against the maker of such a note, who was not a party to the proceedings and who before the bankruptcy of the company had surrendered his policy and received back his note. (Iowa) 704.

Partnership.

The goodwill of a partnership business is held to belong to the surviving partners when, under the contract of partnership, the latter purchased the interest of the deceased at its inventoried and appraised value with the right to continue the business. (Cal.) 265.

Religious society.

An attempt by the majority of the members of an independent congregation of the "Disciples of Christ" who had been wrongfully dropped from the rolls to hold a meeting under direction of a tribunal of the elders of sister congregations and choose new officers is held ineffectual. (Pa.) 169.

Club.

The distribution of intoxicating liquors by an incorporated club to its members is held not to constitute a sale within the meaning of a license law when it is done without profit but on payment by each member for what he receives as he pays for other food and drink obtained there. (Pa.) 84.

IV. DOMESTIC RELATIONS.

See also *infra*, IX.

A child by adoption is held to be "lawful issue" of the adopted parent within the meaning of a will making a gift to the latter with remainder to lawful issue, where the statute makes the adopted child a child for all purposes except to take property expressly limited to heirs of the body. (R. I.) 500.

Exceptions to the rule that a marriage valid in one place must be valid everywhere are considered in a case which holds that the general

rule applies when mere matters of form or ceremony are in question. (Md.) 778.

The effect of intoxication to defeat a marriage is considered in a case which holds that the degree of intoxication must be such as to render the person *non compos mentis* and devoid of reason. (Fla.) 87.

Habitual intemperance which will authorize divorce is held not to be shown by the fact of intoxication about once in three weeks to such an extent that the person did not go as usual to

work on the next morning, and that this had continued for about two years, if it had not caused any loss of his position nor produced want or suffering in his family. (Conn.) 449.

A divorce obtained in a suit brought by the guardian of an insane man is held absolutely void, although the wife is held estopped by her acquiescence therein and subsequent contract of marriage, from claiming the rights of a widow in the husband's estate. (Iowa) 161.

The right of a husband to claim alimony from his wife's separate estate on divorce is denied in the absence of a statutory provision therefor, and a provision allowing the wife to sue in her own name "as well as the husband" in a bill for divorce, alimony, and maintenance, is considered to be merely in respect to her right of action and not an enlargement of his right. (Neb.) 110.

The insanity of a husband is held insufficient

to make a contract by his wife for his support in a hospital valid when it is not executed in the statutory mode. (Ala.) 223.

A renewal by a married woman of an accommodation indorsement made before marriage is held valid under a statute which excepts an accommodation indorsement from the contracts which she is allowed to make. (Pa.) 597.

The sale of laudanum to a married woman after repeated protests of her husband and knowing that it is destroying her mind and body is held to give a cause of action, although there is no direct precedent for it, to the husband. (N. C.) 803.

A husband's right of action for loss of his wife's society is held to be defeated where the injury results in her death and recovery therefor has been had for the benefit of her estate. (Ky.) 783.

V. PERSONAL CAPACITY.

The right of an incompetent person who executed a deed of trust for the preservation of his property to revoke it is denied except on condition that the court approves the revocation. (Pa.) 707.

The fact that an accommodation indorser of

a note became mentally incompetent to do business before signing a renewal note, which was taken in good faith and the old note thereupon discharged, is held insufficient to release his estate from liability thereon. (Tenn.) 374.

See also *infra*, VII., *Gift*.

VI. TORTS; NEGLIGENCE; INJURIES.

Fraud.

Fraud in inducing a man to marry a woman who is pregnant by another, by falsely representing that she is virtuous, is held to give the husband a right of action for damages notwithstanding the fact that no precedent for the action could be found. (N. Y.) 156.

Fright.

Recovery for miscarriage resulting from fright caused by negligence is held not to be allowable as the miscarriage is not the proximate result of the negligence. (N. Y.) 781.

Food.

For furnishing unwholesome food at a restaurant, by which a person is injured, it is held that the proprietor is liable only if it was done through carelessness or negligence, and the mere fact that a person is injured in that way does not make a *prima facie* case. (Ill.) 464.

Flooding land.

The grant of a right to flood a part of a farm by the erection of a dam is held to preclude the maintenance of an action for injuries caused by the dam to the remaining portion of the land. (S. C.) 222.

A recovery of damages for flooding lands by a dam is held to be obtainable under the eminent domain law and not by suit for nuisance, where the dam is built under a statute giving power to raise water of a river for the benefit of a public canal, and providing that the board shall have a right to acquire a right of way in the manner provided by law. (S. C.) 215.

Electric wires.

The utmost care, and not merely very great care, to have perfect insulation of electric wires which are dangerous is held necessary at 34 L. R. A.

places where persons may lawfully go for work, business, or pleasure, although very great care may be sufficient at other places. (Ky.) 812.

Unsafe premises.

Although the owner of a building is not an insurer against accident from its condition, he is bound to keep it in such condition that it will not injure any person rightfully in, around, or passing it, so far as he can do so by the exercise of ordinary care. (Minn.) 557.

The liability of a landlord to his tenant for the unsafe condition of the premises, which was known to or ought to have been known to the former, but not to the latter, is sustained, although the tenant examined the premises and did not discover the defects. (Tenn.) 823.

Likewise a boarder with a tenant is held entitled to recover damages from the landlord under the same conditions. (Tenn.) 615.

But the lessor of a building is held, in Louisiana, to be exempt from any liability to a guest of the lessee for injuries sustained by the fall of a gallery. (La.) 609.

Explosions.

For the explosion of a sewer caused by the formation of gases from oil that had been turned into the sewer during a conflagration, and which could not escape because the outlet was obstructed, and was there left for four days, a city was held liable. (Mo.) 118.

Failure to give warning of an intended blast in an excavation where such work has been going on for several weeks is held not to create a liability for injury to a blacksmith several hundred feet distant by the starting of a horse which he was shoeing when the blast went off. (Mich.) 182.

The explosion of the boiler of a railroad locomotive which was known to be defective is held to make the railroad company liable to a person near the railroad who was struck by a fragment of the boiler; and the court denies that any time for repairs could be claimed by the company after such notice, but that it was bound to discontinue the use of the locomotive. (Ind.) 293.

Injury by cars.

The fright of a mule, caused by the noise of an electric car, is held not to make the street railway company liable for the resulting damages, where it was only the usual and necessary noise of the car. (N. C.) 481.

The killing of a bicycle rider by an electric street car is held to result from the negligence of the rider, and the motorman is held justified in assuming up to the last moment that the rider would get out of the way. (Cal.) 851.

A railroad company permitting children to bring dinners to their fathers employed in a yard is held not to be liable for injury to a seven-year-old boy while on such an errand

when he ran under a standing freight car to get a ball on request of one of several employees playing with it, when it was not necessary for him to go upon that track or under such cars. (Ga.) 459.

Injury to passenger or person on car.

To go from a car in which there is plenty of standing room to the lower step of a car platform in order to vomit is held such negligence on the part of a boy about fifteen years of age as to prevent recovery for his injuries when thrown off by a jerk of the train. (Ind.) 141.

A passenger thrown from a car platform while attempting to pass from one car to another while the train is in motion is held not to have been negligent as matter of law, and no presumption of negligence arises from the circumstances. (D. C.) 720.

Failure to stop a train on a sharp up-grade to remove from it a boy who catches on in violation of statute and of the engineer's orders, is held not to show wilful or wanton neglect of duty. (Ind.) 767.

VII. PROPERTY RIGHTS.

The right to transfer one's property in payment of a debt while he is solvent is held to be protected by the Constitution, and a statute making void any conveyance which would have the effect of preferring a creditor without limiting it to cases of insolvency is held void. (Tenn.) 445.

Covenant running with land.

A covenant that a house shall be forever restricted from having any building attached to the message of more than a certain height is held to run with the land and to apply to the premises, and not merely to the building then existing. (Pa.) 227.

Crops; fences.

An elaborate discussion of the nature of growing crops is made in a case which holds that they as well as fences are realty for the purpose of jurisdiction of an action for damages to them. (Ga.) 206.

Oil and gas.

A provision in an oil and gas lease that in case of default it shall be "null and void" and not binding on either party is held to create a forfeiture for the benefit of the lessor only and at his option. (Ohio) 62.

Trademark.

A trademark in the letters "P. C. W." generally arranged as script printed in a horizontal line upon a background of any suitable color, and which is described in the register as consisting in its essential features of the letters, is held not to be infringed by the letters "W. H. W." in script, in white, in a horizontal line upon a red background. (Pa.) 172.

Fraud on wife's rights.

The attempt of a man just before death to strip himself of all his property in order to defeat his wife's rights therein, by delivering deeds long before secretly prepared and giving a check for his money, is held to constitute fraud as against her. (Colo.) 49.

Gift.

A peculiar illustration of the protection of a donee is afforded where one placed in possession of land in anticipation of a devise is held entitled to retain it as against a guardian of the owner after the latter became a lunatic. (N. J.) 297.

Lien; mortgages.

An implied equitable lien in favor of the grantor of real estate for the unpaid purchase money after delivering an absolute deed and placing the grantee in possession is denied, after a considerable review of the authorities. (Or.) 690.

The lien of a mutual insurance company upon insured property of members for their shares of the losses and expenses is given precedence of the members' homestead rights. (S. C.) 806.

The contract price for building a railroad which was payable in bonds and stock is held for the purpose of determining the limit for which the aggregate of subcontractors' liens can be allowed to be the market value of such securities at the time when they were actually delivered under the contract, and payments to a subcontractor are held applicable first to that part of his claim which is not secured by his lien. (C. C. App. 6th C.) 625.

The fact that a person signs a supersedeas bond as surety of a railroad company and thereby prevents a levy, when there is a mortgage on the property but no default made upon it and the company is apparently solvent, is held to give him no preference to the mortgagees on the subsequent insolvency of the company and his enforced payment of the judgment. (C. C. App. 6th C.) 803.

A chattel mortgage obtained before an assignment for creditors is held valid if the mortgagee did not know of the mortgagor's contemplated assignment, however short a time may have elapsed before the assignment. (C. C. App. 8th C.) 620.

Wills.

The common-law rule that marriage without birth of issue is not sufficient to revoke a will

is held still in force, although the wife is by statute given the right to inherit from the husband. (Minn.) 334.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Survival of action.

The survival of the right to recover for pain and expense caused by personal injuries which subsequently resulted in death is denied under the Rhode Island statutes which give a right of action for death, as the court holds that the general provision for survival of actions for personal injuries must be limited to those which do not cause death. (R. I.) 797.

Place where remedy may be enforced.

A provision of the Mississippi Constitution precluding the defense of an employee's knowledge of defects in appliances by which he was injured is held self-executing, and is enforced by a Federal court in Tennessee, when the injury was received in Mississippi. (C. C. App. 6th C.) 393.

Jurisdiction to enforce in another state the liability of stockholders in a Kansas corporation is sustained in a Federal case. (C. C. App. 7th C.) 743.

But the statutory liability of a stockholder in an insolvent Kansas bank is held by the New York court to be one which comity does not require the New York courts to enforce. (N. Y.) 757.

The same in substance is decided in Illinois, reversing a prior decision on rehearing, although in the latter state special stress is laid on the fact that the remedy provided by the Kansas statutes is a special one. (Ill.) 750.

So, the liability of a stockholder for unpaid subscriptions under the Illinois statutes is held not to be a general contract liability which can be enforced by the courts of another state, but to be limited by the remedy provided in the statute which corresponds to garnishment. (Cal.) 747.

Limitations.

A statute excluding nonresidents who have become such after a cause of action has arisen in the state from the benefit of a statute of limitations is upheld as constitutional. (Pa.) 440.

Injunction.

An injunction to restrain the prosecution of actions for instalments on a contract which has been commenced by an assignee in another state is upheld, when it was done to avoid a statute of the state in which the contract was to be performed and in which all the parties resided. (Ind.) 333.

Replevin.

A licensee having the right to cut and remove timber for which he has paid is held entitled to maintain replevin against a trespasser who has cut the timber, but is required to reimburse the latter for the enhancement in value of the property by manufacturing it into lumber in order to recover the lumber or its value. (Wis.) 321.

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Attachment.

A false written statement as to one's financial ability in order to obtain credit is held not to constitute any basis for an attachment in favor of a person who did not rely upon such statement or know of it until after he had given credit. (N. Y.) 248.

Second appeal.

Elaborately reviewing the question how far an appellate court may re-examine its rulings on the former appeal, the Nebraska court holds that where the first decision merely remanded the case for a new trial the court has power on a second appeal to re-examine the doctrines previously declared. (Neb.) 321.

Exemptions.

A photographic lens owned and used by a photographer in prosecuting his business is held to be within a statutory exemption of implements of trade. (Conn.) 718.

Individual partners are not allowed to claim their statutory exemption out of the partnership property in case of insolvency, unless expressly authorized to do so by statute. (N. M.) 604.

Insolvency.

Partnership creditors are held entitled to vote on the question of the discharge of a single insolvent member of a firm which is solvent. (Mass.) 373.

Damages.

The loss to a child on account of its mother's death is held not to be any part of the damages recoverable in a suit by her husband as administrator under the Tennessee statute which prevents the extinguishment of the cause of action by death, but by failing to provide any beneficiary for the death of a married woman leaves the recovery to inure to the benefit of her surviving husband. (Tenn.) 443.

An instruction that plaintiff is "entitled" to exemplary damages in case of a malicious injury is held error, since at most such damages are allowed in the discretion of the jury. (Wis.) 205.

Evidence.

The measurement in the presence of the jury of a woman's foot and her leg 6 inches above the ankle in an action for injuries thereto, when the physicians on the respective sides give contradictory testimony as to such measurements, should not be rejected by the court,—at least if she does not object. (Iowa) 207.

The destruction by a servant of his employer's books after the latter's death is held insufficient to raise a presumption that they contain charges against the servant,—especially when they had already been examined and the servant claimed to have been executing his employer's orders. (Wyo.) 531.

IX. CRIMINAL LAW AND PRACTICE.

An invalid contract to dissolve a marriage is held not to be admissible in favor of the husband to show his good faith in contracting a later marriage on account of which he is charged with bigamy, where the statute does not require any other criminal intent than is involved in his entering into the prohibited marriage. (Nev.) 784.

The time when the fatal blow is struck is held to be the time of a murder so as to be governed by the laws then in force, although they are changed before death occurs. (Neb.) 851.

The strict rule as to indictments is illustrated by a decision that an indictment alleging an offer of a "bribe and money" by an agent whom the accused had procured "to offer a bribe and money of value" does not sufficiently allege that the money offered was of any value; also that an allegation of an attempt to bribe a jurymen with intent to influence his action and vote as a jurymen is not sufficient to show the knowledge of the accused that he was a jurymen and an intent to influence his action as juror. (Minn.) 178.

The constitutional provision against imprisonment for debt is held not to be violated by a statute making it a misdemeanor to obtain accommodations at an inn, hotel, or boarding house by fraud, or fraudulently to remove baggage or other property therefrom. (Tenn.) 656.

A constitutional provision against imprisonment for debt is held to be violated by a statute making it a misdemeanor to receive a deposit in an insolvent bank where the punishment is by fine of double the deposit, one half

to go to the depositor, and payment to him is made a defense. (Ala.) 684.

Sending letters or circulars to a debtor threatening to advertise a claim against him for sale, which is in violation of a statute against threatening to injure credit or reputation, is held not to be within the constitutional rights of property or of free speech. (Mo.) 127.

A city ordinance prohibiting barbers from working on Sunday is held unconstitutional as class legislation. (Wash.) 68.

The constitutional power to pardon being conferred upon the governor and several associates, it is held that the legislature cannot restore a convict to competency as a witness. (Fla.) 251.

A statute denying the usual good-time allowance to a convict serving for his second offense is held not to be *ex post facto* as applied to the punishment of an offense subsequently committed merely because the first offense was before the statute. (Mich.) 98.

The validity of cumulative and successive sentences is sustained as an exercise of common-law powers, and no act of Congress is held necessary to authorize such sentences by a Federal court. (C. C. App. 6th C.) 509.

The employment of a convict upon the public roads by order of county commissioners and under control of a captain of the chain gang who is a public agent is held lawful against the contention that such order is in the nature of an additional sentence, and it is held not to constitute a hiring out for which an order of the court contained in the sentence is necessary. (N. C.) 392.

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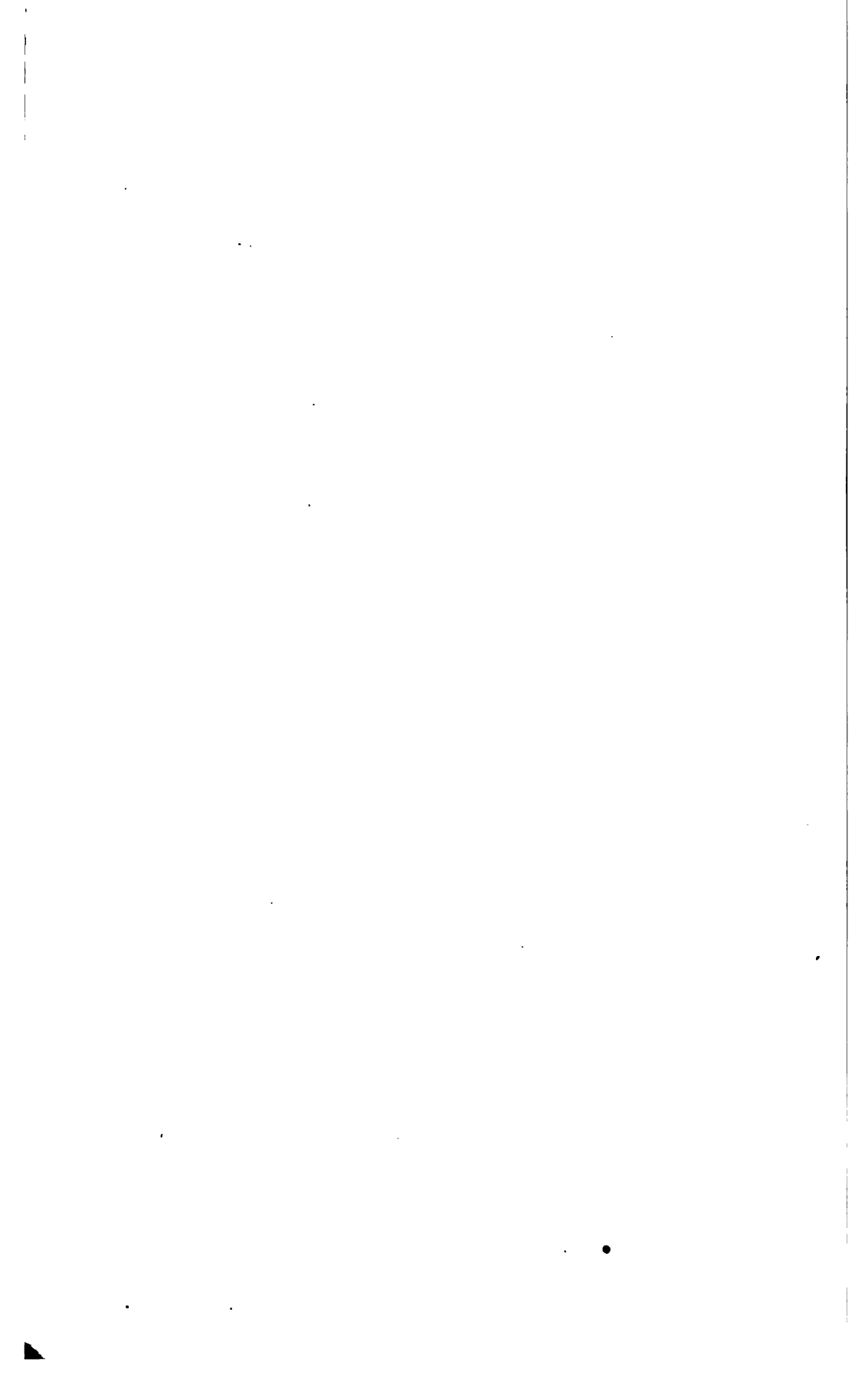
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3. The identical proceeds of a check or draft fraudulently received on deposit by an insolvent bank are sufficiently traced by the depositor when it appears that they are included in a fund paid over to the receiver of the bank by a correspondent as the proceeds of credits made after the bank failed, but before notice thereof to the correspondent. *Id.*

4. Fraud in receiving a deposit of checks or drafts after bank officials know that it is insolvent will not give the depositor a preferential claim against assets in the hands of the receiver of the bank, if the bank before its failure had received the proceeds of such paper or credit therefor from a correspondent, although the bank had on hand when it failed and always after the deposits were made more than the amount thereof in cash. *Id.*

5. Crediting checks and drafts to a bank which has failed, although done by a correspondent which does not yet know of the failure, cannot prejudice the rights of persons who deposited such paper in the insolvent bank to recover back their paper or its proceeds, when the deposit was received after the officers of the bank knew it to be insolvent. *Id.*

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BILL OF EXCEPTIONS. See APPEAL AND ERROR, 6, 7.

BILLS AND NOTES. See also HUSBAND AND WIFE, 6-8; INCOMPETENT PERSONS, 1.

1. A note by a stockholder, director, and creditor of a corporation, given to the maker of an accommodation note which the corporation had received the benefit of, in consideration of money furnished by the maker of the accommodation note to pay it, is not without consideration although the payee was bound to take up the other note. *Abbott v. Doane* (Mass.) 88

2. One who takes the negotiable note of a corporation from its president as collateral security for a loan to him or a firm to which he belongs is not precluded from claiming as a bona fide holder by reason of the fact that the note was signed by the president, where it was payable to a third person who had indorsed it. *Cheever v. Pittsburgh, C. & L. E. R. Co.* (N. Y.) 60

3. The indorsement of a firm name on a note to the firm from one partner, made in his handwriting, and his discount of the note to his own credit at a bank, are sufficient to put the banker upon inquiry and prevent him from being a bona fide holder, if the indorsement was unauthorized. *Brown v. Pettit* (Pa.) 728

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Bills and notes; renewal of, by insane person. 274

Notice of suspicious facts to purchaser. 728

Protection of bona fide holder; notice of suspicious facts. 69

BLACKMAIL. See THREATS.

BLASTING.

1. A provision in a contract for excavating a sewer trench, that blasts are to be carefully covered to effectually prevent injury to persons or property, refers to injury from flying debris, and not from noise of the explosion. *Mitchell v. Prange* (Mich.) 182

2. Failure to give warning of an intended blast in an excavation in which blasting had been going on for several weeks will not ren-

der the person discharging the blast liable for injury to a blacksmith injured by the starting, in consequence of the noise, of a horse which he was shoeing at a place several hundred feet distant from the excavation. *Id.*

BOILER. See EXPLOSIONS.

BONDS. See also ESTOPPEL, 2, 8; MORTGAGE, 1; STATUTES, 14; TAXES, 9-11; VOTERS AND ELECTIONS, 5, 6.

1. The bond of a cashier of a national bank for the faithful performance of his duties "for and during all the time he shall hold the said office" covers defaults in years subsequent to that in which it is given, notwithstanding the by-laws of the bank provide that the cashier shall be elected annually and a resolution appointing him to the office was passed in each year, as the act of Congress relating to national banks provides that the cashier may be dismissed at pleasure of the board of directors, and the first appointment under such act is for an unlimited term. *Westervelt v. Mohrenstecher* (C. C. App. 8th C.) 477

2. It is no defense to an action upon the bond of a cashier of a national bank for misappropriation of money and excessive loans, that the bank or its receiver has obtained judgments upon the notes taken by the cashier for such money and loans. *Id.*

3. Sureties on a bond for the fidelity of a firm as agents for the obligee are not liable for funds misappropriated by one member of such firm after its dissolution and the retirement of the other partner from the business of such agency, even if the obligee does not know of such dissolution. *Standard Oil Co. v. Arnestad* (N. D.) 861

4. Implied power to issue bonds is given to a county by authority to make a donation "of money or other securities" for the benefit of a state home for the feeble-minded. *Lund v. Chippewa County* (Wis.) 181

5. Power to issue bonds payable in gold coin of the United States of the present weight and fineness is not conferred upon a county by a statute authorizing the issue of bonds without prescribing the kind of money in which they may be paid. *Burnett v. Maloney* (Tenn.) 541

6. A special election upon the question of issuing municipal bonds cannot be held where the Constitution provides that not more than one election shall be held in each year, but such question must be submitted at a general election. *Belknap v. Louisville* (Ky.) 256

7. The issuance of negotiable bonds by a township is authorized by Kan. Laws 1879, chap. 50, authorizing townships to refund their indebtedness. *Rathbone v. Hopper* (Kan.) 674

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Bonds; of cashier; duration and extent of liability. 477

To secure fidelity of a firm as agents. 861

BRIBERY. See INDICTMENT, 3, 4.

BUILDING AND LOAN ASSOCIATIONS. See also **CONFLICT OF LAWS**, 7.

1. A mistaken declaration of the maturity of stock by a building and loan association, when the stock is in fact not matured, will not make the stockholder a creditor or put him in the position of a holder of matured stock in subsequently winding up the affairs of the association when insolvent. *Post v. Mechanics' Bldg. & L. Assn.* (Tenn.) 201

2. Payment of dues in advance under an agreement with a building and loan association for interest upon the advances until they are absorbed by dues does not entitle the stockholder in case of the insolvency of the association to be treated as a creditor with the right to repayment of his advances with interest,—especially when the agreement for interest thereon was not warranted by the charter. *Id.*

3. Payments of dues upon stock in a building and loan association cannot be credited upon an usurious loan to stockholders in winding up the affairs when the association is insolvent, since such credit would relieve the borrowing shareholders from their share of the losses and throw them all on the nonborrowing stockholders. *Id.*

4. Loans at fixed premiums without free and competitive bidding, as required by the Tennessee statutes (Mill. & V. Code, § 1751), cannot be lawfully made by a building and loan association, but are usurious, if the premium is more than lawful interest. *Id.*

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Building and loan associations; application of dues to mortgage debt. 201

BUILDINGS. See also **NEGLIGENCE**, 1-3; **COVENANT**, 2-4; **EVIDENCE**, 12, 13.

NOTES AND BRIEFS.

See also **LANDLORD AND TENANT**.

Buildings; individual liability for falling walls or buildings:—Liability of owner or occupier; building in possession of contractor; liability for injury to person in street; liability for injury to person on adjoining property; liability for injury to person on property; neglect to comply with covenants in lease; illegal building; liability of firemen; act of third person; *vis major*; fire, contributory negligence. 557

CARRIERS. See also **COMMERCE; DAMAGES**, 2; **EVIDENCE**, 11.

1. The relations between a steamboat company and a passenger occupying a stateroom are those that exist between an innkeeper and his guest. *Adams v. New Jersey Steamboat Co.* (N. Y.) 683

2. Theft of money from the clothing of a steamer passenger during the night while he is occupying a stateroom with door locked and windows fastened renders the carrier liable for the loss as an insurer and without any proof of negligence, if the sum lost was reasonable and proper for the passenger to carry on his person to defray the expenses of his journey. *Id.*

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3. Trainmen are not guilty of wilful or wanton neglect of duty in failing to stop a freight train running on a sharp up-grade at a speed of 8 miles an hour, to remove a boy eight years and five months old, who, in violation of the statutes as well as of the orders of the engineer caught hold of and hung to one of the cars in the moving train,—especially where it does not appear that the train could safely be stopped at that place. *Pittsburgh, C. O. & St. L. R. Co. v. Redding* (Ind.) 767

4. The act of crossing a car platform from one car to another while the train is in motion is not negligence as matter of law in the absence of any rule of the carrier prohibiting it or any attempt to prevent passengers from so doing. *McAfee v. Huidekoper* (D. C. App.) 720

5. The failure of a carrier to furnish a seat for a passenger does not justify him in going to a place of peril on the platform when there is plenty of standing room in the car. *Cleveland, O. C. & St. L. R. Co. v. Moneyhun* (Ind.) 141

6. Going from a car in which there is plenty of standing room to the lower step of the car platform in order to vomit, when the train is running at the rate of 25 miles per hour, constitutes such contributory negligence on the part of a boy fifteen years of age as to preclude any recovery from the carrier for his injuries when thrown off by a jerk of the train. *Id.*

7. The contract of a baggage transfer company to transport baggage from a residence to a railroad depot is fully performed so that its responsibility ceases when the baggage is delivered to the agent of the railroad company at the depot. *Annisston Transfer Co. v. Gurley* (Ala.) 137

8. Provisions in a carrier's contract that notice of injury to cattle must be given before they are unloaded or mixed with others, and that no animal shall be considered as worth more than a specified sum, conflict with a constitutional provision that common carriers shall not contract for relief from their common-law liability. *Ohio & M. R. Co. v. Taber* (Ky.) 685

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When person becomes a passenger. 783

Contributory negligence of passenger. 141

Negligence of passenger in passing from one car to another:—The general rule; passenger assumes incidental risks; obedience to instructions; vestibuled trains; negligence in fact. 720

Loss of money by passenger; carrier as insurer. 682

Contracts restricting liability. 685

Liability of baggage transfer companies:—(I.) As common carriers; (II.) when liable; (III.) limitation of liability; (IV.) the effect of custom. 137

CASE.

1. A direct precedent for the action is not necessary to give a right of action for a wrong. *Kujek v. Goldman* (N. Y.) 156

2. A man who induces another to marry a girl by false representations that she is vir-

tnous when in fact she has been seduced by himself and has become pregnant is liable for damages in an action by the husband for fraud.

Id.

8. Loss of the comfort founded upon affection and respect derived from conjugal society is sufficient, irrespective of any pecuniary damages, to sustain an action by a husband against one who has fraudulently induced him to marry a woman who is pregnant by another.

Id.

CASES CERTIFIED AND REPORTED.

A question arising upon the pleadings which is certified to the supreme court for decision cannot be answered if the facts do not sufficiently appear in the pleadings to authorize a complete determination of it. *Grand Island & N. W. R. Co. v. Baker* (Wyo.) 885

CASHIER. See BONDS, 1, 2.

CIVIL SERVICE.

1. A preference of veterans over all other persons except women, given by Mass. Stat. 1896, § 2, when they have passed the civil service examination, is not unconstitutional. *Re Opinion of the Justices* (Mass.) 58

2. The discretion to appoint veterans to certain offices and employment without an examination, which is given by Mass. Stat. 1896, § 3, if in the opinion of the appointing power the public service requires this to be done, is not unconstitutional. *Id.*

3. The provision that civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference to all other persons except women which is made by Mass. Stat. 1896, § 6, if construed to mean that only those found competent shall be preferred, is within the constitutional power of the legislature. *Id.*

CLERKS. See ATTORNEYS; JUDGMENT, 5.

CLUB. See INJUNCTION, 1; INTOXICATING LIQUORS.

COLLEGE. See STATE UNIVERSITY.

COMMERCE.

1. Prohibiting common carriers from contracting to limit their common-law liability does not interfere with the power of Congress to regulate interstate commerce. *Ohio & M. R. Co. v. Taber* (Ky.) 685

2. A train composed of empty coal cars, although destined for a point in another state to procure a load, is not engaged in transporting articles of interstate commerce so as to be beyond the control of state laws. *Norfolk & W. R. Co. v. Com.* (Va.) 105

3. State laws prohibiting the running of railway trains on Sunday, if enacted in good faith for the preservation and protection of the health and morals of the people, and without discrimination against interstate or foreign commerce, are not in conflict with the Constitution of the United States. *Id.*

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Commerce; state regulation of Sunday trains. 105

CONFEDERATE MONEY. See EVIDENCE, 6; PAYMENT, 1.

CONFLICT OF LAWS.

1. A marriage valid in the state in which it is contracted will be recognized as valid in another state if it does not contravene the declared policy of the positive law of the latter, although it may have been made without the form or ceremony required in the latter state. *Jackson v. Jackson* (Md.) 773

2. A contract made in Iowa for the transmission of a telegram from a place in that state to a place in Missouri is governed by the laws of Iowa making the proprietor of the telegraph liable for all mistakes in transmission. *Reed v. Western U. Teleg. Co.* (Mo.) 492

3. The law of the forum prevails as to the form of the remedy, the conduct of the trial, and the rules of evidence in an action upon a transitory cause of action arising in another jurisdiction. *Eingartner v. Illinois Steel Co.* (Wis.) 508

4. The mere existence of a slight variance of view, not amounting to a fundamental difference of policy, between the state in which a cause of action under the common law arose and that in which it is sought to be enforced, does not deprive the court of the latter state of jurisdiction of the subject-matter. *Id.*

5. A Federal court in Tennessee will enforce the Mississippi Constitution precluding the defence to an action for an employee's injury that he knew of the defective or unsafe character of the machinery or appliances by which he was injured, when the injury was received in Mississippi, since this provision is simply a variation from, and not repugnant to, the law of Tennessee. *Illinois C. R. Co. v. Ihlenberg* (C. C. App. 6th C.) 898

6. The principles of comity do not apply to an action by a foreign receiver of a foreign mutual insurance company acting under a decree in the foreign jurisdiction making an assessment on premium notes, even if otherwise applicable, where the notes were taken for insurance on property in the state while the company was doing business within the state in violation of McClain's (Iowa) Code, § 1144, prohibiting foreign insurance companies from doing business without compliance with the conditions therein mentioned. *Parker v. Lamb* (Iowa) 704

7. A contract to pay money to a loan association situated in another state at its place of business, made by a resident of one state, who applied to become a member of the association as resident in the foreign state, is to be governed by the laws of its residence, although it had an agency at the place where the borrower resided through which the contract was made. *Bennett v. Eastern Bldg. & L. Assn.* (Pa.) 595

Liability of stockholders.

8. The Kansas statute providing remedies by execution or action to enforce the personal liability of stockholders which the state Consti-

tution declares shall be secured, being construed by the state courts to create a personal liability against the stockholders severally in the nature of a contract obligation, the enforcement of such liability by action at law is not confined to the courts of that state, but may be had in a Federal court sitting in another state wherein a stockholder resides, when it has jurisdiction of the parties. *Rhodes v. United States Nat. Bank* (C. C. App. 7th C.) 742
But see cases following.

9. The statutory liability of a stockholder in an insolvent bank is not primary and contractual so as to be enforceable in any jurisdiction where the stockholder may be found. *Marshall v. Sherman* (N. Y.) 757

10. The statutory liability of stockholders in foreign corporations cannot be enforced except at the domicile of the corporation when the law of the domicile provides the remedy. *Id.*

11. If, under any circumstances, an action to enforce a statutory liability against a stockholder of a foreign corporation could be enforced outside of the state of its creation, it must be by such modes of procedure as like liabilities created by the state where the suit is brought are enforced against its citizens. *Id.*

12. Particular provisions of a statute providing for the individual liability of stockholders in a foreign corporation will not be detached and given effect outside of the domicile of the corporation, if it would be impossible to enforce all the provisions of the statute there, and its whole scope indicates that it was intended to be enforced only where passed. *Id.*

13. A special remedy against stockholders of a corporation provided by the laws of the state where the corporation is domiciled will not, on the ground of comity, be enforced in the courts of another state which has a different and inconsistent method of procedure, where it will result in injustice to the citizens of the latter state. *Tuttle v. National Bank of the Republic* (Ill.) 750

14. The courts of a state of the domicile of an insolvent corporation must, by an appropriate proceeding, determine the relation of the corporation and its creditors and stockholders and the proportionate share of the corporate indebtedness to be borne by each solvent stockholder before relief can be had against a stockholder in the courts of another state. *Id.*

15. The courts of another state cannot enforce the stockholders' liability for unpaid subscriptions provided by the Illinois act of 1871-72, p. 299, § 8, as that is not a general contract liability but is to be enforced by the remedy corresponding to garnishment provided in that section. *Russell v. Pacific R. Co.* (Cal.) 747

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As to the enforcement of stockholder's liability outside of the state of incorporation, see CORPORATIONS.

Conflict of laws; as to marriage. 774

As to contract of foreign loan association. 595

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CONSTITUTIONAL LAW. See also CIVIL SERVICE; COURTS, 2-4; FREE SPEECH; IMPRISONMENT FOR DEBT; OFFICERS, 2-4; PARDON, 2; STATUTES, 1, 4; TRIAL, 1.

1. The recommendation of a constitutional convention, and the submission of a proposal therefor to popular vote, are properly made by the legislature in the form of a joint resolution, and not in that of an ordinary law. *State, Wineman, v. Dahl* (N. D.) 97

2. The submission to popular vote of a proposal to hold a constitutional convention is properly made by the legislature, although the legislature has the power to take the initiative with respect to the calling of such convention. *Id.*

3. An oppressive and unjust law is not void unless it contravenes some provision of the state or Federal Constitution. *State v. Harrington* (Vt.) 100

Self-executing provisions.

4. Whether or not a constitutional provision is self-executing is a question always of intention, to be determined by the language used and the surrounding circumstances. *Illinois O. R. Co. v. Ithenberg* (C. C. App. 6th C.) 393

5. A legislative adoption of the exact language of a constitutional provision, omitting only a clause as to the right of the legislature to make an extension of the provision, does not make a legislative construction of the article to the effect that it is not self-executing. *Id.*

6. A self-executing mandate is made by Miss. Const. § 198, providing that "knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby," with an exception as to conductors or engineers. *Id.*

7. The provision of Kan. Const. art. 12, § 2, that dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such "other means as shall be provided by law," is not self-executing. *Tuttle v. National Bank of the Republic* (Ill.) 750; *Marshall v. Sherman* (N. Y.) 757

Ex post facto or retrospective.

8. A statute denying to convicts under sentence for a second offense the same reductions from their sentence for good behavior that are allowed to other convicts is not *ex post facto* as applied to the punishment of an offense subsequently committed, although the offender had been convicted of his first offense before the passage of the act. *Re Miller* (Mich.) 396

9. A statute excluding nonresidents of the state from the benefit of a statute of limitations, when the cause of action arose in the state and the defendant subsequently ceased to be a resident thereof, is not unconstitutional as applied to pre-existing obligations. *Bates v. Cullum* (Pa.) 440

Delegation of power.

10. The legislature cannot delegate to a levee district the legislative power to levy a tax under Tenn. Const. art. 2, authorizing it to delegate such power to counties and incorporated towns, since this impliedly excludes delegation to any other agency. *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 725

Class legislation.

11. A city ordinance making it unlawful for barbers to pursue their calling on Sunday, without applying to other kinds of employment, is unconstitutional as class legislation. *Tacoma v. Krech* (Wash.) 68

Property rights; due process of law.

12. The constitutional rights of property do not include the right to send letters or circulars to a debtor threatening to advertise a claim against him for sale, which constitutes an offense under Mo. Rev. Stat. 1895, § 3782, as a threat to injure his credit or reputation. *State v. McCabe* (Mo.) 127

13. The right to transfer property in payment of a debt when solvent is within the constitutional protection of property rights and is valid by Tennessee Acts 1895, chap. 128, declaring that every transfer of property to prefer creditors or which "would have that effect" shall be void without limiting it to cases of insolvency. *Third Nat. Bank v. Divine Grocery Co.* (Tenn.) 445

14. Requiring itinerant vendors to deposit \$500 with the state treasurer to be returned on the surrender of the license, less the amount of any fines and costs that may have been imposed, does not deprive the licensee of property without due process of law. *State v. Harrington* (Vt.) 100

Police power.

15. The state has authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property. *Id.*

16. The police power of the state is the power to govern men and things within the limits of its dominion, and is not limited to the protection of health, peace, morals, education, and good order, but comprehends all those general laws or internal regulations necessary to secure peace, good order, the health and comfort of society, and the regulation and protection of all property in the state. *Id.*

17. A statute requiring itinerant vendors who go from place to place and temporarily occupy rooms for the exhibition and sale of goods, to pay a state license of \$25 and deposit \$500 with the state treasurer as security, and then to pay in addition a local license fee in each place in which they sell goods, amounting to a tax on the value of their stock of goods according to the rate of the last preceding assessment of taxes in that place,—is not unconstitutional although it is oppressive. *Id.*

18. The police power of the state does not extend to the levying of special assessments on property benefited by a levee. *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 725
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19. Any occupation comes within the range of the police power, which is such as to be naturally liable to create a nuisance unless subjected to special regulations, whether it be so conducted as in fact to create a nuisance or not. *State v. Orr* (Conn.) 279

20. The fact that garbage is not a nuisance or detrimental to health does not exempt it from the police power or entitle a citizen to engage in its transportation without a license. *Id.*

NOTES AND BRIEFS.

See also CRIMINAL LAW; IMPRISONMENT FOR DEBT; PARDON.

Constitutional law; self-executing provisions. 395

Class legislation by Sunday law. 68

Privilege of contracting; due process of law; monopoly of business. 279

As to right of contract. 467

Statute restricting conveyances to prefer creditors. 446

Annulment of defense under statute of limitations. 440

CONTINUANCE.

A judgment in a trial court against a party whose counsel is, to the knowledge of the court, at the time present in the supreme court in obedience to its rule will not be permitted by the latter court to stand. *Peterson v. Atlantic City R. Co.* (Pa.) 593

CONTRACTS. See also MUNICIPAL CORPORATIONS, 2-6; PARTNERSHIP; SCHOOLS.

1. An instrument would be without consideration and therefore void if a default of the obligor could be held as satisfaction of the consideration. *Woodland Oil Co. v. Crawford* (Ohio) 62

2. The performance of a contract by a party who has hesitated or refused to complete it may constitute a good consideration for a promise by a third person who will be benefited by such performance. *Abbott v. Doane* (Mass.) 83

3. A relinquishment by the mother of a bastard child of her right to compel the father by legal proceedings to assist in the maintenance of the child and her support and education of the child at her own separate expense are a sufficient consideration for his promise to make a conveyance of real estate to her. *Van Epps v. Redfield* (Conn.) 360

4. A construction company becomes a subcontractor, and not an original contractor with a railroad company, when, with full knowledge that a contract company is unable to complete the work, it agrees with it to do so for an agreed sum in cash and bonds, with a provision that it shall have a "subcontractor's lien," although the railroad company has consented to the subletting of the contract and that the construction company shall have a contractor's lien. *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.) 325

5. A contract restricting persons from engaging in the milling business in the vicinity of a certain city after the completion of an agreement for the sale of their business, although it extends for their lives, is not illegal as in restraint of trade. *Kramer v. Old* (N. C.) 889

6. To take stock or help to organize or manage a corporation formed to carry on a business after one has agreed, on the sale of such a business, not to continue it in that locality, is a breach of his contract. *Id.*

7. There can be no recovery as between the parties on a contract made in violation of a statute, the violation of which is prohibited by a penalty, although the statute does not pronounce the contract void or expressly prohibit the same. *Sandage v. Studebaker Bros. Mfg. Co.* (Ind.) 863

8. The tender back of letters patent by a buyer to the seller places the latter *in statu quo* so as to entitle the former to rescind the contract of sale on the ground that the letters were void for lack of novelty. *Id.*

9. The rescission of a written contract to convey land will be decreed in an action to compel specific performance where such performance is denied because of the purchaser's laches and the increased value of the property, although the vendor has obtained a judgment for the purchase price, which he offers to cancel. *Hendry v. Benliss* (Fla.) 288

10. The rule that the members of the legislative body of a city may not so act or contract as to deprive their successors of the unimpaired exercise of the legislative or governmental power does not apply to the exercise of the business or proprietary powers of the municipality,—such as the power to contract for waterworks, but in the exercise of such power the city is governed by the same rules as a private corporation or individual, and may contract for terms longer than the duration of the terms of office of the members of its legislative body. *Illinois Trust & Sav. Bank v. Arkansas City* (C. C. App. 8th C.) 518

11. The cancellation of a contract by a municipality for a water supply will not be made by a court of equity merely because of the inadequacy of the supply, for which the water company is not in fault, but which is due to the inadequate capacity of the springs which the contract requires the supply to be obtained from. *Du Bois v. Du Bois City Waterworks Co.* (Pa.) 92

12. A reformation of a contract for a municipal water supply, because of a mutual mistake of the parties as to the adequacy of the stipulated source of supply, is within the power of the court under Pa. act April 29, 1874, § 84, cl. 3, giving power, on a bill filed by any citizen, to make such order as may seem just and equitable for the correction of the alleged impurity or deficiency of the water supply. *Id.*

NOTES AND BRIEFS.

Contracts; sufficiency of consideration; immoral consideration. 860

Performance of existing contract obligation as consideration for new promise:—In general; payment of existing debt as consideration; 34 L. R. A.

promise to release joint debtor; payment of surety; promise not to sue; compliance with obligation to deliver papers or property; agreement to comply with lease; agreement to comply with marriage contract; promise to do duty; where there is breach on both sides; work already completed when additional promise made; waiver of conditions; acceptance of performance; promise of additional compensation for completing contract; promise to perform additional duty for same consideration; promise by stranger to the contract. 83

In restraint of trade. 890

Inability to perform or get benefit of. 575

Cancellation or rescission of. 93

CONVICTS. See also CRIMINAL LAW, 3, 4. NOTES AND BRIEFS.

1. The employment of a convict upon the public roads under supervision and control of a public agent by order of the county commissioners is not a "hiring out" of the convict which, by N. C. Code, § 3448, requires an order of court embodied in the sentence. *State v. Yandle* (N. C.) 893

2. An order of county commissioners for the employment of a convict upon the public roads, made under N. C. Code, § 3448, and without any provision therefor in the sentence or any order of court, is not void on the ground that it is in the nature of an additional judgment against the convict. *Id.*

CORPORATIONS. See also BILLS AND NOTES, 1, 2; CONFLICT OF LAWS, 8-15; CONTRACTS, 6; COUNTIES, 1; EVIDENCE, 5, 29; INSURANCE, 1; JUDGMENT, 2, 3; TAXES, 12.

1. It is a matter of common knowledge that where the ownership of a majority of the stock of a corporation changes, the board of directors usually changes, unless its members are already in harmony with the policy of its purchasers. *Farmers' Loan & T. Co. v. New York & N. R. Co.* (N. Y.) 76

2. A corporation purchasing a majority of the stock of another competing one cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders. *Id.*

3. A corporation owning a majority of the stock of another company, and assuming control of its business through the control of its officers and directors, assumes the same trust relation toward the minority stockholders that a corporation itself usually bears to stockholders. *Id.*

4. The statutory right of a corporation to purchase stock of another company does not give it any right, as the owner of a majority of the stock and bonds of such company, to manage its affairs so as to cause a default on a mortgage and obtain control of the property by foreclosure at less than its value to the injury of the minority stockholders. *Id.*

5. The fact that a contract company dominates and controls a railroad company having the same stockholders will not make its engagements operate in legal effect as those of the railroad company with respect to one who is fully aware of the relations of the companies when making a contract with the former for work on the railroad. *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.) 625

6. A statute of a state in which a railroad company is organized can give it no authority to lease a railroad held by it in another state contrary to the policy of the latter state. *Van Steuben v. Central R. Co.* (Pa.) 577

7. One who becomes a member of a foreign corporation subjects himself to such laws of the government of its situs as affect its powers and obligations. *Warner v. Delbridge & C. Co.* (Mich.) 701

8. An assessment which will be binding on nonresident policy holders may be made under the Minnesota statutes upon the premium notes of the holders of mutual policies in an insurance company organized in that state to repay unearned premiums on cash policies issued by the company. *Id.*

9. An assessment on premium notes, made by a receiver of a mutual insurance company under a decree of the court, is not an adjudication binding on the courts of another state as against the maker of one of such notes who was not a party to the proceedings resulting in the assessment and who before the bankruptcy of the company had surrendered his policy and received back his note. *Parker v. Lamb* (Iowa) 704

10. A stockholder's liability, which is contractual under the statute, becomes a part of the assets which pass to a receiver for the payment of corporate debts. *Cushing v. Perot* (Pa.) 737

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Corporations; articles of, as contracts. 466

Owning stock of other companies; controlling other company. 78

Effect of assessment on stockholders made under order of court in another state as *res judicata*. 694

Right to enforce stockholder's liability outside of the state of incorporation:—(I.) In action by corporation or its representative; (II.) in action by creditor of corporation: (a) remedy according to law of forum; (b) for unpaid subscriptions to stock: (1) in general; (2) by creditor's bill; (c) for statutory liability after stock is fully paid for: (1) in general; (2) nature of the liability; (3) liability absolute or distinct from statutory remedy; (4) constitutional liability; (5) exclusiveness of statutory remedy provided in state of incorporation; (6) conditions prescribed by statutes in state of incorporation; (7) action at law; (8) suit in equity; (d) remedies in Federal courts: (1) in general; (2) in equity; (3) at law; (III.) contribution between stockholders of foreign corporations. 787

Foreign right of contract. 596

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COSTS AND FEES.

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Costs; as debts within constitutional provision as to imprisonment. 635

COUNTIES. See also BONDS, 4, 5; PUBLIC MONEY; STATUTES, 11-14, 20.

1. Counties are not included among the corporations referred to in Tenn. Const. art. 11, § 8, prohibiting the creation or increase of the power of corporations by special laws. *Burnett v. Maloney* (Tenn.) 541

2. A county is not a municipal corporation in the full sense of the term, but only a quasi corporation, and possesses such powers and is subjected to only such liabilities as are especially provided for by law. *Schweiss v. First Judicial Dist. Ct.* (Nev.) 602

3. Counties are municipalities within the meaning of Wis. Laws 1895, chap. 188, authorizing municipalities to make donations to the state home for the feeble-minded. *Lund v. Chippewa County* (Wis.) 181

4. Donations by a county, made merely to secure a site for a state institution for the feeble-minded, and in no way affecting the efficiency and successful operation of the institution when established, are not against public policy. *Id.*

5. A prohibition of county aid to any individual, association, company, or corporation, does not apply to such aid to the state or United States. *Lancey v. King County* (Wash.) 817

6. A prohibition against county indebtedness for any other than strictly county purposes will not prevent indebtedness for a public canal through the county to connect two large public waterways with the ocean. *Id.*

7. In determining whether or not county indebtedness violates a constitutional provision that no county shall create any indebtedness exceeding 2 per cent upon the assessed value of the taxable property in it, compulsory obligations imposed by the legislature must be included. *Grand Island & N. W. R. Co. v. Baker* (Wyo.) 885

8. The fact that the validity of the debt on which a judgment against a county was rendered cannot be questioned in a proceeding to enforce a tax to pay it does not prevent a resistance of the tax on the ground that it was not authorized by law. *Id.*

9. Recourse to the claims upon which judgments against a county were rendered may be had to determine to what class they belong, and whether or not any limit is imposed upon taxation by which they may be enforced. *Id.*

10. A judgment against a county for a claim which should have been paid out of current revenue, but was not because the amount limited by the Constitution was exhausted, and which did not become valid county indebtedness because the constitutional limit of indebtedness had already been reached, or because it was not legally adopted by the people, is not "public debt" within the meaning of a provision of a Constitution limiting the tax rate except for public debt and interest thereon. *Id.*

11. The expense of maintaining the district court is a county purpose which must be provided for out of the fund raised by the limited tax levy authorized by Wyo. Const. art. 15, § 5. *Grand Island & N. W. R. Co. v. Baker* (Wyo.) 885

12. A board of county commissioners which can only act as a body in session cannot confess judgment against the county under a statute requiring defendant to personally appear in court in order to confess judgment. *Id.*

13. A power of attorney to confess judgment cannot be given by a board of county commissioners without statutory authority. *Id.*

14. Compensation to be made to a landowner for land taken by a county for the location of a public road must be paid out of the ordinary county revenue raised by the limited tax provided by Wyo. Const. art. 15, § 5. *Id.*

NOTES AND BRIEFS.

Countries, as municipalities; incorporation of. 602

As municipalities; donations by, for public institution. 182

Power to issue bonds; issuing bonds payable in gold. 541

Limitation of indebtedness of. 885

COURTS. See also CONTINUANCE.

1. Two members of the Tennessee court of chancery appeals may hear, consider, confer together, and decide the causes before them, in the absence of the other member of the court from sickness or other reason, although the act creating the court makes no provision as to the number which may act or constitute a quorum, but Mill. & V. (Tenn.) Code, § 56, while not applicable to the court, provides generally that a majority of three or more officers to whom joint authority is given may exercise it, unless otherwise declared. *Cowan v. Murch* (Tenn.) 538

2. A citizen of one state may maintain in the courts of another state a transitory action arising at his residence against another citizen of the same state found in the other state under the provision of the United States Constitution guaranteeing to the citizens of each state all the privileges and immunities of citizens of the several states which the courts of the latter state have no discretionary power to dismiss. *Bingartner v. Illinois Steel Co.* (Wis.) 508

3. The legislature must be the judge as to whether or not there is reason to apprehend fraud in the sale of goods by itinerant vendors, when it enacts a stringent license law for the prevention of fraud in such sales. *State v. Harrington* (Vt.) 100

4. The reasonableness of license fees in respect to their amount, when imposed, not by municipal ordinance without legislative authority, but by the state through legislative enactment, is conclusively established by the statute, and cannot be reviewed by the courts. *Id.*

5. A court cannot declare void a contract for the term of twenty-one years made by a city in the exercise of discretionary power given by the legislature to determine the length 84 L. R. A.

of the term of such contract. *Illinois Trust & Sav. Bank v. Arkansas City* (C. C. App. 8th C.) 518

6. In the construction of the statutes of a state which measure the powers and liabilities of its political organizations Federal courts uniformly follow the interpretation of the highest judicial tribunal of the state, where no question of general or commercial law or of right under the United States Constitution or laws is involved. *Id.*

7. The decisions of the highest court of a state upon the proper construction to be given to the constitutional and statutory provisions of that state are binding in Federal courts. *Rhodes v. United States Nat. Bank* (C. C. App. 7th C.) 742

8. The courts of one state will adopt its own methods of construction on a constitutional provision of another state where the courts of the latter state have not construed it. *Tuttle v. National Bank of the Republic* (Ill.) 750

NOTES AND BRIEFS.

Courts; jurisdiction in action between non-residents. 504

Majority or quorum of. 538

COVENANT.

1. The test in equity to determine whether a covenant in a deed runs with the land is the intention of the parties. *Landell v. Hamilton* (Pa.) 237

2. A covenant that the "house" on a lot conveyed "shall be forever hereafter restricted from having any building or part of a building attached to the said messuage thereon erected more than 10 feet high is not limited to the house or building then existing on the land. *Id.*

3. A change in the use of premises from residence to business purposes after a covenant restricting erections thereon above a certain height is not sufficient to destroy the effect of the covenant. *Id.*

4. Building along the division line and partly on each lot a solid wall higher than a covenant requires the servient lot to remain unobstructed for the purpose of furnishing light and air to the dominant lot will prevent the dominant owner, who builds it, from enforcing the covenant in equity as to the space below the top of the wall, but will not absolutely terminate the covenant. *Id.*

NOTES AND BRIEFS.

Covenant; running with land; restricting building. 227

CREDITORS' BILL.

NOTES AND BRIEFS.

For unpaid subscriptions to stock of foreign corporation. 743

CRIMINAL LAW. See also BIGAMY; CONSTITUTIONAL LAW, 8; CONVICTS; HABEAS CORPUS, 2; IMPRISONMENT FOR DEBT.

1. The laws in force when the fatal blow or wound is inflicted govern the crime of murder.

as it is regarded as committed at that time, although the death occurs on a subsequent date. *Debney v. State* (Neb.) 851

2. A consolidation of separate indictments charging definite offenses, for the purposes of trial, does not make them one offense so as to permit but one sentence. *Howard v. United States* (C. C. App. 6th C.) 509

3. Cumulative and successive sentences are within the power of a court to impose at common law, and they may be imposed by Federal courts without any express authority by act of Congress. *Id.*

4. The possibility of a deduction by good-time credits, although contingent on the conduct of the convict, does not render a sentence so indefinite or uncertain that a successive sentence to begin on the expiration of the former will be invalid. *Id.*

NOTES AND BRIEFS.

Criminal law; enhancing penalty of crimes when committed by habitual criminals or prior offenders:—(I.) Validity of statutes and ordinances: (a) in general; (b) *ex post facto* laws; (c) cruel and unusual punishment; (d) equal protection of the laws; (e) second punishment or jeopardy for the same offense; (II.) Construction and effect of statutes: (a) in general; (b) third and subsequent offenses; (c) conditions as to prior conviction before commission of later offense; (d) conditions as to execution of or relief from prior sentence before commission of later offense; (e) effect of pardon of prior offense; (f) effect of appeal or writ of error to review prior conviction; (g) effect of prior conviction in other state or country; (h) what prior sentence must have been; (i) similarity or identity of prior and subsequent offenses; (j) procedure: (1) in general; (2) pleas and admissions; (3) order of trial; separating issues; (4) proof; (5) attacking validity of prior conviction; (6) verdict and judgment; (7) appeal or writ of error. 898

Reduction of prisoner's term by allowance for good behavior:—(I.) Constitutionality of statute providing therefor; (II.) Construction and effect of statutes: (a) in general; (b) Federal cases. 509

CROPS. See EMBLEMENTS.

CUSTOM. See CARRIERS, NOTES AND BRIEFS.

DAMAGES. See also TRIAL, 6.

1. Exemplary damages are recoverable for fraud in inducing a man to marry a woman who is pregnant by another. *Kujek v. Goldman* (N. Y.) 156

2. Exemplary damages cannot be recovered from a carrier for the malicious act of the conductor in ejecting a passenger unless his act is either authorized or ratified by the carrier. *Robinson v. Superior Rapid Transit R. Co.* (Wis.) 205

3. The holder of a fire insurance policy insuring "forever" the insured and his assigns may, where the insurer wrongfully terminates the policy, secure a new policy in another company, and recover from the old company 34 L. R. A.

the costs thereof. *Marshall v. Franklin F. Ins. Co.* (Pa.) 159

4. The difference between the actual market value of a lot and the price received by the measure of damages for a mistake in the transmission of a telegram which is not in cipher, to an agent by which a lower price is named to him than that stated by the principal, and in reliance upon which he executes the contract. *Reed v. Western U. Teleg. Co.* (Mo.) 492

5. A verdict for \$500 is not excessive as damages for the mental anguish suffered by a father on account of inexcusable delay in delivering a telegram to a minister of the gospel calling him to the bedside of a daughter who desired baptism and union with the church, where the result was that he failed to come until after she was dead. *Western U. Teleg. Co. v. Robinson* (Tenn.) 431

6. No recovery can be had for a miscarriage resulting from fright caused by the negligence of another. *Mitchell v. Rochester R. Co.* (N. Y.) 781

7. Damages for the death of a married woman cannot include the loss to her minor child where the action is brought by her husband, under Mill. & V. (Tenn.) Code, § 3180, which provides that a right of action for injuries causing the death of any person shall not abate by reason of the death, but shall pass to his widow, or if none, to his children, or to his personal representative, for the benefit of the widow or next of kin, but fails to make any express provision as to the beneficiary in case of the death of a married woman, and leaves the recovery to go to the husband *jure mariti*, as it would have gone at common law but for its rule of abatement. *Chattanooga Electric R. Co. v. Johnson* (Tenn.) 442

NOTES AND BRIEFS.

Damages; exemplary, for act of carrier's servant. 205

DAMS.

1. A statute giving the trustees of a public canal power to raise the water in a river to a certain height by means of a dam, and providing that if in constructing the canal or developing the dam it becomes necessary to use private property, the board "shall have a right to acquire such right of way" in the manner now provided by law, requires the settlement of damages for flooding lands by the dam under the eminent domain law, and not by suit for nuisance. *Leitseny v. Columbia Water Power Co.* (S. C.) 215

2. Failure to object to the raising of water along abutting lands by a dam across a river constitutes permission to do so within the provision of a statute that in case any person permits entry upon his land for the construction of a public improvement without previous compensation he shall have a right to petition for the assessment of his damages, so that such remedy is exclusive. *Id.*

3. The grant of a right to flood a part of a farm by the erection of a dam will preclude the maintenance of an action for injuries caused

by the dam to the remaining portion. *Nuna-maker v. Columbia Water Power Co.* (S. C.) 222

DEATH. See also DAMAGES, 7; HUSBAND AND WIFE, 10.

1. A surviving husband as such cannot maintain a suit for the wrongful killing of his wife, under Mill. & V. (Tenn.) Code, § 8180, preventing the abatement of the suit, although the recovery inures to his benefit, but he must bring the action as administrator. *Chattanooga Electric R. Co. v. Johnson* (Tenn.) - 443

2. The right of action for damages resulting from death is exclusive of an administrator's right of action to recover for the pain and expense suffered by the person of his intestate from the injuries which caused his death, under R. I. Rev. Stat. 1857, chap. 176, creating a right of action for death, and also providing for the survival of actions of "trespass on the case for damages to the person" as the survival applies to cases of injuries not causing death. *Lubrano v. Atlantic Mills* (R. I.) 797

NOTES AND BRIEFS.

Death; right of action for death of married woman. 442

How many distinct causes of action arise from injuries resulting in death:—(I.) Alternative action for death or injury: (a) generally; (b) actions for death as affected by release: (1) by injured party; (2) by others; (3) by plaintiffs; (c) other actions as a bar: (1) actions for the injury; (2) other actions for the death; (d) multiplicity of actions for death; (e) bar of other actions by limitation; (f) for death of infants; (II.) concurrent actions for death and injury. 788

DEBT. See IMPRISONMENT FOR DEBT, NOTES AND BRIEFS.

DEBTOR AND CREDITOR. See CONSTITUTIONAL LAW, 18.

DEDICATION. See PUBLIC GROUNDS, 1, 2.

NOTES AND BRIEFS.

Dedication; acceptance of; nonuser; estoppel as to. 784

DEED. See DAMS, 8; EVIDENCE, 17; TRUSTS.

DEFINITIONS. See CONSTITUTIONAL LAW, 16; HUSBAND AND WIFE, 17; LIENS, 1; PARENT AND CHILD.

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 10.

DESCENT AND DISTRIBUTION. See also ESTOPPEL, 6; PARENT AND CHILD.

A fraud upon the rights of a wife is committed when the husband strips himself of all his property just before death by delivering deeds of real estate that had been made some 34 L. R. A.

years before and giving a check for money which constituted all of his personal property in order to defeat his wife's rights as his heir, after obtaining the full benefit of the property up to the end of his own life. *Smith v. Smith* (Colo.) 49

NOTES AND BRIEFS.

Descent; disposal of property in fraud of wife's rights. 50

DIVORCE. See HUSBAND AND WIFE, 11, 12, NOTES AND BRIEFS.

DONATION. See BONDS, 4; COUNTIES, 4, 5; PUBLIC MONEY.

DOWER. See also DESCENT AND DISTRIBUTION.

NOTES AND BRIEFS.

Dower; as affected by insanity of husband. 224

DRAINS AND SEWERS. See also OIL, TRIAL, 7.

The fact that a sewer blows up is entitled to consideration upon the question of care on the part of a municipality in respect to its management. *Fuchs v. St. Louis* (Mo.) 118

NOTES AND BRIEFS.

Drains; liability of city for dangerous sewers. 118

DRUNKENNESS. See HUSBAND AND WIFE, 4, 14, NOTES AND BRIEFS.

ELECTRICAL USES AND APPLIANCES.

1. A man who comes in contact with an electric-light wire on the side of a building while climbing out of a window upon a cornice while at work painting the building is not guilty of contributory negligence, unless in so doing he fails to exercise the degree of care which ordinarily careful and prudent persons usually exercise under such circumstances. *McLaughlin v. Louisville Electric Light Co.* (Ky.) 812

2. The apparently proper insulation of electric-light wires on the side of a building is an invitation or inducement to persons painting the building to risk the consequences of contact with them,—especially in the middle of the day. *Id.*

3. The utmost care is necessary to keep the insulation of dangerous electric wires perfect at a place where people have the right to go for work, business, or pleasure, although very great care may be sufficient as to wires at other places. *Id.*

4. The fact that the insulation of dangerous electric wires is very expensive or inconvenient is no excuse for failure to make such insulation perfect at points where people have the right to go for work, business, or pleasure. *Id.*

5. The only power of regulation impliedly reserved by a city on giving to a telegraph company or other such corporation its consent that electric wires may be laid under the streets is such regulation as the safety and welfare of the public may demand, where the corporation derives its power to place wires underground from the state, subject only to the consent of the municipality. *State, St. Louis Underground Service Co. v. Murphy* (Mo.) 369

6. An ordinance granting to a subway company and its assigns the right to occupy space under any streets in the city for the period of fifty years, to the practical exclusion of all other public uses, with power to select its own patrons and dictate its own terms and elect which streets it will use, is void as an attempt to surrender the power to regulate the underground use of streets by wire-using companies. *Id.*

7. A city has no power to grant to a corporation the right to lay a subway for electric wires under all the city streets, without reserving the power of supervision and control, not only of the work of excavating in the streets, but of all matters incident to its location, construction, maintenance, and use, although the sole purpose of the subway may be that of leasing to public wire-using corporations. *Id.*

NOTES AND BRIEFS.

Electrical uses; grant of franchises to electrical subway companies. 369

ELECTRIC RAILROADS. See **STREET RAILWAYS**, 1, 2, 4.

EMBLEMENTS.

Unmatured crops growing upon land belonging to the owner of the crops are part and parcel of the land for the purpose of jurisdiction of an action for damages to them. *Bagley v. Columbus S. R. Co.* (Ga.) 286

EMINENT DOMAIN. See also **DAMS**, 1, 2.

1. That title to a public improvement when it is completed is to be conveyed to the United States will not prevent the state from exercising its power of eminent domain to acquire the necessary land upon which to construct it. *Lancey v. King County* (Wash.) 817

2. A constitutional right to a remedy for injury to property does not include the right to recover for an injury not different in kind, but only in degree, from that suffered by the community in general from the vacation of a remote part of a street, though it causes depreciation in the value of property, but leaves ample means of access thereto. *Danter v. Indianapolis U. R. Co.* (Ind.) 769

3. A railroad chartered to extend from a certain town past a sawmill, through rough, mountainous, timbered, and sparsely settled country, to the middle of a certain section on lands of the United States, without going near any other town, city, or settlement or other railroad, but which has been built only from the sawmill about 2 miles from the town, for 5½ miles into the timbered region, and has no freight or passenger depots, passenger coaches, 34 L. R. A.

or freight cars, except trucks, and has never charged passengers any fare,—is a public way for which eminent domain may be exercised, where it is not shown that it was intended simply as a logging road, and everyone having occasion to use it as a passenger or for the transportation of freight has a right to require the service. *Bridal Veil Lumbering Co. v. Johnson* (Or.) 868

4. Payment into court of an award of view-ers from which an appeal is taken by the property owners is not sufficient to satisfy Pa. Const. art. 16, § 8, requiring just compensation to be "paid or secured before the taking, injury, or destruction" of property in eminent domain cases, and therefore the act of May 14, 1889, providing that on such payment into court the right to use the property shall vest in the corporation seeking to take it, and that the money shall remain in court to await the final judgment on appeal, is unconstitutional. *Harrisburg, C. & C. Turnp. Road Co. v. Harrisburg & M. Elec. R. Co.* (Pa.) 439

NOTES AND BRIEFS.

Eminent domain; payment or security of just compensation. 439

ESTOPPEL.

1. No one may to the damage of another deny the truth of representations by which he has purposely or carelessly induced the latter to change his situation. *Illinois Trust & Sav. Bank v. Arkansas City* (O. C. App. 8th C.) 518

2. The payment of interest on town bonds which were void because issued without authority does not ratify them. *Union Bank v. Oxford* (N. C.) 487

3. A city is estopped to defeat a recovery for rent of hydrants as against bondholders who loaned money on a mortgage of the plant and income of waterworks built under the direction and accepted by formal resolution of the city council, and completed according to the terms of a defeated ordinance, where the city has paid rents without protest for fourteen months, either on the ground that there was no contract or that it had no power for the term mentioned in the ordinance or to grant the exclusive right to the use of its streets for water pipes. [Per Sanborn, J.] *Illinois Trust & Sav. Bank v. Arkansas City* (O. C. App. 8th C.) 518

4. An equitable estoppel will preclude the public from claiming as a public park land so designated on a recorded plat, where it makes no claim to the land except by failing to assess it for taxes for many years, and then the owner files a new plat on which the land is described as his own property, after which he continues in possession as he always had done, takes down the old fence and makes a new one, expends money in other improvements upon it, pays taxes for a series of years upon it and builds a sidewalk along one side by order of the city authorities, and there is an express adoption of his new plat about seven years after it was filed by an act incorporating the city. *Reuter v. Lawe* (Wis.) 788

5. A state is not estopped from denying the validity of a contract made without authority because the contractor has in good faith performed services under it, since he must at his peril know the authority of those who seem to act for the state. *Mullan v. State* (Cal.) 262

6. A woman is estopped to claim a share in an estate as widow, although a divorce obtained from her in a suit brought by the guardian for her insane husband was absolutely void, where she has accepted alimony under the decree and contracted a subsequent marriage. *Mohler v. Shank* (Iowa) 161

7. Legatees of full age who demand and compel a distribution to them of the proceeds of a sale by an executor of the interest of a deceased partner, although protesting at the same time that they do not admit that this is all that is due, thereby ratify the sale, and cannot afterwards deny the executor's power to make it or claim anything additional on account of the goodwill of the business for which nothing was received. [Per Beatty, Ch. J., *Henshaw and Temple, JJ.*] *Philbrook v. Newman* (Cal.) 265

NOTES AND BRIEFS.

See also DEDICATION.

Estoppel; of state. 262

EVIDENCE. See also BANKS, 6.

Judicial notice.

1. The courts are charged with knowledge under Cal. Code Civ. Proc. § 1875, subs. 2, 3, of whatever is established by law, and of all public as well as private acts of the legislative, executive, and judicial departments of the state. *Mullan v. State* (Cal.) 262

2. The court can judicially know that a certain town is one of the smaller towns of the state. *Western U. Teleg. Co. v. Robinson* (Tenn.) 481

3. It is a matter of common knowledge that a bicycle under a rider of ordinary strength and experience can attain a much higher rate of speed than that of an electric car running about 10 miles an hour, and by mere pressure of the hand can be instantly turned aside so as to leave a street-car track on which it is going. *Eberett v. Los Angeles Consol. E. R. Co.* (Cal.) 850

4. The fact that gases form from crude petroleum oil upon its subjection to heat will be judicially noticed by the courts. *Fuchs v. St. Louis* (Mo.) 118

Presumptions and burden of proof.

5. It will be presumed, in the absence of any decision to the contrary in a sister state, that the contractual liability of a stockholder in that state goes to a receiver as assets for the payment of corporate debts. *Cushing v. Peot* (Pa.) 787

6. An agent will be presumed, in the absence of directions to the contrary from a principal residing in the state, to have been authorized to receive Confederate money in payment of a debt or judgment, at a time and place when and where such money was generally received in business transactions and was 84 L. R. A.

the current money of the state. *Hendry v. Bentiss* (Fla.) 283

7. Destruction by a servant of his employer's books after the latter's death will not raise the presumption that they contained charges against the servant,—especially where they were not destroyed until after they had been examined and the servant claimed to have been executing his employer's orders. *Hay v. Peterson* (Wyo.) 581

8. An executor resisting payment of a claim for compensation for services rendered to the testator by a person not related to him on the ground that they were rendered in consideration of his maintenance, has the burden of showing that fact. *Id.*

9. A presumption that a girl became unconscious before a minister summoned by telegraph could have reached her does not arise from the averment that she became unconscious after sending the message and died before he arrived, where in the same action it is said that if the telegram had been promptly delivered he would have arrived in time to have administered to her spiritual wants. *Western U. Teleg. Co. v. Robinson* (Tenn.) 481

10. A mistake in the transmission of a telegram makes a prima facie case of negligence, and casts on the telegraph company the burden of disproving negligence. *Read v. Western U. Teleg. Co.* (Mo.) 492

11. No presumption of negligence can arise from the mere fact that a passenger was injured while attempting to pass from one car to another while the train was in motion. *McAfee v. Huidekoper* (D. C. App.) 720

12. The burden of showing that a latent defect in the construction of a building might have been discovered and removed by the owner before the fall of the building by reason thereof rests upon the party asserting negligence in such respect, in the absence of evidence tending to connect such cause with the owner's negligence. *Ryder v. Ksney* (Minn.) 557

13. The falling of a building without any apparent cause, in the absence of explanatory circumstances, raises a presumption of failure by the owner to exercise ordinary care to keep it in a safe condition. *Id.*

14. Proof by one injured by eating unwholesome food at a public restaurant of the fact of eating the food and of consequent sickness is not sufficient to make a prima facie case in his favor against the restaurant keeper, nor to shift the burden upon the latter to establish due care. *Sheffer v. Willoughby* (Ill.) 464

Documents.

15. An invalid contract to dissolve a marriage between husband and wife is not admissible in his favor to show his good faith in contracting a later marriage, when charged with bigamy, under a statute which does not require any other criminal intent than is involved in entering into the prohibited marriage. *State v. Zichfeld* (Nev.) 784

16. A letter in which the writer refers to a man as her husband, and which is handed him to read, and which after he reads he incloses in an envelope and puts in his pocket

with other letters apparently for the purpose of posting it, may be put in evidence as an admission on his part on an issue as to the fact of marriage. *Re Hulett's Estate* (Minn.) 384

17. Conveyances describing the grantor as a single man are inadmissible in evidence after his death against a person claiming to be his widow, in order to disprove the marriage. *Id.*

18. Memoranda of accounts not in regular account books are not admissible as secondary evidence in the absence of anything to show that the items had ever been entered in such books, or if so that they could not be produced. *Hay v. Peterson* (Wyo.) 581

19. Memoranda written by a deceased person upon dates on a calendar indicating payment of money to his creditor but not specifying the amounts, nor shown to have been made in regular course of business or to have been continuous, are not admissible as evidence that such payments were made. *Id.*

Physical examination.

20. The measurement in the presence of the jury of a woman's foot and her leg 6 inches above the ankle, in a suit for injuries to the foot and ankle, must be permitted by the court when there is a direct conflict as to such measurements by the medical men called by the respective parties,—at least if the witness herself does not object. *Hall v. Manson* (Iowa) 207

Oral, as to writings.

21. Parol evidence is inadmissible to extend the effect of a written contract to abrogate a prior agreement beyond the terms of such contract where it is complete and there is no apparent ambiguity therein that requires an explanation. *Sandage v. Studebaker Bros. Mfg. Co.* (Ind.) 863

22. Oral evidence that a landlord agreed to put the leased premises in safe condition before the contract was made, or that at the time it was made he and his agent represented that they had been put in safe condition as promised, is admissible where the written contract relates only to the obligations and undertakings imposed upon the tenant, and does not in fact include all of these. *Hines v. Wilcox* (Tenn.) 824

Miscellaneous.

23. A lawyer of another state who declares that he is familiar with the law there may be allowed to prove such law as to the requisites of a valid marriage. *Jackson v. Jackson* (Md.) 778

24. The statute of limitations of the state in which a cause of action arose is not available in an action in another state for the enforcement of such cause of action, unless it is offered in evidence. *Eingartner v. Illinois Steel Co.* (Wis.) 508

25. What a conductor said after allowing a passenger to get back on the car because he had become convinced that he had paid his fare, although he had put the passenger off because he thought he had not paid the fare, is a part of the *res gestæ* of the ejection. *Robinson v. Superior Rapid Transit R. Co.* (Wis.) 205

26. A witness cannot testify to the general reputation of a woman for chastity while living with an alleged husband from whom she has since separated in order to repudiate a presumption of marriage. *Jackson v. Jackson* (Md.) 778

27. A divided reputation in the community as to the marriage of persons cannot be proved. *Id.*

28. Evidence as to sparks thrown and fires set by unidentified engines is admissible in an action against a railroad company for fires charged to have been set by sparks, where there is evidence that the fire started while two trains were passing. *Van Steuben v. Centra. R. Co.* (Pa.) 577

29. Evidence that officers of a corporation, acting in the interest of another company which owned a majority of its stock, declined to accept business which would produce a fund with which to pay interest that was due, and diverted its income to other and improper purposes, whereby a default of the interest was occasioned, is admissible in defense of a foreclosure instituted on behalf of such other corporation as owner of a majority of the mortgage bonds. *Farmers' Loan & T. Co. v. New York & N. E. Co.* (N. Y.) 76

30. A woman who authorizes her attorney to employ detectives to watch her husband, whom she suspects of infidelity, for the purpose of obtaining evidence which will entitle her to a divorce, and who goes with them at a time appointed to surprise him in a compromising position with a lewd woman employed by them for that purpose, may be found to have known that the woman's movements were governed by them, so as to show connivance on her part which will bar her right to divorce. *Dennis v. Dennis* (Conn.) 449

NOTES AND BRIEFS.

Evidence; presumption against the destroyer (spoliator) of evidence:—(I.) Where a party fails to produce evidence after demand or notice by the party entitled to the production thereof; (II.) where a party fails to introduce documentary ("the best") evidence which would properly be a part of the case: (a) the rule stated; (b) the substituted evidence; (c) the rule and evidence in admiralty; (III.) where a party adversely interested destroys or withholds evidence to which the adversary is entitled: (a) the rule; (b) the proof; (c) the damages. 581

Of reputation of marriage. 774

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Personal examination of injured party. 209

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EXCAVATION. See HIGHWAYS, 1, 2.

EXECUTION. See also ATTORNEYS.

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Execution; imprisonment on, see IMPRISONMENT FOR DEBT.

Against railroad. 565

EXECUTORS AND ADMINISTRATORS. See EVIDENCE, 8.**EXPLOSION.** See also BLASTING; OIL; TRIAL, 7, 8.

Time for repairs after notice of the unsafe condition of a locomotive boiler cannot be claimed by a railroad company, so as to excuse it from liability for injury to a person near the railroad, caused by an explosion of the boiler, if it could have avoided the explosion by discontinuing the use of the locomotive. *Louisville, N. A. & O. R. Co. v. Lynch* (Ind.) 298

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Explosion; liability for negligence in case of. 294

EXPORTS. See TAXES, 7.**EX POST FACTO LAWS.**

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As to habitual criminals. 399

FENCES.

Fences permanently affixed to land constitute a part of the realty for the purpose of jurisdiction of an action for damages to them. *Bagley v. Columbus S. R. Co.* (Ga.) 286

FINES.

NOTES AND BRIEFS.

Imprisonment for, as imprisonment for debt. 651

FIRES. See EVIDENCE, 28; TRIAL, 9, 10.**FOOD.** See also EVIDENCE, 14; LICENSE, 2, 8.

A person injured by eating unwholesome food at a public restaurant must, in order to recover damages from the person keeping the restaurant, establish carelessness or negligence on his part. *Sheffer v. Wiloughby* (Ill.) 484

FORFEITURE. See MINES, 2.**FORMER JEOPARDY.**

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As to habitual criminals. 400

FRAUD AND FRAUDULENT CONVEYANCES. See also ATTACHMENT; BANKS; CASE, 2, 8; CONSTITUTIONAL LAW, 18; DESCENT AND DISTRIBUTION; STATUTES, 5, 18.

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Imprisonment for debt in case of. 642

FREE SPEECH.

The constitutional guaranty of the right to speak, write, or publish on any subject, does not extend to the sending of letters or

circulars to a debtor threatening to advertise a claim against him for sale, which is a threat to injure his credit or reputation in violation of Mo. Rev. Stat. 1889, § 8782. *State v. McCabe* (Mo.) 127

FRIGHT. See also DAMAGES, 6; PROXIMATE CAUSE; STREET RAILWAYS, 4.

NOTES AND BRIEFS.

See also STREET RAILWAYS.

Fright; action for damages caused by. 782

GARBAGE. See also CONSTITUTIONAL LAW, 19, 20.

1. An ordinance prohibiting the collection or transportation of garbage without a license therefor is authorized by a charter giving power to regulate by ordinance the collection and removal of garbage, although it makes no express provision for licenses. *State v. Orr* (Conn.) 279

2. The wrongful refusal to a person of a license for transportation of garbage does not entitle him to pursue the business without a license in violation of an ordinance, but his remedy is by mandamus. *Id.*

8. "Refuse matter" within the meaning of an ordinance prohibiting the transportation without a license of "such refuse matter as accumulates in the preparation of food for the table" includes only what is abandoned as worthless, but such materials as may be properly utilized for other purposes when they do not constitute a nuisance remain property which may be sold or otherwise disposed of at the will of the owner. *Id.*

NOTES AND BRIEFS.

Garbage; validity of ordinance as to. 279

GAS. See EVIDENCE, 4; MINES, 1, 2, NOTES AND BRIEFS.**GIFT.** See also INCOMPETENT PERSONS, NOTES AND BRIEFS.

One who is placed in possession of land by the owner in anticipation of a devise thereof in his will, and who makes improvements thereon, will be protected, after the owner has become a lunatic, against dispossession by his guardian. *Potter v. Berry* (N. J. Err. & App.) 297

GOLD. See BONDS, 5.**GOOD TIME.** See CRIMINAL LAW, NOTES AND BRIEFS.**GOODWILL.** See PARTNERSHIP, 1.**HABEAS CORPUS.**

1. The question of error in an order consolidating indictments cannot be re-examined by writ of habeas corpus, as error in that respect would not make the judgment and sentence void as without jurisdiction and authority. *Howard v. United States* (C. C. App. 6th C.) 509

2. An omission in a copy of the mittimus

furnished under U. S. Rev. Stat. § 1028, by a marshal to the warden of a penitentiary, when it is a mere clerical error and no such omission exists in the original mittimus or sentence, does not entitle the prisoner to his release on habeas corpus. *Id.*

HABITUAL CRIMINALS. See CRIMINAL LAW, NOTES AND BRIEFS.

HABITUAL DRUNKENNESS. See HUSBAND AND WIFE, 14.

HIGHWAYS. See also ELECTRICAL USES AND APPLIANCES, 5-7; MUNICIPAL CORPORATIONS, 8; TRIAL, 4, 5.

1. A pedestrian's knowledge that the town is laying watermains is not sufficient to give notice of an excavation at a particular place near a crossing. *Hall v. Manson* (Iowa) 207

2. An unguarded and unlighted excavation in close proximity to a crosswalk may constitute negligence of a municipality, although the crosswalk itself is not defective. *Id.*

3. Depreciation in the value of property by the added inconvenience of access thereto, consequent on the vacation of a part of a street at a point some distance therefrom, is an injury not different in kind, but only in degree, from that suffered by the community in general, and will not sustain a right of action for damages. *Dantzer v. Indianapolis U. R. Co.* (Ind.) 769

NOTES AND BRIEFS.

See also ELECTRICAL USES AND APPLIANCES.

Negligence as to crosswalk. 208

Lawful use of streets. 870

HOMESTEAD.

A pledge of property insured in a mutual insurance company as security for payment of the owner's share of the debts and liabilities of the company is a mortgage within the meaning of a statute restricting the modes of waiving homestead rights to alienation or mortgage of the property. *Farmers' Mut. Ins. Assn. v. Burch* (S. C.) 806

HOMICIDE. See also CRIMINAL LAW, 1.

NOTES AND BRIEFS.

Homicide; time when deemed to be committed. 851

HUSBAND AND WIFE. See also APPEAL AND ERROR, 1, 2, 12; CASE, 2, 8; CONFLICT OF LAWS, 1; DAMAGES, 1; DEATH, 1; DESCENT AND DISTRIBUTION; ESTOPPEL, 6; EVIDENCE, 15-17, 26, 27, 80.

1. A present agreement between competent parties is sufficient to make them husband and wife, without holding themselves out as such to the public, or acting upon it by professedly living together in that relation. *Re Hulet's Estate* (Minn.) 884

2. A marriage by contract between parties competent to enter into that relation with each other is valid under Nev. act November 23, 34 L. R. A.

1861 (Nev. Gen. Stat. chap. 4), making provisions as to licenses and the persons by whom marriages may be celebrated, but containing no express clause of nullity as to marriages otherwise contracted. *State v. Zichfeld* (Nev.) 784.

3. A marriage invalid for want of mental capacity of a party thereto may be made valid afterwards when the party is competent, by any acts or conduct which amount to a recognition of the marriage. *Prine v. Prine* (Fla.) 87

4. Intoxication to render one incompetent to enter into a marriage contract is such that the person is for the time *non compos mentis*, and does not know what he is doing, and is deprived of reason. *Id.*

Wife's contracts.

5. A contract by a married woman to pay for the support of her insane husband in an asylum, not made in the mode provided by statute, is not valid under Ala. Code, § 2346, giving a wife capacity to contract as if sole, "with the assent or concurrence of her husband expressed in writing," and § 2350, authorizing her to engage in trade or business without his consent if he is of unsound mind or has abandoned her. *McAnally v. Alabama Insane Hospital* (Ala.) 223

6. A statute excepting accommodation indorsement from the contracts which may be made by a married woman does not render invalid a renewal after marriage of such an indorsement made before marriage. *Harrisburg Nat. Bank v. Bradshaw* (Pa.) 597

7. A married woman may confirm the act of her attorney in renewing, in excess of his authority, her indorsement on a note given before marriage, if she could have conferred the power on him in the first instance. *Id.*

8. The facts that renewal notes are not made until after the old ones are overdue, and that the old ones are not protested for nonpayment, will not make the renewals new contracts beyond the power of a married woman to make if the original note was indorsed before her marriage and the renewals are in pursuance of a general understanding that they shall be made, and there was no intention that they should be new contracts. *Id.*

Actions.

9. The sale of laudanum as a beverage to a married woman, knowing that it is destroying her mind and body and causing loss to her husband, when continued after his repeated warnings and protest, renders the seller liable to him for the damages which he sustains on account of the loss of her services. *Holleman v. Harward* (N. C.) 808

10. A husband's right of action for the loss of his wife's society on account of injuries which result in her death is defeated by a recovery of judgment by her personal representative in an action for her death, brought under Ky. Gen. Stat. chap. 57, § 1, for the benefit of her estate, which is more advantageous to him than his common-law right of action for loss of her society. *Louisville & N. R. Co. v. McElwain* (Ky.) 788

Divorce.

11. Jurisdiction of a divorce suit cannot be obtained on a complaint by the guardian of an

insane man, although the wife is properly served and appears to contest the jurisdiction. *Mohler v. Shank* (Iowa) 161

12. Courts will use their discretion to defeat any and all attempts to use the forms of the law of divorce to minister to the caprices of the fickle-minded, or to the revenges of the disappointed or vindictive, or to the passions of the incontinent. *Dennis v. Dennis* (Conn.) 449

13. The right to a divorce for adultery will be barred if plaintiff consented to the employment of a person to allure defendant into the offense for which the action is brought. *Id.*

14. Habitual intemperance, within the meaning of a statute authorizing a divorce for such cause, is not shown by the facts that defendant about once in three weeks became intoxicated during the evening to such an extent that the next morning he did not go as usual to his work, and had continued to do so for two years, if it had not caused loss of his position, nor produced want or suffering in the family. *Id.*

Alimony.

15. The power to grant alimony independent of statute belongs to a court of chancery in a suit to declare a marriage void *ab initio*. *Prine v. Prine* (Fla.) 87

16. A husband cannot recover alimony to be paid out of his divorced wife's separate estate unless it is allowed by statute, and it is not allowed by Neb. Comp. Stat. 1895, chap. 25, § 10, authorizing a petition or bill of divorce, alimony, and maintenance to be exhibited "by a wife in her own name as well as a husband." *Greene v. Greene* (Neb.) 110

17. Alimony is a sum ordered by the court to be paid to a wife by the husband for her support during the time she lives separate from him, or paid by him after divorce for her maintenance. *Id.*

NOTES AND BRIEFS.

See also FRAUD.

Common-law marriage.	884
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Effect of marriage in other state; proof by reputation.	774
Husband's right of action for loss of service of wife.	804
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Insanity of husband as affecting wife's disability of coverture:—(I.) Generally,—wife as head of family; (II.) as to separate property and rights of wife; (III.) as to dower rights; (IV.) as to community property; (V.) as to property and rights of husband.	223

Allowance to husband from property held by the wife in divorce cases:—(I.) Permanent allowance; (II.) statutes; (III.) alimony *pendente lite*; (IV.) English cases. 110

Divorce when husband or wife becomes insane:—(I.) Insanity as a ground for divorce; (II.) insanity as affecting adultery: (a) as a ground for divorce; (b) as a defense to a claim for alimony; (III.) insanity as affecting abandonment and failure to support; (IV.) insanity 34 L. R. A.

as affecting cruelty; (V.) the defense; (VI.) actions on behalf of insane persons. 161

Drunkenness as affecting divorce:—(I.) Drunkenness as a ground for divorce: (a) provisions for; (b) what constitutes drunkenness; (c) degree of drunkenness authorizing divorce; (d) pleadings and proof; (e) defenses; (f) incidents and effects; (II.) drunkenness as affecting cruel and inhuman treatment: (a) drunkenness as cruelty; (b) drunkenness connected with cruelty; (c) drunkenness as evidence of cruelty; (III.) drunkenness as affecting desertion. 449

Enforcing payment of alimony as imprisonment for debt. 665

ILLEGITIMATE CHILDREN. See INCOMPETENT PERSONS, NOTES AND BRIEFS.

IMPRISONMENT FOR DEBT.

1. A constitutional provision "that no persons shall be imprisoned for debt" is violated by Ala. act Dec. 12, 1893, making it a misdemeanor for a person engaged in banking to receive a deposit when insolvent, and punishing with a fine not less than double the amount of the deposit, one half of which shall go to the depositor, and providing that payment to him before conviction shall be a defense to prosecution. *Carr v. State* (Ala.) 634

2. Tenn. Laws 1895, chap. 67, providing that any person who fraudulently obtains accommodations at an inn, hotel, or boarding-house, or fraudulently removes his baggage or other property, shall be guilty of a misdemeanor and be punished accordingly, does not violate Tenn. Const. art. 1, § 18, prohibiting the passage of any law authorizing imprisonment for debt. *State v. Yardley* (Tenn.) 656

NOTES AND BRIEFS.

Constitutionality of imprisonment for debt:—(I.) General extent and construction of constitutional provisions; (II.) what are debts: (a) meaning of the word "debt;" (b) in general; (c) breach of promise to marry; (III.) action founded on tort: (a) in general; (b) mesne profits; (c) trespass; (d) fraud; (IV.) fines and penalties as debts: (a) in general; (b) fines imposed by city authority; (V.) taxes as debts; (VI.) costs as debts: (a) debts in civil actions; (b) not debts in civil actions; (c) debts in criminal actions; (d) not debts in criminal actions; (VII.) statutory, criminal, or quasi-criminal cases; (VIII.) enforcing orders and decrees of court: (a) in general; (b) in decedent's estates; (c) in admiralty; (d) alimony; (e) in bastardy; (f) against officers of the court; (IX.) due process of law; (X.) *ne exeat*; (XI.) debts owing to the United States. 634

INCOMPETENT PERSONS. See also APPEAL AND ERROR, 12; GIFT; HUSBAND AND WIFE, 8-5, 14; INSURANCE, 12.

1. The mental incompetency of an accommodation indorser at the time of signing a note in renewal of one which he indorsed when fully competent to do so does not prevent his estate from being liable on the renewal note, when the holder took it in good faith and there-

upon extinguished and surrendered the old note, so that he cannot be restored to his original position. *Memphis Nat. Bank v. Neely* (Tenn.) 274

2. An incompetent person executing a deed of trust for the preservation of his property need not fully appreciate all the technical intricacies of the transaction to make the deed binding. It is sufficient if he is not deceived or misled by fear or favor. *Neal v. Black* (Pa.) 707

3. That a voluntary deed by an incompetent person to protect his property was made under advice of his uncle and the attorney for his guardian will not render it invalid, if they had no adverse interest in the estate and there is nothing in their relations to him and his estate to make them incompetent advisers. *Id.*

4. A voluntary deed by an incompetent person for the protection of his estate cannot be revoked as improvident if its general purpose is wise and proper, because it strips him of all his property, is irrevocable, leaves the portion to be expended by him at the discretion of the trustee, makes no provision for future contingencies, and does not require the trustee to give security, permits him to appoint a successor without security, while it gives him unlimited power as to conversion of investments, and does not require him to account to anybody. *Id.*

NOTES AND BRIEFS.

See also HUSBAND AND WIFE.

Incompetent persons; renewal of obligations by. 274

Using lunatic's property to carry out his presumed wishes or to fulfil his equitable obligations in the absence of a legal authority:—(I.) Power generally; (II.) in support of his family; (III.) in support of illegitimate children, etc.; (IV.) for allowances to persons entitled to inheritance; (V.) for allowances to collateral relations; (VI.) for allowances to persons not related; (VII.) for charitable and religious purposes; (VIII.) to continue arrangements made while sane. 297

INDICTMENT. See also HABEAS CORPUS, 1.

1. An indictment which simply follows the words of a statute is not sufficient unless the statute sets forth all the elements necessary to constitute the offense. *State v. Howard* (Minn.) 178

2. Neither a misnomer of a crime nor the omission to give it any name in the caption of the indictments affects the validity of an indictment. *Id.*

3. That the money offered was of value is not sufficiently shown in an indictment for bribery by alleging that the accused procured another "to offer a bribe and money of value" to a jurymen and that the agent did "offer the said bribe and money to the said jurymen." *Id.*

4. An intent to influence the action of a jury as such and the knowledge of the accused as to the fact that the person whom he attempts to bribe is a juror are not sufficiently shown by 34 L. R. A.

allegations in an indictment of an offer to bribe a jurymen serving on a jury with intent "to influence the action, vote, opinion, and decision of him, the said jurymen, E. O. as a jurymen . . . and to cause him . . . to hang the said jury." *Id.*

NOTES AND BRIEFS.

Indictment; for bribery; sufficiency of. 178

INJUNCTION.

1. An injunction against the sale of intoxicating liquors by an incorporated club to its members in pursuance of a resolution of the club may be granted in favor of a member whose property rights would be damaged thereby, if the sale would be illegal, although it might be punishable by indictment. *Klein v. Livingston Club* (Pa.) 94

2. An injunction to prevent a school teacher from attempting to teach in a schoolhouse after an ineffectual attempt to dismiss him arbitrarily will not be granted to school directors, although they have by statute the charge and control of the school property. *Thompson v. Gibbs* (Tenn.) 548

3. The right to an injunction to restrain the prosecution of several actions on a contract for the recovery of different instalments, commenced in the court of another state for the purpose of avoiding a statute of the state of the residence of the parties, affecting the validity of the contract, is not defeated by the fact that complainant has other legal defenses available in the foreign jurisdiction. *Sandage v. Studebaker Bros. Mfg. Co.* (Ind.) 863

4. A party to a contract is entitled to an injunction restraining the prosecution of several actions for the recovery of different instalments thereunder, commenced by the assignee of the other party in the court of a foreign state for the purpose of avoiding a statute of the state in which the contract was made and to be performed, and in which both the parties and such assignee reside. *Id.*

INNKEEPERS. See IMPRISONMENT FOR DEBT, 2; STATUTES, 5, 8, 9; TRIAL, 1.

INSOLVENCY. See also LEVY AND SEIZURE, 1.

1. A chattel mortgage executed and delivered, no matter how short a time before the making of an assignment for creditors, is not invalid although the mortgagor contemplated the making of the assignment, where the mortgagees acted in good faith in demanding and accepting the mortgage, and without knowledge of the mortgagor's purpose to make an assignment. *Ottenberg v. Corner* (C. C. App. 8th C.) 620

2. One creditor of an insolvent is not aggrieved by the refusal of the insolvency court to permit other creditors to withdraw their assent to the discharge of the insolvent. *Clark v. Stanwood* (Mass.) 878

3. Partnership creditors may vote in the choice of assignees and on the matter of the discharge of a single insolvent partner, although the firm is not insolvent. *Id.*

4. Firm debts can be proved against a

single insolvent partner although the partnership is not insolvent or any proceedings taken against it. *Clark v. Stanwood* (Mass.) 378

5. A release of an insolvent is not "a thing of value" within the meaning of Mass. Pub. Stat. chap. 157, § 93, for obtaining which on credit and without intent to pay therefor he may be refused a discharge, and it does not constitute an asset in the debtor's estate. *Id.*

NOTES AND BRIEFS.

Insolvency; chattel mortgage as preference. 620

INSURANCE. See also ACTION OR SUIT, 2; APPEAL AND ERROR, 8; CONFLICT OF LAWS, 6; CORPORATIONS, 8, 9; DAMAGES, 8; HOMESTEAD; PLEADING, 5; SERVICE, 1.

1. McClain's (Iowa) Code, § 1144, absolutely prohibiting foreign insurance companies from taking risks or transacting insurance business in the state, unless possessed of \$200,000 actual paid-up capital, and unless they comply with other conditions named therein, is not unconstitutional. *Parker v. Lamb* (Iowa) 704

2. The lien of a mutual insurance company upon insured property of members for their shares of the losses and expenses of the company takes precedence of the member's homestead rights under a by-law which provides that the insured buildings and the right, title, and interest of the assured to the lands on which they stand shall be pledged to the company, which shall have a lien against all persons interested during the continuance of the insurance as to all debts or liabilities incurred by the company. *Farmers' Mut. Ins. Assn. v. Burch* (S. C.) 806

3. Written parts of an insurance policy will control printed parts, and in case of repugnancy the latter must be disregarded. *Yoch v. Home Mut. Ins. Co.* (Cal.) 857

4. An "agreement indorsed," permitting otherwise prohibited articles to be kept on insured premises, is made where the articles are included in the written description of the property insured. *Id.*

5. Untrue answers to questions in an application for insurance do not constitute a concealment or misrepresentation by the insured which will make the policy void, where the misstatements were written by the insurance agent without any direction or knowledge of the insured. *Id.*

6. Stipulations in an insurance policy against assignment cannot avail an assignor when the insurer declines to take advantage of them and pays the money into court. *Spencer v. Myers* (N. Y.) 175

7. The right of a wife to assign a policy of insurance on the life of her husband, under N. Y. Laws 1879, chap. 248, when the policy is issued for her benefit and the husband gives his written consent, is not limited to policies issued or delivered within the state, but extends to those issued by a foreign company in another state. *Id.*

8. Gasolene kept as part of the usual stock of merchandise will not avoid a policy in which a written description of the property

insured names such stock "as is usually kept in a country store," although a printed condition declares that the policy shall be void if certain articles, including gasolene, are kept, used, or allowed on the premises. *Yoch v. Home Mut. Ins. Co.* (Cal.) 857

9. An insurance company which issues a policy of "permanent insurance" by which it agrees to be and remain "forever" liable to the assured, his heirs and assigns, and which provides that any assignment of the policy shall be brought to the company's office to be entered and "allowed," cannot refuse to enter and allow an assignment solely because it has decided not to consent to the transfer of old policies. *Marshall v. Franklin F. Ins. Co.* (Pa.) 159

10. Intentional killing by a third person, of an insured person without the latter's connivance or foreknowledge, is an accident within the meaning of an accident insurance policy. *American Acci. Co. v. Carson* (Ky.) 801

11. The omission of the word "death" from a clause in an accident policy providing that it shall not "extend to or cover intentional injuries inflicted" by "any other person," when it is used in other excepting clauses immediately contiguous, will make the insurer liable in case of the murder of the insured. *Id.*

12. The beneficiary in a certificate of insurance on the life of her father who is insane or incapable of attending to business is entitled to notice of his default in paying assessments before a forfeiture can be declared therefor after she has given notice to the company of his condition and requested a notice of any default on his part so that she might make an effort to pay the assessment if he did not. *Buchanan v. Supreme Concordia I. O. of H.* (Pa.) 436

13. Insurance against loss by reason of having to pay rent for a building under a lease while it is untenable by reason of fire will cover the time during which the landlord is in possession for the purpose of rebuilding the burned building under an agreement with the tenant that such possession shall not affect the tenant's liability for rent under the lease until the completion of the new building. *Heller v. Royal Ins. Co.* (Pa.) 600

14. An insurer against loss by reason of liability for rent under a lease while the building is untenable because of fire is not relieved from any part of his liability by the fact that the tenant receives from his landlord a sum derived from a policy insuring the landlord against loss of rent because of fire,—at least if the combined amounts will not wholly reimburse the tenant the rent he is compelled to pay under his contract while the building is untenable. *Id.*

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Insurance; right to assign. 159

Assignment of policy on husband's life. 175

Notice of member's default; effect of disability of member. 436

Effect of other remedy of insured. 600

Keeping prohibited articles on premises.

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Lien of mutual company on property of members.

908

INTEREST.

1. An implied promise to pay interest after a specified date is made in a contract fixing the time of payment, but providing that until a later date specified it shall bear no interest. *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.)

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2. Interest on overdue claims of subcontractors may be included in the amount of their liens, although the owner of the property is insolvent and the allowance of interest will diminish the fund applicable to inferior liens.

Id.

INTOXICATING LIQUORS. See also INJUNCTION, 1.

The distribution of intoxicating liquors by an incorporated club to its members without any profit to the club, but on payment by each member for what he receives in the same way as he pays for any food or drink obtained there, does not constitute a sale within the meaning of the Pennsylvania license act of May 13, 1887. *Klein v. Livingston Club* (Pa.)

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Intoxicating liquor; sale of, by club.

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ITINERANT VENDORS. See CONSTITUTIONAL LAW, 17; COURTS, 8.

JUDGMENT. See also CONTINUANCE; CORPORATIONS, 9; COUNTIES, 12, 13; RECEIVERS; STATUTES, 19; TAXES, 4.

1. A consent judgment entered into by town authorities cannot bind the town to a subscription to a railroad, unless the power to subscribe or donate has been legally granted by the legislature. *Union Bank v. Orford* (N. C.)

487

2. Judgment against a stockholder of a corporation, and execution levied on his real estate for an amount that exhausts his liability in the state where the corporation was created, are a bar to an action in another state on his liability as a stockholder. *Cushing v. Perot* (Pa.)

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3. A decree in a sister state as to the amount of assets and debts of an insolvent mutual insurance company, and of the amount of assessments necessary to liquidate its liabilities, rendered by a court to which a statute has given entire jurisdiction in the matter without service upon or notice to the stockholders or members, is conclusive on a stockholder when sued upon a note which was a chose in action in possession of the company and under the control of the court which made the decree, although the court in which he is sued takes a different view of the case as to the assessments. *Mutual F. Ins. Co. v. Phoenix Furniture Co.* (Mich.)

694

4. The receipt of money due on a judgment, by an officer authorized by law to ac-

cept it, satisfies the debt. *Hendry v. Benliea* (Fla.)

283

5. Clerks of the Florida circuit court were not authorized, in 1864, to receive payment of judgments or accept money thereon as paid into the registry of the court, without a judicial order for the purpose, and a payment to them without prior authority or subsequent ratification by the judgment creditor was invalid.

Id.

NOTES AND BRIEFS.

See also APPEAL AND ERROR; CORPORATIONS.

Judgment; conclusiveness of.

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Conclusiveness of, in other states.

695, 701, 704

JUDICIAL SALE. See PUBLIC IMPROVEMENTS, 8.

JURY. See TRIAL, 1, 2.

JUSTICE OF THE PEACE. See also FENCES.

An action for damages to fences, pasture, and an unmatured crop of cotton growing in a field, is for damages to realty of which a justice's court has no jurisdiction. *Bagley v. Columbus S. R. Co.* (Ga.)

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Justice of the peace; limits of jurisdiction of.

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LABEL. See TRADEMARK, 1.

LANDING. See LANDLORD AND TENANT, 2, 8.

LANDLORD AND TENANT. See also EVIDENCE, 22; INSURANCE, 13, 14; MINES; NEGLIGENCE, 3.

1. Rentals which had matured and remained unpaid at the time of the assignment of a lease are assumed by the assignee when the assignment stipulates that he shall hold the lease under the terms thereof and subject to the rents and covenants therein on the part of the lessee, and he accepts such assignment. *Woodland Oil Co. v. Crawford* (Ohio)

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2. The destruction of the property extinguishes the liability for rent under a lease of a river front and landing consisting of a narrow footing at the base of a bluff without any wharf, dock, or pier when the unprecedented ravages of the river effectually destroyed the use of the landing by washing away all but a shallow fragment of the lot,—especially when, with the lessor's consent and participation, works were constructed in front of the shore line which destroyed safe access to the landing. *Wait v. O'Neil* (C. C. App. 6th C.)

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3. A lessee's agreement to keep in repair a roadway which is below highwater mark and is a mere incident to the right of mooring, loading, and unloading at a leased river front and so-called landing which has no wharf, dock, or pier, and to deliver the premises in "good order and repair," and "make good all damages to said premises except the usual

wear and proper use thereof," does not obligate the lessee to protect the bank against an extraordinary peril from a sudden change in the current of the river, which washes away a bank that had stood in the same condition for centuries. *Wait v. O'Neil* (C. C. App. 6th C.) 550

4. One having the lease of the roof and outside of a party wall of a building projecting above the adjoining building, for the purpose of advertising thereon by means of a stereopticon, is not evicted by the destruction of the value of the wall for advertising purposes caused by the tenant of the adjoining building without any denial of the validity of the lease, by renting the roof of his building, with a screen erected thereon, to another advertising company. *Oakford v. Nison* (Pa.) 575

5. A lease of the roof and outside of a party wall of a building projecting above the adjoining building, for the purpose of advertising thereon by means of a stereopticon, does not become invalid for failure of consideration because the tenant in possession of the adjoining building, without questioning the validity of the lease, leases the roof of his building, with a screen erected thereon, to another advertising company, by means of which the value of the wall for advertising purposes is destroyed, where the lease contained no provision on that point. *Id.*

6. A landlord is liable to a boarder on premises leased for a boarding house for injuries sustained by reason of the unsafe and dangerous condition of the premises, which was known to, or might by the exercise of reasonable care and diligence have been known to, the landlord, but not to the boarder. *Stenberg v. Wilcox* (Tenn.) 615

7. A landlord is liable to his tenant for damages that may result from the unsafe and dangerous condition of the premises leased when that was known to, or with reasonable care and diligence might have been known to, the landlord, but not to the tenant, although the latter examined the premises and did not discover the defect. *Hines v. Wilcox* (Tenn.) 824

NOTES AND BRIEFS.

See also MINES.

Liability of landlord for injury to tenant from defect in premises:—Landlord not bound to have premises safe; implied covenants; action for nonrepair; construction of covenant to repair; warranty or representations by landlord; fraud or deceit; concealment of defects; statutory liability; landlord actively negligent; contributory negligence; proximate cause; measure of damages; distinguishable cases. 824

Liability of landlord for injuries to tenant's guest and servant from defects in premises:—Duty the same toward tenant and tenant's guest or servant; landlord not generally liable; defect in premises when let; effect of concealment by landlord; effect of duty to repair; structure for use of public; liability of reversaloner; contributory negligence; portion of building in landlord's possession; dangerous agency on adjoining premises. 609

LAUDANUM. See HUSBAND AND WIFE, 9.

LAW. See EVIDENCE, 23, 24; STATUTES, 4.
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LAW OF THE CASE. See APPEAL AND ERROR, NOTES AND BRIEFS.

LEGISLATURE. See COURTS, 8; PARDON, NOTES AND BRIEFS.

LETTER. See EVIDENCE, 16.

LEVEES. See also CONSTITUTIONAL LAW, 10, 18; MUNICIPAL CORPORATIONS, 8; PUBLIC IMPROVEMENTS, 4; TAXES, 8.

1. A levee district created by special law is not within a constitutional prohibition against creating corporations by special law. *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 725

2. Taxation of property in a levee district for a levee to protect the property is for a public purpose because beneficial to a large community of people and also to the state. *Id.*

3. Delegation to a city of the "care, supervision, and control" of all public highways, streets, levees, etc., within the city limits does not authorize the council to grant to a railway company the right to construct and maintain a freight house on a public levee for its own exclusive use. *St. Paul v. Chicago, M. & St. P. R. Co.* (Minn.) 184

4. The erection of a warehouse on land dedicated to public use as a levee is not necessarily a misuse of the property, as such a structure may be in aid of the use for which the dedication was made. *Id.*

5. The right to occupy a portion of a public levee as a site for a permanent freight house of a railroad company cannot be granted by the common council of a city under legislative authority to grant a right of way through highways, public grounds, or levees as that applies only to the right of trackage, nor by a provision that the city may agree with the railroad company on terms and conditions upon which a railroad may occupy, so far as necessary, any road, street, alley, or public way. *Id.*

6. The legislature may authorize the grant to a railroad company having traffic with craft navigating the water contiguous to land dedicated to the public use as a levee, of the exclusive use of so much of the levee as is reasonably necessary for its business with such craft, so long as it does not unreasonably interfere with the use of the levee by the public; but it cannot give any part of such levee as a permanent site for the general freight warehouse of a railroad company, without reference to its traffic with such craft. *Id.*

LEVY AND SEIZURE.

1. Individual partners cannot claim their statutory exemption out of the partnership property in case of insolvency, in the absence of a statute expressly authorizing them to do so. *Re Spitz Brothers' Assignment* (N. M.) 604

2. A photographic lens owned and used by a photographer in the prosecution of his business is within a provision of a statute exempting from attachment implements of the debtor's trade. *Davidson v. Hannon* (Conn.) 718

NOTES AND BRIEFS.

Levy; exemptions out of partnership assets.	604
Exemption of implements of trade.	718

LIBEL AND SLANDER.

NOTES AND BRIEFS.

Libel; by threatening letters.	127
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LICENSE. See also CONSTITUTIONAL LAW, 14, 17; COURTS, 4; GARBAGE, 2.

1. A license tax cannot be deemed unequal because it reaches one occupation only, if it reaches all who follow that occupation. *State v. Harrington* (Vt.) 100

2. A requirement in a city ordinance that an applicant for a license to sell milk within the city shall consent that the animals from which he obtains the milk shall be subjected to the "tuberculin test" is not unreasonable. *State v. Nelson* (Minn.) 318

3. A city ordinance requiring an applicant for a license to sell milk within the city to consent that the dairy herd from which he obtains his milk be inspected by the commissioner of health of the city, although such herd is kept outside the city limits, is authorized by Minn. Gen. Laws 1895, chap. 203, authorizing the city council of any city to provide by ordinance for the inspection of milk and dairy herds kept for the production of milk within the city limits, and to issue licenses for the sale of milk within such limits. *Id.*

LIENS. See also CONTRACTS, 4; INTEREST, 2; PAYMENT, 2; VENDOR AND PURCHASER.

1. Legal or other services rendered in acquiring rights of way for a railroad do not constitute "services" within the meaning of a lien law. *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* (C. C. App. 6th C.) 625

2. Materials not actually used or delivered to a contractor are not "furnished" for the purpose of creating a subcontractor's lien, although they were worthless for any other purpose, and were prepared for the contractor under a contract which he broke by refusing to accept them. *Id.*

3. A lien for furnishing new material and replacing it in a bridge cannot be claimed by a subcontractor whose employees by negligence had made the new material and work necessary. *Id.*

4. Procuring rights of way for a railroad is not the furnishing of materials within the meaning of a lien law. *Id.*

5. The agreed contract price of railroad construction payable in bonds should be diminished, for the purpose of limiting the amount of subcontractors' liens, by the amount of unpaid interest which the contractor had agreed to pay on the railroad bonds in order to maintain the credit of the railroad company until after completion of the road. *Id.*

6. Money expended by a subcontractor in paying salaries of its corporate officers and office expenses and to secure a guaranty on its

contract for purchase of material will not sustain a subcontractors' lien. *Id.*

7. Failure to file a statement of lien in "each county in which the labor was performed," as required by statute, will not prevent enforcing a lien for the proportionate part of the labor which was done in one county in which it was filed. *Id.*

NOTES AND BRIEFS.

Liens; what are.	472
Of subcontractors.	626

LIEUTENANT GOVERNOR. See OFFICERS, 1.

LIMITATION OF ACTIONS. See also CONSTITUTIONAL LAW, 9; EVIDENCE, 24; TIME.

1. Regular payments for a period of time of a part of the monthly wages earned by a servant, who has been working for his employer for several years without a settlement, will make the account mutual for the purpose of determining whether any part is barred by the statute of limitations. *Hay v. Peterson* (Wyo.) 581

2. A statute providing that defendants "who shall have become nonresidents of the state" after a cause of action has arisen in the state shall not have the benefit of a statute of limitations is retrospective, at least as applied to the cause of action and residence of the defendant, and covers a case of one who had previously obtained the opening of a judgment to enable him to interpose the statute of limitations. *Bates v. Cullum* (Pa.) 440

NOTES AND BRIEFS.

Limitation of actions; retroactive effect of statute; effect of absence from state. 440

LOCAL GOVERNMENT. See OFFICERS, 2.

LOCAL OPTION. See MUNICIPAL CORPORATIONS, NOTES AND BRIEFS; STATUTES, 15, 16.

LOCOMOTIVE. See EXPLOSIONS.

MAIL. See SERVICE.

MAJORITY. See MUNICIPAL CORPORATIONS, 1; PARLIAMENTARY LAW, 2; VOTERS AND ELECTIONS, 5, 6.

MANDAMUS.

1. Mandamus will not lie to compel the secretary of the electoral board to permit memoranda to be taken from records in his possession which may be properly copied, until it is shown that such right has been denied. *Gleaves v. Terry* (Va.) 144

2. Mandamus to compel the state board of regents to comply with the provisions of a statute as to the location of a department of the state university does not lie at the suit of a private citizen who has not obtained permission from the court to apply for the writ.

Sterling v. Regents of the University of Michigan (Mich.) 150

8. Mandamus to compel the levy of a tax to pay a consent judgment entered into by town authorities will not be granted if it appears that there was no authority to issue the bonds for which the judgment was rendered. *Union Bank v. Oxford* (N. C.) 487

MASTER AND SERVANT. See also CONFLICT OF LAWS, 5.

A "carpenter gang" whose duty it is to replace the planks about a machine called the "bloom rolls," after their removal for the purpose of attaching new rolls, are not fellow servants of one employed to oil the machine, and their negligence in replacing the planks is chargeable to the master. *Kingartner v. Illinois Steel Co.* (Wis.) 503

NOTES AND BRIEFS.

Master and servant; duty as to dangerous machinery. 394

MAXIMS.

1. Actio personallis moritur cum persona. *Louisville & N. R. Co. v. McElwain* (Ky.) 788

2. Damnum absque injuria. *Dantzer v. Indianapolis U. R. Co.* (Ind.) 769

3. Exceptio probat regulam de rebus non exceptis. *P. C. Wiest Co. v. Weeks* (Pa.) 172

4. Generalia specialibus non derogant. *Burnett v. Maloney* (Tenn.) 541

5. Hæres legitimus est quem nuptiæ demonstrant. *Jackson v. Jackson* (Md.) 773

6. He who prevents a thing from being done shall not avail himself of the nonperformance he has occasioned. *Farmers' Loan & T. Co. v. New York & N. R. Co.* (N. Y.) 76

7. Mobilia personam sequuntur. *Re Whiting's Estate* (N. Y.) 232

8. Sic utere tuo ut alienum non lædas. *State v. Harrington* (Vt.) 100

MEMORANDA. See EVIDENCE, 18, 19.

MENTAL ANGUISH. See DAMAGES, 5; TELEGRAPHS, 3.

MILK. See LICENSE, 2, 3

MINES. See also LANDLORD AND TENANT, 1.

1. A recovery of the agreed rental, and not merely of unliquidated damages, can be had by the lessor on failure to drill an oil or gas well as agreed by a lessee who promises that on such default he will pay a specified rental. *Woodland Oil Co. v. Crawford* (Ohio) 62

2. The forfeiture of an oil and gas lease is for the benefit of the lessor and at his option, although the lease provides that failure on the part of the lessee to complete a well or wells as specified or to pay the rental as provided "shall render this lease and agreement null and void, together with all rights and claims, and not binding on either party, and not to be revived without the consent of both parties hereto in writing." *Id.*

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3. A lease of land, oil, and gas for a limited time and purpose, and not merely a license, is made by an instrument which grants, demises, and lets "all the petroleum and gas in or under that certain tract of land, . . . and also all the said tract of land, for the purpose and with the exclusive right to drill and operate upon said premises for said petroleum and gas." *Id.*

NOTES AND BRIEFS.

Mines; effect of assignment of oil or gas lease:—(I.) Liability of assignor; (II.) liability of assignee. 62

MISCARRIAGE. See DAMAGES, 6; PROXIMATE CAUSE.

MONEY. See also BONDS, 5; EVIDENCE, 6; PAYMENT, 1.

NOTES AND BRIEFS.

Money; Making bonds payable in gold. 541

MORTGAGE. See also CORPORATIONS, 4; INSOLVENCY, 1; RECEIVERS.

1. A request to foreclose a mortgage, which must be made by the holders of \$2,000,000 in amount of bonds, is not valid when made only by the holder of \$1,700,000, who is not in fact the owner of them, but holds them subject to the order of another, and who claims to represent the owners of other bonds for which the party he represents had a mere contract to purchase. *Farmers' Loan & T. Co. v. New York & N. R. Co.* (N. Y.) 76

2. A stipulation in a mortgage that the mortgagor shall pay within the time prescribed by law all taxes upon the premises does not make the mortgagor liable for all taxes in case of the subsequent passage of a law requiring the mortgagor to pay those properly leviable against his interest. *Fuller v. Kane* (Mich.) 308

NOTES AND BRIEFS.

Mortgage; priority as to judgment for damages against railroad company. 303

Of chattels; by insolvent debtor. 630

MUNICIPAL CORPORATIONS. See also BONDS, 6, 7; CONTRACTS, 10-12; COUNTIES, 2, 3; COURTS, 4, 5; DRAINS AND SEWERS; ESTOPPEL, 3, 4; GARBAGE, 1; HIGHWAYS, 2; LEASES, 5; LICENSES; OFFICERS, 2-4; PARLIAMENTARY LAW; PUBLIC GROUNDS, 2; STATUTES, 7; VOTERS AND ELECTIONS, 1, 2, 5, 6; WATERS, 2.

1. An ordinance which does not receive the votes of a majority of the members elect of a city council is defeated under Kan. Gen. Stat. 1889, ¶ 765. *Illinois Trust & Sav. Bank v. Arkansas City* (C. C. App. 8th C.) 518

2. A contract may be made upon motion or by resolution by a city council, under statutes authorizing it to contract, but not requiring an ordinance therefor. *Id.*

3. The presentation to a city council in open session, by a private party named as grantee in a defeated ordinance, of a written

acceptance of the terms of the ordinance and a bond to construct waterworks accordingly, the construction of the work and location of the hydrants by such grantee under direction of the city council, the actual acceptance and use of the works by the city when completed, and the passage by the council of a formal resolution accepting such works,—constitute a binding contract for the construction and operation of the works according to the terms of such ordinance between the city and the grantee therein. *Id.*

4. The remainder of a divisible contract of a municipal corporation may be enforced, although part of such contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, unless it appears from a consideration of the entire agreement that it would not have been made independently of the part which is void. *Id.*

5. A city of the second class in Kansas has power to contract with a private party for the construction and operation of waterworks and for the payment of rent for the use of hydrants, and to grant to such a party the use, not exclusive, of its streets for the purpose of laying pipes to conduct the water. *Id.*

6. A city of the second class under the power given by Kan. Gen. Stat. 1889, § 7185, to contract for and procure the construction of waterworks, may contract for such construction and lease of hydrants for a term exceeding the single year during which the members of its council hold office. *Id.*

7. A municipal corporation which has contracted with a private corporation for a water supply as authorized by Pa. act May 21, 1874, cannot subsequently proceed to erect a plant of its own, as it is authorized to do by another section of the act, but in case it wishes to own a waterworks plant it must proceed, under § 50 of the act, to acquire the one belonging to the other contracting party. *White v. Headville (Pa.)* 567

8. A municipal corporation has no proprietary rights in streets, levees, or other public grounds within its territorial limits, but whatever rights it has in them are held merely in trust for the public. *St. Paul v. Chicago, M. & St. P. R. Co. (Minn.)* 184

9. Land within the limits of a town, although it has never been divided into building lots, is subject to municipal taxation if it is near railroad depots and shops, has convenient access to the highways, and lies only a short distance from the business portion of the town, so that it enjoys the police protection and other benefits of the town. *Briggs v. Russellville (Ky.)* 193

10. The presentment of a claim against a city for injury or damage to person or property, which by Neb. Comp. Stat. art. 2, chap. 14, § 84, must be in writing and verified, is a condition precedent to the maintenance of an action for such injury. *Hastings v. Foxworthy (Neb.)* 821

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Municipal corporations; distinguished from towns and counties. 674
84 L. R. A.

Distinction between resolution and ordinance; contract for period of years. 523

Rules of parliamentary law in passing ordinance. 459

Validity of ordinance regulating business. 319

Delegation of power to; local option under constitutional provision against special laws. 777

Extent of police power; delegation of power; regulation of business by; creation of monopoly. 279

Grant of exclusive franchise by. 567

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As imprisonment for debt. 671

Municipal taxation of rural lands within the limits of the corporation:—(I.) Validity of exemption or discrimination in rates; (II.) construction of statutory exemption or discrimination; (III.) right to repeal exemptions; (IV.) validity of taxation of farm lands; (V.) power of courts; (VI.) what property is taxable; (VII.) power of municipality to exempt; (VIII.) original incorporation; (IX.) assessments; (X.) method of raising question. 193

NEGLIGENCE. See also CARRIERS, 3-6; DAMAGES, 6; ELECTRICAL USKS AND APPLIANCES, 1-4; EVIDENCE, 10-14, 28; EXPLOSIONS; HIGHWAYS, 1, 2; LANDLORD AND TENANT, 6, 7; MASTER AND SERVANT; STREET RAILWAYS, 2-4; TELEGRAPHS, 1; TRIAL, 7-11, 15.

1. The owner of a building is bound, so far as the exercise of ordinary care will enable him to do so, to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it, but he is not an insurer against accident from its condition. *Ryder v. Kinsey (Minn.)* 557

2. The liability of the owner of a building for damages occasioned by its ruin, declared by La. Rev. Civ. Code, § 2822, when caused by vice in its original construction or neglect to repair it, is limited by the terms of art. 670, which must be construed with the former section, and which names "the neighbors or passengers" as those to whom the owner must respond for injuries by the fall of the building or any portion of its materials, and injuries to occupants of the building or guests therein are excluded. *McConnell v. Lemley (La.)* 609

3. A member of a surprise party visiting the tenant of a building for the purpose of spending an evening in social amusement cannot, if injured by means of a falling gallery, recover damages of the lessor, under La. Rev. Civ. Code, arts. 670, 2822, but the remedy, if any could be allowed, would be against the tenant. *Id.*

4. A railway company permitting children to come into its yard at noon to bring dinners to their fathers employed there, and to cross a

track for that purpose, does not become liable for injury to a seven-year-old boy who, while returning from such errand, ran under one of some standing freight cars to get a ball on request of one of several employees who were throwing and catching it and was hurt by the sudden moving of the cars, which were struck by an engine at some distance from the place where he was, while it does not appear that the employees in charge of the engine knew or had reason to know of his position, if there was a perfectly safe way for the children to pass and repass without going upon the tracks where the cars were standing, and no occasion for their going under the cars at all. *Savannah, F. & W. R. Co. v. Waller* (Ga.) 459

NOTES AND BRIEFS.

See also BUILDINGS; LANDLORD AND TENANT.

Negligence; in blasting. 183
In respect to locomotive or machinery. 294
As to trespasser or licensee in railroad yard. 460

NOTICE. See also SERVICE.

The knowledge of one member of the discount committee of a bank, who was not present when the renewal of a note was taken and had no part in the transaction, is not enough to charge the bank with notice of the fact, known to him, that the indorser of the note had become incompetent to do business. *Memphis Nat. Bank v. Neely* (Tenn.) 274

NOTES AND BRIEFS.

Notice; by newspaper publication. 486

OFFICERS. See also CIVIL SERVICE; STATUTES, 7.

1. One appointed by the governor to the office of lieutenant governor after the death of the original incumbent will hold for the remainder of the unexpired term, under Cal. Const. art. 5, § 15, providing that a lieutenant governor shall be elected at the same time, place, and manner, and for the same term as the governor, and § 8 providing that when any office shall become vacant the governor may fill such vacancy by granting a commission to expire at the "next election by the people." *People, Lynch, v. Budd* (Cal.) 48

2. The right of local self-government is violated by N. Y. Laws 1896, chap. 427, which prevents majority rule in the selection of local officers by providing that each member of the common council shall vote for but two of the four police commissioners to be chosen, and that no person shall be eligible to the office who does not belong to the political party having the highest or next highest representation in the council, and that in case the board cannot agree in continuing in office the present force before a certain date the police force shall cease to exist, except a certain person who was senior captain on a specified day, who shall be chief of police until the board shall agree. [Per Gray and O'Brien, JJ.] *Rathbone v. Wirth* (N. Y.) 408

3. The power to designate the local authority who shall appoint local officers, conferred on the legislature by N. Y. Const. art. 10, § 2, 84 L. R. A.

if the election or appointment of such officers is not provided for by that Constitution, does not authorize the enactment of N. Y. Laws 1896, chap. 427, providing that the police board of the city of Albany shall consist of four commissioners of whom two shall belong to the political party having the highest representation in the common council, and the other two to the party having the next highest representation therein, and that each member of the council shall be entitled to vote for only two of such officers, since the minority which is thus given power to appoint two of the commissioners is not a city authority within the meaning of the Constitution. *Id.*

4. A statute making any person ineligible to appointment as police commissioner who did not belong to the party having the highest or next highest representation in the common council, which must appoint two from each of those parties, is in violation of N. Y. Const. art. 1, § 1, declaring that no member of the state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers, and art. 13, § 1, prohibiting any oath, declaration, or test as a qualification for office. [Per O'Brien, J.] *Id.*

5. A supervisor is liable on grounds of public policy for public money lost by the failure of a firm of private bankers with whom he had deposited, although he acted in good faith and without negligence. *Tillinghast v. Merrill* (N. Y.) 678

NOTES AND BRIEFS.

See also PUBLIC MONIES.

Officers; vacancies; election to fill. 46
Provisions for appointment of; filling vacancies; constitutional restrictions of; membership in political party as a qualification. 409

OIL. See also EVIDENCE, 4. MINES, 1, 2.
NOTES AND BRIEFS; TRIAL, 7.

An oil company from whose premises crude petroleum escapes during a conflagration not shown to be due to its negligence is not liable for injuries caused by an explosion of a public sewer into which the oil was turned by the municipal authorities after it had left the premises of the oil company and without its knowledge, for the purpose of checking the spread of the conflagration. *Fuchs v. St. Louis* (Mo.) 118

OPIUM. See HUSBAND AND WIFE, 9.

PARDON.

1. A restoration of competency to testify as a witness which was lost by conviction of a crime cannot be made by legislative act where the Constitution confers the pardoning power upon a board consisting of the governor and several associates. *Singleton v. State* (Fla.) 251

2. The power to pardon after conviction of crime which is conferred upon the governor and other specified officers by Fla. Const. art. 4, in all cases except impeachment and treason, is exclusive of the legislative power to grant a pardon by statute. *Id.*

NOTES AND BRIEFS.

Pardon; as affecting enhanced punishment for later offense. 402

Legislative power to grant pardon or amnesty:—(I.) After conviction; (II.) before conviction; (III.) incidental or implied pardon. 251

PARENT AND CHILD.

An adopted child is the "lawful issue" of a person within the meaning of a will making a gift to such person with remainder to his "lawful issue," under R. I. Pub. Laws 1866, chap. 627, making an adopted child for all purposes of inheritance and all other legal consequences and incidents a child of the parents by adoption the same as if born in lawful wedlock, except that he shall not take property expressly limited to "the heirs of the body or bodies" of such parents. *Hartwell v. Tefft* (R. I.) 500

NOTES AND BRIEFS.

Rights of adopted child as "lawful issue." 500

PARKS AND SQUARES. See also *ESTOPPEL*, 4.

NOTES AND BRIEFS.

Parks; dedication of; nonuser; acceptance; estoppel to deny dedication. 784

PARLIAMENTARY LAW. See also *STATUTES*, 2, 3.

The indefinite postponement of the consideration of an ordinance to authorize a certain company to lay railway tracks in specified streets does not prevent the subsequent passage at the same session of another ordinance granting the same company the right to lay tracks on streets many of which are the same as were named in the prior ordinance but containing new provisions as to the connection of the new tracks with an existing system and various other provisions for a more efficient protection of the public interest, although a rule of procedure prohibits action during the session on the "same subject" after a question has been indefinitely postponed. *Zeller v. Central R. Co.* (Md.) 469

3. The two thirds of the members of a branch of a municipal government which are required by a rule of procedure in order to dispense with one of the regular readings of a proposed ordinance need not be two thirds of all the members of the body but only two thirds of the members voting, if they are not less than a majority, and the majority constitutes a quorum. *Id.*

PARTNERSHIP. See also *BILLS AND NOTES*, 3; *BONDS*, 3; *INSOLVENCY*, 3, 4; *LEVY AND SEIZURE*, 1.

1. The goodwill of the business passes to surviving partners upon their purchase of the interest of the deceased at its inventoried and appraised value, under a provision of articles of association giving them and their successors the right and privilege of continuing the business under the firm name. *Philbrook v. Newman* (Cal.) 265

2. A contract is not void as allowing surviving partners to fix their own purchase price of the interest of a deceased partner, when it permits a representative of his estate to participate in the inventory, fixes a definite amount for the value of store and office fixtures, and provides that the merchandise shall be taken at its actual value, not exceeding the original cost, and solvent debts be taken at their face value. *Id.*

3. The basis for fixing the purchase price of a deceased partner's interest is fixed by articles of partnership at the inventory and appraisal provided for therein to be taken annually as the basis of estimating profits, where the articles further provide that in the event of the death of one partner "the inventory provided for herein shall be taken as expeditiously as possible," allowing a representative of the estate to participate in the business until all is settled, and providing that the amount ascertained to be due the estate shall be paid in twelve equal monthly instalments, but giving the surviving partners an option to retain the estate in the partnership. [Court equally divided on this point.] *Id.*

NOTES AND BRIEFS.
See also *BONDS*.
Rights of firm creditors on insolvency of partner. 378

PARTY WALL. See *COVENANT*, 4.

PATENTS. See *CONTRACTS*, 8.

PAYMENT. See also *EVIDENCE*, 6.

1. A payment of a debt or judgment during the Rebellion, in Confederate money, was valid and settled the debt or judgment in full where it was accepted. *Hendry v. Benliss* (Fla.) 268

2. Payment in bonds under a contract by an embarrassed railroad contractor to pay a construction company for completing the contract \$1 for each \$1 expended and an equal amount in bonds of the railroad company, which were worth about 40 per cent of their face value when the contract was made, and greatly depreciated thereafter, will be applied ratably on the lienable and nonlienable expenditures, and the part applicable to the former, like other payments to subcontractors, will be applied on the excess of the claim over the security of the subcontractor's lien. *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* (O. C. App. 6th C.) 625

PEDDLERS. See *CONSTITUTIONAL LAW*, 17; *COURTS*, 3.

PENALTY.

NOTES AND BRIEFS.

Penalty; imprisonment for, as imprisonment for debt. 651

PERMANENT INSURANCE. See *ACTION OR SUIT*, 2; *INSURANCE*, 9.

PHOTOGRAPHS. See LEVY AND SEIZURE, 2.

PHYSICAL EXAMINATION. See EVIDENCE, 20.

PLEADING.

1. An objection that an allegation is not sufficiently full, clear, and specific cannot be reached by demurrer, but requires a motion to make it more specific. *Louisville, N. A. & C. R. Co. v. Lynch* (Ind.) 293

2. A demurrer to a complaint against a grantee of one who erected a dam for injuring land by maintenance of the nuisance cannot be sustained for failure to state injury after notice to defendant of the nuisance, where the notice was given fifteen days before suit was brought, and the complaint alleged injury up to the time it was filed. *Leitesey v. Columbia Water Power Co.* (S. C.) 215

3. A complaint alleging an agreement and promise to convey real estate is not demurrable because it does not expressly allege that the contract was in writing. *Van Epps v. Redfield* (Conn.) 860

4. An agreement to convey real estate appraised at \$3,800, in consideration of the release of the grantor from his liability with respect to a bastard child, when the amount of this burden does not appear, is not based on such an inadequate consideration that a bill for specific performance of the agreement to convey will be had on demurrer, but the sufficiency of the consideration will be left for determination at the trial. *Id.*

5. One suing for the full amount of an accident insurance policy which classifies risks and promises the full amount only when insured is engaged in certain business at the time of injury, must allege that he was employed in such business at the time of injury. *American Acci. Co. v. Carson* (Ky.) 801

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Pleading; averments of negligence. 294

PLEDGE. See HOMESTEAD.

POLL TAXES. See TAXES, 5.

POSTOFFICE. See SERVICE.

PRESUMPTIONS. See EVIDENCE, NOTES AND BRIEFS.

PRINCIPAL AND SURETY. See BONDS, 8.

PROXIMATE CAUSE. See also STREET RAILWAYS, 8.

Miscarriage resulting from fright caused by the negligence of another is not the proximate result of the negligence. *Mitchell v. Rochester R. Co.* (N. Y.) 781

NOTES AND BRIEFS.

Proximate cause of injury to passenger. 782

PUBLIC GROUNDS. See also LEVEES, 8-5; MUNICIPAL CORPORATIONS, 8; STATUTES, 6.

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1. The legislature has no power to divert land dedicated to a specific, limited, and definite public use to any other purpose inconsistent with such use. *St. Paul v. Chicago, M. & St. P. R. Co.* (Minn.) 184

2. A city is authorized to grant to a railroad company such rights in public grounds as the legislature itself might have granted, and such only, by Minn. Gen. Stat. 1894, § 2680, authorizing the corporate authorities of any city to grant, sell, convey, or lease any public grounds within the corporate limits to any railroad corporation. *Id.*

3. Although a grant of special privileges on land dedicated to a particular public use is always subject to the implied condition that it may be revoked whenever the needs of the public require it, and the state or municipality has a large discretion in determining when such a condition arises, such a grant, when rightfully made and acted upon, cannot be revoked at the mere arbitrary pleasure of the state or the municipality. *Id.*

PUBLIC IMPROVEMENTS. See also CONSTITUTIONAL LAW, 18.

1. Power to assess railroad real estate for local improvements is conferred by a statute for the equalization of the public burden, which provides that railroad property, with certain exceptions, shall be subject to "taxation by ordinances for city purposes." *Philadelphia v. Philadelphia & E. R. Co.* (Pa.) 564

2. A strip of land 1,500 feet wide along a river bank and used by a railroad company as a coal and ore terminal is not all exempt from taxation as roadbed although a large part of it is covered with tracks. *Id.*

3. A yard owned and used by a railroad company as a coal and ore terminal may be sold to satisfy a tax lien, but the purchaser will take subject to the easement of the company to operate its tracks over the property. *Id.*

4. A special tax on land in a levee district, which is especially benefited by a levee for which the tax is made, is a tax within Tenn. Const. art. 2, § 28, requiring taxes to be levied on all property, real, personal, and mixed, and levied according to value. *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 725

NOTES AND BRIEFS.

Public improvements; assessments on railroad property. 565

Taxation by corporation created for. 726

PUBLIC MONEYS. See also COUNTIES, 4, 5.

The use of county funds to make a donation to a state institution for the feeble-minded, in order to secure its location within that county, is for a public purpose and may be authorized by the legislature. *Lund v. Chippewa County* (Wis.) 181

NOTES AND BRIEFS.

Public moneys; liability of officer for; deposit in bank. 679

Public purposes for which it may be used. 818

PUNISHMENT. See CRIMINAL LAW, NOTES AND BRIEFS.

QUORUM. See COURTS, 1, NOTES AND BRIEFS.

RAILROADS. See also CARRIERS, 8; COMMERCE, 2, 3; CORPORATIONS, 5, 6; EMINENT DOMAIN, 3; EVIDENCE, 28; EXPLOSIONS; LEVEES, 8, 5, 6; LIENS, 4, 5; NEGLIGENCE, 4; PUBLIC GROUNDS, 2; PUBLIC IMPROVEMENTS, 1-3; RECEIVERS; TRIAL, 8-10.

1. A lease by a railroad company without clear and specific statutory authority is utterly void. *Van Steuben v. Central R. Co. (Pa.)* 577

2. Authority to a street-railway company to cross any railroad operated by steam or otherwise does not give power to cross elsewhere than at points where the railroad is crossed by a street or highway when other sections of the street-railway charter confine the adoption of its route to established streets and public highways. *Northern C. R. Co. v. Harrisburg & M. Electric R. Co. (Pa.)* 572

3. A railroad right of way is property which the company may protect from unlawful invasion by a street-railroad company which seeks to establish a crossing over it. *Id.*

4. Constructing a street railway on a viaduct 100 feet long and 22 feet high over a railroad company's right of way, and operating cars thereon, are such an invasion of the rights of the railroad company as will entitle it to maintain a suit to restrain it. *Id.*

NOTES AND BRIEFS.

See also NEGLIGENCE; PUBLIC IMPROVEMENTS.

Railroad; duty as to sounding whistles. 182

Right of street railway to cross. 573

Liability for injury caused by lessee. 577

RATIFICATION. See ESTOPPEL, 2.

RECEIVERS. See also BANKS, 2; CONFLICT OF LAWS, 6; CORPORATIONS, 10; EVIDENCE, 5.

Preference to railroad mortgagees is not gained by payment of a judgment against the railroad company for damages, when it is paid after its affirmance on appeal by the surety on a supersedeas bond who signed it when the mortgage was in existence and no default had been made upon it and when the railroad company was apparently solvent, although the bond may have benefited the mortgagees by preventing a levy on the railroad which might have worked detriment to them directly and indirectly as substantial owners of the property. *Whitely v. Central Trust Co. (C. C. App. 6th C.)* 808

RECORDS. See also MANDAMUS, 1; VOTERS AND ELECTIONS, 3, 4.

NOTES AND BRIEFS.

Records; right of citizen to inspect. 144
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REGENTS. See MANDAMUS, 2; STATE UNIVERSITY.

REGISTERED LETTER. See SERVICE.
RELEASE.

NOTES AND BRIEFS

As affecting right of action for death. 788

RELIGIOUS SOCIETIES.

1. A majority of the members of an absolutely independent congregation cannot exercise the authority to remove officers whose term is indefinite, except by acting in compliance with the rules and discipline of the church. *Long v. Harvey (Pa.)* 169

2. A meeting held by a majority of the members of an independent congregation of the "Disciples of Christ," which is presided over by a clergyman of another congregation and held under a call directed by a tribunal of the elders of sister congregations to whom the majority appealed, and which was held in front of the church because the elders belonging to the minority had closed and locked its doors, when the laws or rules of the church do not provide for such proceeding, is wholly without authority to depose the old officers or elect new ones, but their remedy is by assertion of their rights as members of the congregation. *Id.*

NOTES AND BRIEFS.

Religious societies; laws of; power of majority. 170

REPLEVIN.

1. For the enhancement by a trespasser of the value of timber which he manufactures into lumber, a licensee having the right to cut and remove the timber must repay him in order to recover the lumber or its value, since if he adopts or ratifies the trespasser's acts in severance of the timber he must adopt them in full. *Keystone Lumber Co. v. Kolman (Wis.)* 821

2. A licensee under an unrevoked license to cut and remove timber for which he has paid full value has sufficient title in the timber to support replevin for it when wrongfully cut by a trespasser. *Id.*

NOTES AND BRIEFS.

Replevin; for timber, who may maintain. 821

REPUTATION. See EVIDENCE, 26, 27.

RES GESTÆ. See EVIDENCE, 25.

RESOLUTION. See CONSTITUTIONAL LAW, 1; MUNICIPAL CORPORATIONS; STATUTES, 4, NOTES AND BRIEFS.

RESTAURANT. See EVIDENCE, 14; FOOD.

RESUME. For résumé of contents of book see 865

RIVER FRONT. See LANDLORD AND TENANT, 2.

ROOF. See LANDLORD AND TENANT, 4, 5.

SALE.

NOTES AND BRIEFS.

Sale; recovering back purchase money for lack of consideration. 864
Implied warranty of food. 465

SCHOOLS. See also INJUNCTION, 2.

A reservation of the right to annul all contracts every fourth month, stamped across the face of a contract with a school teacher, does not entitle the school directors to dismiss him without charges, or notice, or testimony, under Mill. & V. (Tenn.) Code, § 1192, suba. 3, empowering them to dismiss a teacher "for incompetence, improper conduct, or inattention." *Thompson v. Gibbs* (Tenn.) 548

SERVICE.

1. Notice by a registered letter, provided for by Iowa Laws 1880, chap. 210, § 2, in case of notice precedent to forfeiture of insurance policies, is completed by due registration of the letter at the office from which it is to be sent. *Ross v. Hawkeys Ins. Co.* (Iowa) 466

2. A letter is not registered so as to complete service of notice by registered letter where such service is authorized, until it is numbered as required by the postal laws and regulations, although the postmaster has received it properly addressed and given a receipt therefor. *Id.*

SEWERS. See DRAINS AND SEWERS, NOTES AND BRIEFS; OIL; TRIAL, 7.

SHIPPING. See CARRIERS, 1, 2.

SITUS. See TAXES, NOTES AND BRIEFS.

SOLDIERS. See CIVIL SERVICE.

SPECIFIC PERFORMANCE. See also CONTRACTS, 9; PLEADING, 4.

A contract to convey land to be paid for in three annual instalments will not be specifically enforced nearly forty years after its execution, where there has been no valid payment of the purchase money and the land has greatly increased in value and the purchasers have become insolvent, although the vendor ten years after the execution of the contract procured a judgment for the purchase money, on which an invalid payment in full was made to the clerk of the court. *Handry v. Benlisa* (Fla.) 288

STATE. See ESTOPPEL, 5.

STATE INSTITUTIONS. See COUNTIES, 4; PUBLIC MONEY.

STATE UNIVERSITY. See also MANDAMUS, 2.

Clauses in a Constitution providing for a board of regents to be elected by the people, and to have general supervision of the state university and the control of all expenditures 84 L. R. A.

from the university interest fund, will exclude the legislature from power to designate where departments of the university shall be located. *Sterling v. Regents of the University of Michigan* (Mich.) 150

NOTES AND BRIEFS.

State university; control of; power of legislature as to. 151

STATUTES.

1. Constitutional requirements as to the style of acts or the manner of their passage are mandatory, and not directory. *Union Bank v. Oxford* (N. C.) 487

2. Failure to enter the yeas and nays on legislative journals as required by N. C. Const. art. 2, § 14, on the second and third readings of an act authorizing the creation of indebtedness by a town, renders the act void. *Id.*

3. Certificates of speakers that an act was ratified, although conclusive of the fact that it was read three several times in each house and ratified, do not show that the act was read three several days in each house and that the yeas and nays were entered on the journal as required by N. C. Const. art. 2, § 14, when the act authorizes the creation of indebtedness by a town. *Id.*

4. A mere concurrent resolution of the legislature to which the executive approval is not affixed as in case of a statute, although it is passed upon the governor's recommendation to ratify his appointment of an agent for the state, and expressly directs him to allow a certain compensation, is not an "express authority of law" which can authorize a contract which will be the basis for a claim against the state, under Cal. Const. art. 4, § 82, requiring "express authority of law" therefor, and § 15 of the same article, providing that "no law shall be passed except by bill." *Mullan v. State* (Cal.) 262

5. Tenn. Acts 1895, chap. 67, providing that specified fraudulent acts to the prejudice of hotel, inn, and boarding-house keepers, shall be misdemeanors, and declaring what shall constitute prima facie evidence of fraudulent intent in a prosecution for such acts, and authorizing the sale of baggage left by defaulting patrons,—is not unconstitutional on the ground that it embraces more than one subject. *State v. Yardley* (Tenn.) 656

Partly invalid.

6. Although Minn. Gen. Stat. 1894, § 2680, authorizing the common council of a city to sell, convey, or lease any public grounds within its corporate limits to any railroad corporation, is broad enough to authorize a city to divert lands held in trust for a particular purpose to another and inconsistent one, and is void to that extent, it is not necessarily void *in toto*. *St. Paul v. Chicago, M. & St. P. R. Co.* (Minn.) 184

7. The unconstitutionality of a provision that each member of a common council may vote for but two of the four commissioners to be chosen, and that only members of the highest and the next highest political party represented in the council shall be eligible, is so essential a part of the scheme of N. Y. Laws

1896, chap. 427, the main purpose of which was to secure a bi-partisan police board, that the whole act must fall. *Rathbone v. Wirth* (N. Y.) 408

Title.

8. Tenn. Acts 1895, chap. 67, entitled "An Act to Protect Hotel, Inn, and Boarding-House Keepers," is not unconstitutional on the ground that the title embraces more than one subject. *State v. Yardley* (Tenn.) 656

9. The subject of Tenn. Laws 1895, chap. 67, providing for the protection of hotel, inn, and boarding-house keepers, is sufficiently embraced in the title "An Act to Protect Hotel, Inn, and Boarding-House Keepers," although the means or instrumentalities for such protection are not recited therein. *Id.*

10. A provision in a statute authorizing "townships" to refund their indebtedness is within the title "An Act to Enable . . . Municipal Corporations . . . to Refund Their Indebtedness." *Rathbone v. Hopper* (Kan.) 674

11. Provisions concerning the condemnation and disposal of land by counties in relation to public improvements undertaken by the state or the United States are sufficiently covered by a title "An Act to Grant to and Prescribe Powers of Counties Relative to Public Works Undertaken or Proposed by the State or the United States." *Lancey v. King County* (Wash.) 817

Special or local laws.

12. The prohibition against local and special acts regulating county business is violated by Nev. act March 15, 1895, which attempts to create Storey county into a municipal corporation, as it unquestionably attempted to regulate the business of that county. *Schweiss v. First Judicial Dist. Ct.* (Nev.) 602

13. The requirement of Nev. Const. art. 4, § 25, that the system of county governments shall be uniform throughout the state, means that all county governments must in all essential particulars be alike, and is violated by Nev. act March 15, 1895, attempting to confer upon Storey county the full powers of a municipal corporation. *Id.*

14. A statute giving a certain county power to issue bridge bonds and levy taxes to pay them does not violate Tenn. Const. art. 11, § 8, prohibiting the suspension of general laws for the benefit of a particular individual and the granting to any individual of special rights, privileges, immunities, or exemptions. *Burnett v. Maloney* (Tenn.) 541

15. A local-option law granting charter power to all the cities of a certain class, to take effect in each city only upon the adoption of the same by such city, is in contravention of Minn. Const. art. 4, §§ 33, 34, prohibiting special legislation as to cities, and requiring all laws as to the same to be uniform in their operation throughout the state, although a local option law granting power to adopt a mere by-law or ordinance may be valid. *State, Childs, v. Copeland* (Minn.) 777

16. The right to repeal any existing special law, but not to amend, extend, or modify it, which is given by Minn. Const. art. 4, § 33 (amendment of 1891), does not include the

right to make a partial repeal of a special law, either directly or by a local-option provision which would have that effect. *Id.*

Construction.

17. A statute authorizing the granting of a warrant of attachment against one who makes a false statement in writing to obtain credit will be strictly construed in favor of those against whom it may be employed, as it is in derogation of the common law. *Penoyar v. Kelsey* (N. Y.) 248

18. A provision exempting debts already contracted from the prohibition against transfers of property to prefer creditors is not embraced within the title of Tenn. Acts 1895, chap. 128, which indicates merely the prohibition of such preferences without anything to show that it permits any preferences. *Third Nat. Bank v. Divine Grocery Co.* (Tenn.) 445

19. A prohibition of judgments by default is not within the scope of Tenn. Acts 1895, chap. 128, indicating a prohibition of preferences by "confession of judgment." *Id.*

Repeal.

20. The limitation on the taxing power of counties by the general revenue law of Tennessee, passed at the extra session of 1895, does not repeal the provision of the special act of 1895, p. 122, chap. 80, relating to the power to tax to pay bridge bonds of Knox county. *Burnett v. Maloney* (Tenn.) 541

21. A statute which does not expressly repeal, revive, or amend any former law, but states that "all laws and parts of laws in conflict" therewith are repealed, does not violate Tenn. Const. art. 2, § 17, requiring all acts which repeal, revive, or amend former laws to recite the title or substance of the law repealed, revived, or amended. *State v. Yardley* (Tenn.) 656

NOTES AND BRIEFS.

Statutes; resolution distinguished from. 262
Power of court to look behind record of. 487
Intent of legislature. 248
Partial invalidity of. 410
Embracing more than one subject; defective title. 818

STREET RAILWAYS. See also RAILROADS, 2-4.

1. A person riding between the rails of an electric-street railway upon a bicycle has the duty to look out for and endeavor to avoid danger from the electric cars. *Everett v. Los Angeles Consol. E. R. Co.* (Cal.) 850

2. The motorman of an electric car seeing a bicycle rider going on the track in front of him may assume up to the last moment that the rider will get out of the way by increasing his speed or turning aside in time to avoid the danger. *Id.*

3. The negligence of a bicycle rider who continued to ride on the track of an electric car up to the very moment when he was struck when by the slightest care and effort on his part he could have put himself out of danger up to the last moment is a contributing and efficient cause of the injury, which precludes

the conclusion that the negligence in managing the car was later in time and therefore the proximate cause of the injury. *Rossett v. Los Angeles Consol. E. R. Co.* (Cal.) 850

4. The fright of a mule caused by the unusual noise incident to running a street car by electricity, without any unnecessary noise made for the purpose of scaring the animal, does not make the street railway company liable for resulting damages. *Doster v. Charlotte Street R. Co.* (N. C.) 481

NOTES AND BRIEFS.

Street railways; use of streets by; crossing railroad. 572

Negligence in striking person by street car; contributory negligence. 350

Frightening of horse by street car;—(1) Generally; (2) by bells, gongs, and whistles; (3) by steam; (4) contributory negligence. 481

SUBCONTRACTORS. See **CONTRACTS**, 4; **INTEREST**, 2; **LIENS**, 6.

SUBWAYS. See **ELECTRICAL USES AND APPLIANCES**, 6, 7, **NOTES AND BRIEFS**.

SUNDAY. See **COMMERCE**, 3; **CONSTITUTIONAL LAW**, 11, **NOTES AND BRIEFS**.

SUPERVISOR. See **OFFICERS**, 5.

SURVIVAL. See **DEATH**, 2.

TAXES. See also **CONSTITUTIONAL LAW**, 10; **COUNTIES**, 8; **LEVIES**, 2; **MANDAMUS**, 8; **MORTGAGE**, 2; **MUNICIPAL CORPORATIONS**, 9; **PUBLIC IMPROVEMENTS**, 4; **STATUTES**, 14, 20.

1. The constitutional rule of uniformity in taxation is not violated by a statute authorizing a county to make a donation to secure the location of a state institution within the county, although that county as well as others will be taxed for its maintenance. *Lund v. Chippewa County* (Wis.) 181

2. A tax on any property *in specie* or by the acre is contrary to Tenn. Const. art. 2, § 28, requiring all property to be taxed according to its value. *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 725

3. A tax on land alone in a certain levee district, but excepting land under water, violates Tenn. Const. art. 2, § 28, requiring all property, real, personal, or mixed, to be taxed. *Id.*

4. The assessment and taxation of judgments rendered by the courts of a state in favor of and owned by citizens of other states is not authorized by Kan. Gen. Stat. 1889, chap. 107, § 1, providing generally for the taxation of all property in the state and mentioning judgments among other classes of taxable personal property. *Kingman County v. Leonard* (Kan.) 810

5. Nontaxable property cannot be sold for the payment of a poll tax, under Miss. Const. § 243, which makes said tax "a lien only upon taxable property," as this section is a part of the article on franchise and is intended to be a clog upon the franchise more than a means of revenue. *Ratliff v. Beale* (Miss.) 472

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6. The average amount of live stock which cattle dealers have each week, although usually sold within one day after they are received, and most of them are brought from other states, constitutes property within the state which can be taxed under Md. Code, art. 81. *Myers v. Baltimore County* (Md.) 309

7. The intent of dealers in cattle to export part of them, and the fact that they do export about two thirds of all which they handle, do not prevent the taxation of such cattle to the average amount that they have on hand. *Id.*

8. Notice of a new assessment or of an increase of taxation required by Md. Code, art. 81, § 145, is necessary in order to sustain such new or increased tax. *Id.*

Transfer tax.

9. Bonds issued by the United States were not intended to be made subject to tax by the New York transfer tax act of 1892 as property over which the state "has any jurisdiction for the purposes of taxation." *Re Whiting's Estate* (N. Y.) 232

10. Bonds of a foreign corporation, as well as bonds and certificates of stock of domestic corporations, when deposited in a safe deposit vault within the state, although owned by a nonresident, are "property within the state," within the meaning of the New York transfer tax act of 1892. *Id.*

11. Bonds of a domestic corporation, which are in another state in possession of a nonresident owner, are "not property within the state," within the meaning of the New York transfer tax act of 1892, imposing a tax on the transfer from a nonresident decedent of property within the state. *Re Bronson's Estate* (N. Y.) 233

12. Shares of capital stock of a domestic corporation, although the certificates are in another state in possession of a nonresident owner, constitute "property within the state," within the meaning of the New York transfer tax act of 1892, taxing a transfer of property within the state from a nonresident decedent. *Id.*

13. Money of a nonresident deposited by him in a bank within the state, although commingled with trust funds in an account opened by him as trustee, constitute "property within the state," within the meaning of the New York transfer tax act of 1892, which includes property of a nonresident decedent if within the state. *Houdayer's Estate* (N. Y.) 235

NOTES AND BRIEFS.

See also **MUNICIPAL CORPORATIONS**.

Taxes; uniformity of; delegation of power of. 726

Situs of personal property for; on personal property of nonresidents. 232, 236, 238, 810

On stock in trade; on property to be exported. 309

On mortgages. 306

Imprisonment for nonpayment. 654

TELEGRAPHS. See also **CONFLICT OF LAWS**, 2; **DAMAGES**, 4, 5; **EVIDENCE**, 9.

1. A stipulation limiting the liability of a telegraph company for errors and mistakes in

the transmission of an unrepeatable message is not valid so far as it applies to mistakes caused by negligence of the telegraph operators. *Reed v. Western U. Tele. Co. (Mo.)* 492

2. A rule of a telegraph company not to deliver messages outside a half mile limit cannot be set up to excuse a delay in delivering a message sent to a small town a few miles away, summoning a minister of the gospel to a person near death, when the rule was not known to the sender, and was not mentioned by the agent, who received the message about dark, stating that it could be delivered that night. *Western U. Tele. Co. v. Robinson (Tenn.)* 481

8. Mental anguish of a father caused by the failure of a minister to reach his daughter until after she was dead, when he had telegraphed for him because of her desire for baptism and union with the church, is not without foundation merely because complete church membership could not have been consummated during her life, but may be the basis of a cause of action against the telegraph company. *Id.*

NOTES AND BRIEFS.

Telegraphs; limits for delivery of telegrams. 481

Interstate business of; liability for mistakes; restricting liability. 492

THREATS. See also **LIBEL AND SLANDER**,
NOTES AND BRIEFS.

The name and signature of a claimant agency subscribed to threatening letters and circulars which are sent in violation of Mo. Rev. Stat. 1889, § 8782, are entirely immaterial to the offense of the persons who sent them. *State v. McCabe (Mo.)* 127

TIMBER. See **REFLEVIN**.

TIME.

The disability of a plaintiff during a portion of the period allowed for the performance of a condition precedent to the maintenance of an action will not extend the time of performance, provided a reasonable time remains within that period after the removal of the disability. *Hastings v. Foxworthy (Neb.)* 821

TOWNS. See also **BONDS**, 7; **EVIDENCE**, 2; **JUDGMENT**, 1; **STATUTES**, 10.

NOTES AND BRIEFS.

Towns; as municipalities; powers of. 674

TRADEMARK.

1. The use of the same names for varieties of candy by one who is charged with infringing a trademark on the boxes of which such names do not form a part does not sustain a charge of infringement of such trademark, but it can be complained of only as an attempt to represent the goods as those of the other party. *P. O. West Co. v. Weeks (Pa.)* 172

2. Similarity in the size and shape of boxes for confectionery which are obtained from box manufacturers and are sold to the trade with-
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out discrimination and known as "stock boxes" will not justify a finding in a trademark case that they were selected for an improper or fraudulent purpose. *Id.*

3. The letters "W. H. W." printed in script, in white, in a horizontal line upon a red background, on boxes of confectionery, do not infringe a trademark which, as registered in the United States patent office, is described as the letters "P. C. W." generally arranged to appear as script, printed in a horizontal line upon a background of "any suitable color," distinctly stating that other forms of letters may be employed or that they may be differently arranged, and that the essential features are the letters "P. C. W." *Id.*

NOTES AND BRIEFS.

Trademarks; infringement of label. 172

TRANSFER TAX. See **TAXES**, 9, 18.

TRESPASS.

NOTES AND BRIEFS.

Trespass; imprisonment for debt in case of. 641

TRIAL. See also **WITNESSES**, 1.

1. Tenn. Laws 1895, chap. 67, providing that proof of certain things enumerated shall be prima facie evidence of fraudulent intent in procuring accommodations at a hotel, inn, or boarding-house, which is made a misdemeanor, does not violate Tenn. Const. art. 1, §§ 6, 8, 9, guaranteeing the right of trial by an impartial jury. *State v. Yardley (Tenn.)* 656

2. A stockholder in a corporation which owns stock in another company is disqualified to act as juror in an action against the latter company. *McLaughlin v. Louisville Electric Light Co. (Ky.)* 812

3. The question whether an entire contract was reduced to writing, or an independent collateral agreement was made, is one of fact for the jury where there is any evidence to sustain a contention upon the point. *Hines v. Wilcox (Tenn.)* 824

4. Whether a legal injury is pleaded by alleging the vacation of a part of a street at some distance from one's property is a question of law for the court, and not a question for the jury. *Danteer v. Indianapolis U. R. Co. (Ind.)* 709

5. An instruction as to the duty of a municipality in respect to a walk, which says it must be kept "in a safe condition" for public travel, ought to be changed to say that the duty in that respect is to use reasonable and ordinary care. *Hall v. Manson (Iowa)* 207

6. An instruction that plaintiff is "entitled" to exemplary or punitive damages if the injury was malicious is error, since such damages cannot be claimed as matter of law, but only in the discretion of the jury. *Robinson v. Superior Rapid-Transit R. Co. (Wis.)* 205

7. The jury must be permitted to pass upon the question of due care by a municipal corporation which in midsummer turns a large quantity of crude petroleum into a public sewer the natural outlet of which is obstructed.

and leaves it four days without taking any precautions to avoid a resulting explosion. *Fuchs v. St. Louis* (Mo.) 118

8. When the jury have found that defects existed in an engine of which the owner had knowledge a sufficient time to have remedied them before an explosion which injured a bystander, they need not find further facts which raise the inference that the accident arose from the want of some precaution which the owner of the engine ought to have taken, since the question of his duty to have avoided the injury becomes one of law. *Louisville, N. A. & C. R. Co. v. Lynch* (Ind.) 293

9. Evidence that a certain engine which passed at the time a fire started threw sparks to an unusual distance is sufficient to go to the jury, on the question whether or not such engine caused the fire, notwithstanding testimony that such engine was provided with a sufficient spark arrester. *Van Steuben v. Central R. Co.* (Pa.) 577

10. The testimony of a witness that she had seen the engine claimed to have set a fire on different occasions throw large coals should not be taken from the jury, notwithstanding she testifies on cross-examination that she was mistaken, where the reason she gives for her mistake is unsatisfactory. *Id.*

11. General instructions as to the ultimate conclusion of negligence are not proper where a special verdict is required. *Louisville, N. A. & C. R. Co. v. Lynch* (Ind.) 293

12. Instructions to a jury are sufficient if they properly state the law when considered as a whole and construed together. *Debney v. State* (Neb.) 851

13. Refusal to give an instruction that declarations by a creditor that any debt that had existed was discharged is prima facie evidence of payment is properly refused when the declarations in evidence may be referred as much to the question of the existence of the contract as to that of payment. *Hay v. Peterson* (Wyo.) 581

14. Facts gathered from several findings of a special verdict, although not stated in logical or consecutive order, must be considered as an entirety, and not in fragmentary parts. *Louisville, N. A. & C. R. Co. v. Lynch* (Ind.) 293

15. A verdict for plaintiff in an action to recover for injuries caused by negligence cannot be found upon grounds not alleged in the declaration. *Mitchell v. Prange* (Mich.) 182

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Trial; sufficiency of evidence to go to jury. 577

TRUSTS. See also INCOMPETENT PERSONS, 2-4; TAXES, 13.

One who makes a voluntary deed for his own benefit cannot remove his act except subject to the approval of a court having jurisdiction of such matters. *Neal v. Black* (Pa.) 707

NOTES AND BRIEFS.

See also BANKS.

Trust; revocation of; necessity of approval by court. 716

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TWO THIRDS. See PARLIAMENTARY LAW, 2; VOTERS AND ELECTIONS, 5, 6.

UNIVERSITY. See STATE UNIVERSITY.

USURY. See BUILDING AND LOAN ASSOCIATIONS, 3, 4.

VENDOR AND PURCHASER.

1. A grantor of real estate has no implied equitable lien thereon for the unpaid purchase money after he has delivered an absolute deed to the property and placed the grantee in possession. *Frame v. Sliter* (Or.) 690

2. An implied vendor's lien in favor of a judgment for damages for breach of indefinite, continuing covenants in a conveyance cannot arise under Ky. Gen. Stat. chap. 63, art. 1, § 24, denying a lien for unpaid purchase money unless the deed states what part of the consideration remains unpaid. *Whiteley v. Central Trust Co.* (C. C. App. 6th C.) 803

NOTES AND BRIEFS.

As to vendors' liens. 690

VETERANS. See CIVIL SERVICE.

VOTERS AND ELECTIONS. See also BONDS, 6; MANDAMUS, 1.

1. The qualifications of voters at municipal elections may be prescribed by the legislature, as by requiring them to be taxpayers, in the absence of any constitutional provision to the contrary. *Hanna v. Young* (Md.) 55

2. The right to vote "at all elections," given by Md. Const. art. 1, § 1, to every male citizen of full age "who has been a resident of the state for one year and of the legislative district of Baltimore city, or of the county in which he may offer to vote, for six months," does not extend to municipal elections outside of the city of Baltimore. *Id.*

3. No citizen other than the proper officials has a right to inspect and take memoranda from so much of the records of the electoral board as relates to the preparation and printing of the official ballots, certification of the same and their distribution to the judges of election of the several precincts. *Gleason v. Terry* (Va.) 144

4. So much of the records of the electoral board as relates to the appointment and removal of judges and commissioners of election and registers or the ordering of a new registration may be inspected and copied by citizens. *Id.*

5. An ordinance providing for the submission to the voters of the question whether or not park bonds shall be issued, at a specified general election, and authorizing the issuance of the bonds "in the event that two thirds of those voting at said election shall vote in favor," requires a favorable vote of two thirds of all those voting at the general election. *Belknap v. Louisville* (Ky.) 256

6. Two thirds of the voters voting at an election to be held for that purpose, whose assent is necessary to authorize municipal indebtedness, means two thirds of all the votes

cast for any purpose at the election, where but one election can be held during the year, at which all questions to be submitted to the voters must be decided. *Id.*

Ballots.

7. A statute prohibiting the name of any candidate for office from being placed on the official ballot more than once is within legislative discretion, and does not violate the constitutional rights of electors. *State, Bateman, v. Bode* (Ohio) 498

8. The name of a person as candidate for an elector of President and Vice President cannot appear in more than one place upon the official ballot, under Wyo. Laws 1890, chap. 80, § 104, which provides for no party headings or columns set apart for separate parties, but requires the ballot to name the party or principle represented by a candidate in connection with his name. *State, Blydenburgh, v. Burdick* (Wyo.) 845

9. The name of a candidate nominated by certificate of electors in place of a person previously nominated in the same way but who has declined should be given the same place upon the ballot that the prior nominee would have been entitled to. *Id.*

10. Adding his party designation, i. e., "Independent Democrat," to the name of a candidate written upon a ballot in the same way that party designations follow the names of candidates in the printed list as required by Cal. Pol. Code, § 1191, does not destroy the legality of the ballot when it was manifestly not intended as a distinguishing mark. *Jennings v. Brown* (Cal.) 45

11. The grouping of candidates for presidential electors is to be made by the county clerk, and not by the secretary of state, under Wyo. Laws 1890, chap. 80, § 104, providing that the names of such electors presented in one certificate shall be arranged in a separate group, but the secretary must so certify the names and description of the candidates as to convey to the clerk all knowledge requisite to such grouping. *State, Blydenburgh, v. Burdick* (Wyo.) 845

12. The protest of a nonresident candidate for Vice President against printing his name on a ticket of presidential electors named by a state convention, without attempting to decline the national nomination or even withdrawing as a candidate in that state, is not a withdrawal "from nomination" within the meaning of Kan. Sess. Laws 1893, chap. 78, § 8, and does not preclude the use of his name on such ballot. *Breidenthal v. Edwards* (Kan.) 146

Nominations.

13. Nominations cannot be made by a petition filed with a county clerk and recorder so as to entitle the names of the nominees to be placed upon an official ticket as candidates of a party. *State, Russell, v. Tooker* (Mont.) 315

14. Nominations by a self-constituted county committee of an alleged party cannot be made so as to appear on an official ticket when no power has been delegated to such committee by any convention of the party. *Id.*

15. A nomination by a political club cannot be recognized as that of a county convention when the participants did not consider

themselves a convention, and the minutes kept were those of the club, and there had been no call or notice of a convention nor any election of delegates, and no primaries had been held. *Id.*

16. The validity of a nomination made by a chairman of the state committee of a political party with 100 associates, to fill vacancies in the list of presidential electors nominated in the same manner, when not in violation of statute, cannot be contested by the committee of an entirely distinct political party. *Id.*

17. The exclusion from the signers of a certificate of electors to nominate candidates by Wyo. Laws 1890, chap. 80, § 89, of those persons who have joined in a certificate nominating other candidates for the same office, does not apply to persons who have participated in the nomination of other persons through primaries, but only those who have joined in nominations by certificate. *Id.*

18. A county convention whose nominees will have a right to appear on an official ballot cannot be held by twenty-one persons coming from but one fourth of the precincts in the county, who met and assumed to form a new party without any credentials or election as delegates, or any call for a convention, or any notice except by word of mouth. *State, McCall, v. Johnson* (Mont.) 818

19. A state convention nominating candidates will not be recognized so as to permit the names of the nominees to appear on an official ballot when it was held by only twenty-one persons representing only one fourth of the precincts of a single county, who met without any call for a convention, or any notices given except by word of mouth, or any election as delegates, or any credentials, and immediately assumed to form a new party and organize themselves into a county convention and then on the same evening into a state convention. *Id.*

20. Neither the party appellation nor the names of the presidential and vice presidential candidates added thereto by authority of law and properly appearing in the certificate of nominations made under Kan. Sess. Laws 1893, chap. 78, § 6, can be omitted by the secretary of state from his certificate of such nominations to the county clerks under § 18. *Breidenthal v. Edwards* (Kan.) 146

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Validity of nominations; nominations by certificate or convention. 816

Restricting names on official ballot. 498

Right to vote at municipal election. 55

What constitutes majority; two thirds of voters. 256

WALLS. See BUILDINGS, NOTES AND BRIEFS.

WAREHOUSEMEN. See LEVEES, 3-6

WATERS. See also CONTRACTS, 11, 12; DAMS, 1, 2; ESTOPPEL, 3; MUNICIPAL CORPORATIONS, 5, 7.

1. No one who does not infringe or threaten to infringe the exclusiveness of a

grant of the right to use the streets of a city for water pipes can be heard to allege its invalidity because of its exclusiveness, after the works have been constructed and the contract has been substantially performed by the grantee. *Illinois Trust & Sav. Bank v. Arkansas City* (C. C. App. 8th C.) 518

2. The invalidity of the exclusive grant by a city of the right to use its streets to conduct water to its inhabitants is no defense to an action for rent which the city has promised to pay the grantee for the use of hydrants, after the works have been constructed according to the contract and have been accepted by the city. *Id.*

WILLS. See also PARENT AND CHILD.

A will is not revoked by subsequent marriage alone without the birth of issue, although the wife has been given by statute the right to inherit from her husband. *Re Hullett's Estate* (Minn.) 384

NOTES AND BRIEFS.

Wills; revocation of, by marriage. 335

Gift to "lawful issue;" right of adopted child. 500

34 L. R. A.

WIRE. See ELECTRICAL USES AND APPLICATIONS.

WITNESSES. See also PARDON, 1.

1. Leading questions may be permitted where the only objection is that they are irrelevant and immaterial. *Yock v. Home Mut. Ins. Co.* (Cal.) 857

2. A witness called by both parties may be impeached by the party first calling him by proof of his contradictory statements as to a matter to which he testified only when cross-examined as the witness of the other party. *Hall v. Manson* (Iowa) 207

3. An executor may call one who is suing on a claim against the estate as a witness and compel him to testify as to transactions with the testator, although the statute forbids the claimant to support his claim by his own testimony in the first instance. *Hay v. Peterson* (Wyo.) 581

YEAS AND NAYS. See STATUTES, 2, &

L. R. A. CASES AS AUTHORITIES.

CASES IN 34 L. R. A.

34 L. R. A. 33, *ABBOTT v. DOANE*, 163 Mass. 433, 47 Am. St. Rep. 465, 40 N. E. 197.

New promise as to existing contract.

Cited in *Monnahan v. Judd* 165 Mass. 100, 42 N. E. 555, raising but not deciding, question whether agreement to pay back wages to servant employed by third person without authority, if servant would continue work, constituted independent promise; *Wetherill Bros. v. Erwin & W. Co.* 12 Pa. Super. Ct. 270, enforcing promise to pay rebate on sale of goods, where made on compromise of ambiguous executory contract; and referring particularly to annotation in 34 L. R. A. 33.

Cited in footnote to *Olmstead v. Latimer*, 43 L. R. A. 685, which holds invalid, extension of time to pay mortgage without new consideration.

34 L. R. A. 45, *JENNINGS v. BROWN*, 114 Cal. 307, 46 Pac. 77.

Election law.

Cited in *Packwood v. Brownell*, 121 Cal. 480, 53 Pac. 1079, holding that failure to open polls at sunrise in accordance with mandatory provision of statute does not invalidate precinct vote where substantial compliance is made in good faith.

— Distinguishing marks.

Cited in *Parker v. Hughes*, 64 Kan. 241, 56 L. R. A. 279, 91 Am. St. Rep. 216, 67 Pac. 637 (concurring opinion), majority upholding ballots on which same candidate's name, appearing in columns of two parties, was twice marked with cross; *Patterson v. Hanley*, 136 Cal. 269, 68 Pac. 821, holding that cross mark after words "no nomination" invalidates ballot.

Cited in note (47 L. R. A. 808, 841) on marking official ballot.

34 L. R. A. 46, *PEOPLE ex rel. LYNCH v. BUDD*, 114 Cal. 168, 45 Pac. 1060.

Duration of term of appointee to vacant elective office.

Cited in *People ex rel. Murphy v. Col.* 132 Cal. 337, 64 Pac. 477, holding that county auditor appointed until "next general election" holds office until next election of county officers, irrespective of intervening general election.

Distinguished in *People ex rel. Webster v. Babcock*, 123 Cal. 309, 55 Pac. 1017, holding appointee to position of school superintendent, until "next regular election," holds only until next general election, and not until expiration of term when office regularly filled.

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Sequence in executive authority.

Cited in *State ex rel. Hardin v. Sadler*, 23 Nev. 358, 47 Pac. 450, holding president *pro tempore* of senate follows lieutenant governor in case of vacancy of governor's chair.

34 L. R. A. 49, *SMITH v. SMITH*, 22 Colo. 480, 55 Am. St. Rep. 142, 46 Pac. 128.

Disposition of property to defeat wife's rights.

Cited in *Smith v. Smith*, 24 Colo. 528, 65 Am. St. Rep. 251, 52 Pac. 790, setting aside deeds by husband to children, withheld from record until his death, where he meanwhile enjoyed full use of property; *Arnegard v. Arnegard*, 7 N. D. 486. 41 L. R. A. 262, 75 N. W. 797, setting aside deed of homestead to son on eve of second marriage, where not recorded and wife ignorant thereof.

Distinguished in *Phillips v. Phillips*, 30 Colo. 519, 71 Pac. 363, holding delivery of deeds by husband to his daughters, gift not being in contemplation of death, valid as against wife.

34 L. R. A. 55, *HANNA v. YOUNG*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674.

Validity of election regulations.

Cited in *State ex rel. Porter v. Crook*, 126 Ala. 610, 28 So. 745, raising, but not deciding, question whether constitutional provisions relating to suffrage and elections refer exclusively to elections of public officers by the people.

34 L. R. A. 58, *OPINION OF THE JUSTICES*, 166 Mass. 589, 44 N. E. 625.

Preference of veterans in civil service.

Cited in *People ex rel. Kenny v. Folks*, 89 App. Div. 180, 85 N. Y. Supp. 1100 (concurring opinion), majority upholding statute forbidding removal of veteran from municipal office, except on notice and hearing; *Goodrich v. Mitchell*, 68 Kan. 771, 64 L. R. A. 947, footnote p. 945, 75 Pac. 1034, sustaining statute giving preference to honorably discharged soldiers and sailors.

34 L. R. A. 62, *WOODLAND OIL CO. v. CRAWFORD*, 55 Ohio St. 161, 44 N. E. 1093.

Oil and gas leases.

Cited in *Brown v. Fowler*, 65 Ohio St. 521, 63 N. E. 76, holding instrument granting land for purpose of operating thereon for oil and gas is lease, and not mere license; *Harris v. Ohio Oil Co.* 57 Ohio St. 129, 48 N. E. 502, holding vested interest in land held under oil lease not forfeited by breach of implied covenant reasonably to operate wells; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 134, 71 N. E. 281, holding grant of oil, requiring payment of annual rental if well not drilled in specified time, to be lease at annual rental, at option of lessee, after expiration of time for drilling well.

Cited in footnote to *Paul v. Cragnas*, 47 L. R. A. 540, which holds lease, and not license, created by "lease" of undivided mine interest to party agreeing to work same on royalty.

— Forfeitures.

Cited in *Northwestern Ohio Natural Gas Co. v. Browning*, 15 Ohio C. C. 89, holding lessee entitled to reasonable time after expiration of period limited in lease, within which to drill well.

Cited in footnotes to *Parish Fork Oil Co. v. Bridgewater Gas Co.* 59 L. R. A. 566, which holds oil lease forfeited by abandonment of well, subsequently caving in for want of protection; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 62 L. R. A. 895, which holds that equity may enforce contract for right to explore for oil or gas on a tract of real estate, where it would be against equity to permit lessee longer to assert title.

— **Options.**

Cited in *Bettman v. Shadle*, 22 Ind. App. 548, 53 N. E. 662, holding payment of rent to time of surrender bars damages for failure to bore well, under lease giving lessee option.

Distinguished in *Van Etten v. Kelly*, 66 Ohio St. 611, 64 N. E. 560, denying right of action for rent to lessor on lease giving option to lessee to operate or pay rent under penalty of forfeiture, though no operations put into effect.

— **Liability of assignee.**

Cited in *Thoms v. Meader*, 6 Ohio N. P. 243, holding lessee's assignee for benefit of creditors cannot, by mere abandonment of premises, escape liability on lessee's covenants in oil lease, accepted as part of assets.

Cited in note (33 L. R. A. 847) on liability for rent on oil and gas lease.

Liability of assignee of leasehold for rent.

Cited in footnotes to *Louisville Trust Co. v. Gaertner*, 45 L. R. A. 513, which upholds statutory lien for rent on property of assignee of lease; *Springer v. De Wolf*, 56 L. R. A. 465, which denies assignee's power to absolve himself from liability to lessor for rent by assigning lease to third person.

34 L. R. A. 68, *TACOMA v. KRECH*, 15 Wash. 296, 46 Pac. 255.

Class legislation, and Sunday and holiday law.

Cited in *Dennis v. Moses*, 18 Wash. 574, 40 L. R. A. 309, 52 Pac. 333, denying constitutionality of statute limiting remedies on debt secured by mortgage to the property mortgaged; *Denver v. Bach*, 26 Colo. 533, 46 L. R. A. 850, 58 Pac. 1089, holding ordinance forbidding sales of clothes on Sunday, void.

Cited in footnotes to *Watson v. Thomson*, 59 L. R. A. 602, which denies city's power to prevent carrying on of lawful avocation on Christmas day; *State v. Ray*, 60 L. R. A. 634, which holds unauthorized, ordinance for closing stores at 7:30 P. M., except Saturdays; *State ex rel. Hoffman v. Justus*, 64 L. R. A. 510, which sustains statute prohibiting keeping butcher shops open on Sunday, though authorizing sale of confectionery and tobacco.

Distinguished in *Morris v. Stout*, 110 Iowa, 662, 50 L. R. A. 99, 78 N. W. 843, upholding statute making it misdemeanor to marry a woman to escape prosecution for seduction and thereafter desert her.

Disapproved in *State v. Sopher*, 25 Utah, 324, 60 L. R. A. 470, 95 Am. St. Rep. 845, 71 Pac. 482, and *Ex parte Northrup*, 41 Or. 495, 69 Pac. 445, upholding act forbidding Sunday barbering.

Overruled in *State v. Nichols*, 28 Wash. 637, 69 Pac. 372, upholding statute forbidding, with certain exceptions, opening of offices or stores for business on Sunday.

34 L. R. A. 69, CHEEVER v. PITTSBURG, C. & L. E. R. CO. 150 N. Y. 59, 55 Am. St. Rep. 646, 44 N. E. 701.

Judgment for plaintiff on verdict in third trial affirmed in 50 App. Div. 423, 64 N. Y. Supp. 65.

Constructive notice; duty of inquiry.

Cited in *Western Nat. Bank v. Faber*, 29 Misc. 470, 62 N. Y. Supp. 82, upholding corporate note discounted for president by bank without inquiry, where proceeds received by corporation customarily making notes in such form; *Buffalo Loan, Trust & S. D. Co. v. Medina Gas & Electric Light Co.* 12 App. Div. 206, 42 N. Y. Supp. 781, holding failure of lender to secretary of corporation on faith of its bonds to inquire as to his authority to receive the money not fatal to recovery on the bonds if he had such authority; *Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 53 App. Div. 636, 65 N. Y. Supp. 757, holding bad character of depositor and fact that account was opened as trustee insufficient to put bank on inquiry as to title to bonds deposited to secure loan; *Union Nut & Bolt Co. v. Doherty*, 32 Misc. 498, 66 N. Y. Supp. 405, holding inquiry showing makers of note given "for merchandise" to be in transportation business insufficient to inform taker that it was made outside scope of business; *Ketcham v. Govin*, 35 Misc. 376, 71 N. Y. Supp. 991, enforcing check taken by endorsee in course of business, though procured by payee by fraud, of which no notice chargeable to endorsee; *Rochester & C. Turnp. Road Co. v. Paviour*, 164 N. Y. 284, 52 L. R. A. 794, 58 N. E. 114, holding payee of corporate checks drawn by treasurer in payment of individual debt chargeable with knowledge of fraud; *First Nat. Bank v. Weston*, 25 App. Div. 418, 49 N. Y. Supp. 542, holding discount procured by payee of note bearing indorsement of firm by single member gives discounting bank notice of accommodation indorsement; *Eldridge v. Husted*, 24 Misc. 179, 52 N. Y. Supp. 681, holding evidence that principal did not receive proceeds of note admissible against party taking note without inquiry from agent pretending to have authority; *Citizens' Bank v. Rung Furniture Co.* 76 App. Div. 474, 78 N. Y. Supp. 604, holding purchaser of note charged with notice of its infirmity by circumstances sufficient to put him upon inquiry; *Second Nat. Bank v. Weston*, 172 N. Y. 255, 64 N. E. 949, holding makers of accommodation notes liable to discounting bank, which acted with due care and without notice.

Cited in footnote to *Lamson v. Beard*, 45 L. R. A. 822, which holds brokers taking from bank president drafts signed by him for individual debt not bona fide purchaser.

Questions for jury.

Cited in *Cheever v. Pittsburgh, S. & L. E. R. Co.* 28 App. Div. 88, 50 N. Y. Supp. 1067, holding notice and good faith of purchaser questions for jury, where face of paper and previous dealings of parties sufficient to put taker on inquiry; *Wright v. Bartholomew*, 66 App. Div. 362, 72 N. Y. Supp. 706, holding good faith of party purchasing from person of suspicious character, notes fraudulently obtained, question for jury; *First Nat. Bank v. Weston*, 24 App. Div. 233, 48 N. Y. Supp. 403, holding good faith of bank discounting accommodation note made by single member of partnership, question for jury, where evidence thereof given by plaintiff; *Second Nat. Bank v. Weston*, 161 N. Y. 525, 76 Am. St. Rep. 283, 55 N. E. 1080, Reversing 31 App. Div. 405, 52 N. Y. Supp. 315, holding constructive notice of accommodation not imputable as matter of law to discounting bank by notice that firm note, issued by one member, had been "renewed" to makers; *Bank*

of *Monongahela Valley v. Weston*, 172 N. Y. 268, 64 N. E. 946, holding that rate of discount of note with accommodation indorsement cannot be submitted to jury to impeach good faith of bank discounting it; *Valley Sav. Bank v. Mercer*, 97 Md. 479, 55 Atl. 435, holding submission of question of good faith of purchaser of note to jury, after instruction that there was no evidence in case showing bad faith, erroneous.

Burden of proof.

Cited in *Blair v. Hagemeyer*, 26 App. Div. 224, 49 N. Y. Supp. 965, holding burden on maker to show notice to purchaser, in due course, of note alleged to have been diverted by payee; *Perth Amboy Mut. Loan, Homestead & Bldg. Asso. v. Chapman*, 80 App. Div. 562, 81 N. Y. Supp. 38, holding proof of circumstances tending to arouse suspicion of gross negligence insufficient, in absence of proof of bad faith, in action to recover bonds alleged to have been fraudulently obtained by defendant's vendor; *Karsch v. Pottier & S. Mfg. & Improv. Co.* 82 App. Div. 233, 81 N. Y. Supp. 782, holding burden of proving *ultra vires* is on business corporation, where note proved to have been executed by president and indorsed by authorized secretary.

34 L. R. A. 76, *FARMERS' LOAN & T. CO. v. NEW YORK & N. R. CO.* 150 N. Y. 410, 55 Am. St. Rep. 689, 44 N. E. 1043.

Motion for restitution on calendar denied in 168 N. Y. 668, 61 N. E. 1129.

Followed in later action in Federal court in *DeNeufville v. New York & N. R. Co.* 26 C. C. A. 307, 51 U. S. App. 374, 81 Fed. 11.

Injunction *pendente lite* against sale and issue of more bonds refused in *DeNeufville v. New York & N. R. Co.* 84 Fed. 391.

Control of one corporation by another.

Cited in *Jacobus v. American Mineral Water Mach. Co.* 38 Misc. 373, 77 N. Y. Supp. 898, holding minority stockholder entitled to equitable relief against competing company controlling stock and sacrificing business of plaintiff's company; *McLeary v. Erie Teleg. & Teleph. Co.* 38 Misc. 8, 76 N. Y. Supp. 712, holding minority stockholder entitled to injunction against vote of majority stock controlled by different corporation, to repudiate dividend agreement; *Hallenborg v. Greene*, 66 App. Div. 596, 73 N. Y. Supp. 403, enjoining fulfillment of conspiracy of resident directors of foreign corporation to transfer its property without consideration to rival company; *Sidell v. Missouri P. R. Co.* 24 C. C. A. 219, 51 U. S. App. 1, 78 Fed. 727, holding rent under lease voted to itself by independent corporation owning majority stock, subject to claim of creditor of lessor corporation; *Lange v. Burke*, 69 Ark. 90, 61 S. W. 165, holding claims of corporation, majority of stock of which owned by majority stockholder of insolvent corporation, entitled to payment on equal basis with claims of other creditors out of latter's assets; *Niles v. New York C. & H. R. R. Co.* 176 N. Y. 126, 68 N. E. 142, Affirming 69 App. Div. 146, 74 N. Y. Supp. 617, Which Affirmed 35 Misc. 69, 71 N. Y. Supp. 271, holding action for damages against corporation obtaining control of majority stock in another, and fraudulently depreciating latter, not maintainable by stockholder not suffering special damage; *United States v. Northern Securities Co.* 120 Fed. 726, holding illegal, organization of corporation to purchase shares in, and control policy of, two competing railroad corporations.

Cited in footnote to *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* 34 L. R. A. 625, which holds that contracts of construction company controlling railroad company with same stockholders do not operate as those of latter company.

Cited in note (33 L. R. A. 792) on contracts between corporations having common directors or officers.

Distinguished in *Robotham v. Prudential Ins. Co.* 64 N. J. Eq. 689, 53 Atl. 842, holding purchase of controlling interest in trust company by insurance company paying more than twice book value of the stock not authorized as "an investment."

Misuse of corporate property.

Distinguished in *Lewisohn Bros. v. Anaconda Copper Min. Co.* 26 Misc. 628, 56 N. Y. Supp. 807, refusing to enjoin private sale of corporate property approved by directors and majority stockholders, where full value received though higher bid subsequently made; *Rothchild v. Memphis & C. R. Co.* 51 C. C. A. 315, 113 Fed. 481, refusing to set aside sale of corporate property to majority stockholder who does not control or mismanage its business for his own benefit; *Windmuller v. Standard Distilling & Distributing Co.* 114 Fed. 494, refusing to enjoin dissolution of corporation pursuant to requisite two-third stock vote, at suit of minority stockholder; *Luther v. C. J. Luther Co.* 118 Wis. 123, 99 Am. St. Rep. 977, 94 N. W. 69, holding sale of unissued stock by minority faction of board of directors to confederate to carry out their policy, void.

Procedure.

Cited in *Gray v. Fuller*, 17 App. Div. 34, 44 N. Y. Supp. 883, holding action against directors, majority stockholders, and their agents to enjoin various individual acts forming single scheme to depreciate corporate property, not multifarious; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 508, 53 N. E. 520, holding action to annul fraudulent lease cannot be brought by stockholder in his own name without prior demand on corporation to annul same; *Ryan v. Williams*, 100 Fed. 174, refusing preliminary injunction against sale of stock, enabling consolidation with antagonistic corporation prior to proof of injury; *Rosenbaum v. Rice*, 36 Misc. 413, 73 N. Y. Supp. 714, permitting examination before trial of president and directors of corporation by minority stockholders in trust to prevent fraudulent transfer of corporate property, where failure to state sources of knowledge as to essential facts of complaint is due to exclusive knowledge by president.

Distinguished in *Drake v. New York Suburban Water Co.* 36 App. Div. 279, 55 N. Y. Supp. 225, refusing to set aside foreclosure sale of after-acquired property subjected to mortgage by consolidation agreement with independent corporation, where stockholder may intervene in foreclosure proceedings; *Atlantic Trust Co. v. New York City Suburban Water Co.* 75 App. Div. 359, 78 N. Y. Supp. 120, refusing to allow intervention of stockholder in foreclosure proceedings seven years after judgment, to contest lien of mortgage on after-acquired property.

Maturity of corporate mortgage.

Distinguished in *Atlantic Trust Co. v. Crystal Water Co.* 72 App. Div. 546, 76 N. Y. Supp. 647, holding demand of payments of interest coupons on portion of mortgage bonds matures principal debt, where demand by all bondholders not stipulated for.

Due process of law.

Cited in *Williams v. Port Chester*, 72 App. Div. 513, 76 N. Y. Supp. 631, denying constitutionality of statute relieving municipality from liability for injuries due to its negligence, except where claim presented within thirty days.

34 L. R. A. 87, *PRINE v. PRINE*, 36 Fla. 676, 18 So. 781.

Allowance of alimony.

Cited in *Smith v. Smith*, 51 S. C. 385, 29 S. E. 227, upholding interlocutory order for alimony *pendente lite* at chambers in action for permanent alimony; *Hall v. Hall*, 77 Miss. 744, 27 So. 636, allowing counsel fees to wife on husband's appeal from allowance of alimony *pendente lite*.

Marriage of party non compos mentis.

Cited in note (40 L. R. A. 740) on marriage of person when insane.

34 L. R. A. 92, *DU BOIS v. DU BOIS CITY WATERWORKS CO.* 176 Pa. 430, 53 Am. St. Rep. 678, 35 Atl. 248.

Rescission of contract.

Cited in *Troy Water Co. v. Troy*, 200 Pa. 457, 50 Atl. 259, enjoining borough from instalation of independent water plant after execution of contract with water company for supply, although supply inadequate; *Petry v. Clark*, 28 Pa. Co. Ct. 538, refusing to cancel deed of trust by husband for benefit of wife, where not executed through fraud, accident, or mistake.

Cited in footnotes to *West v. Bechtel*, 51 L. R. A. 791, which holds contract not abandoned by purchaser's breach of agreement to pay for each shipment as received; *Bigham v. Madison*, 47 L. R. A. 267, which authorizes rescission for mutual mistake as to location of boundary lines pointed out by vendor.

Cited in note (61 L. R. A. 87) on establishment and regulation of municipal water supply.

Distinguished in *United States Waterworks Co. v. Du Bois*, 176 Pa. 443, 35 Atl. 251, holding *quantum meruit* at contract price recoverable for water used by borough after rescission of contract.

Statutory penalty for turning on water.

Cited in *Tyrone Gas & Water Co. v. Burley*, 19 Pa. Super. Ct. 354, holding plumber and committee of borough council, forcibly turning on water supply, subject to statutory penalty, although acting under resolution of council.

Collateral attack on corporate existence.

Cited in *Olyphant Sewage-Drainage Co. v. Olyphant*, 196 Pa. 556, 46 Atl. 896, overruling defense attacking plaintiff's corporate existence, in suit to enjoin interference with construction of sewers.

Powers of municipal corporations.

Distinguished in *Van Voorhis v. Pittsburg & C. Street R. Co.* 34 Pittsb. L. J. N. S. 154, denying power of municipal corporation to grant franchise to railroad company to lay tracks in streets not included in its charter.

34 L. R. A. 94, *KLEIN v. LIVINGSTON CLUB*, 177 Pa. 224, 55 Am. St. Rep. 717, 35 Atl. 606.

Sales of intoxicating liquor by club.

Cited in *Com. v. Smith*, 2 Pa. Super. Ct. 485, denying violation of liquor law,

where liquor obtained and paid for without profit at bona fide club; *Com. v. Brem*, 5 Pa. Super. Ct. 109, sustaining indictment for unlicensed sale of liquor on Sunday under guise of club distribution; *Com. v. Pefferman*, 12 Pa. Super. Ct. 205, holding proof of incorporation for club, and of distribution bona fide among members only, competent on trial for selling liquor without license.

Cited in footnotes to *Mohrmann v. State*, 43 L. R. A. 398, which holds social club in which liquor sold, within statute against tippling houses open on Sunday; *State ex rel. Stevenson v. Law & Order Club*, 62 L. R. A. 885, which denies right of social club, without license, to dispense liquors to members in exchange for checks given them on payment of special assessments.

Distinguished in *United States v. Alexis Club*, 98 Fed. 728, 9 Pa. Dist. R. 39, holding social club liable to Federal tax upon retail liquor dealers.

Right to impose conditions on granting of license.

Cited in *Re Indiana County Licenses*, 6 Pa. Dist. R. 363, imposing conditions on which license to sell liquor granted.

Injunction to prevent crime.

Cited in *Nashville, C. & St. L. R. Co. v. M'Connell*, 82 Fed. 78, enjoining sale of tickets by scalpers though such sale punishable as crime.

Cited in footnote to *State v. O'Leary*, 52 L. R. A. 299, which denies state's right to injunction to suppress gambling house.

34 L. R. A. 97, *STATE ex rel. WINEMAN v. DAHL*, 6 N. D. 81, 68 N. W. 418.

Constitutional amendments.

Cited in *Hays v. Hays*, 5 Idaho, 159, 47 Pac. 732, holding that amendment to Constitution may be proposed by joint resolution of legislature.

Cited in footnotes to *State, Bott, Prosecutor, v. Wurts*, 45 L. R. A. 251, which holds provision for counting uncanceled propositions for, and canceled propositions against, constitutional amendments sufficient submission to separate votes; *Com. ex rel. Elkin v. Griest*, 50 L. R. A. 568, which holds governor's approval of proposed constitutional amendment unnecessary.

Resolution distinguished from statute.

Cited in footnote to *Mullan v. State*, 34 L. R. A. 262, which holds concurrent resolution of legislature ratifying appointment by governor not "express authority of law."

Mandamus.

Cited in note (58 L. R. A. 855) on original jurisdiction of court of last resort in mandamus case.

34 L. R. A. 100, *STATE v. HARRINGTON*, 68 Vt. 622, 35 Atl. 515.

Validity of license taxes.

Cited in *Hill v. Abbeville*, 59 S. C. 428, 38 S. E. 11, holding unconstitutional, license tax discriminating between members of same class; *State v. Bevius*, 70 Vt. 579, 41 Atl. 655, denying validity of license charge so excessive as to amount to tax for revenue; *Levy v. State*, 161 Ind. 261, 68 N. E. 172, upholding act forbidding transaction of business by transient merchants, without a license; *State v. Shedroi*, 75 Vt. 283, 63 L. R. A. 181, 98 Am. St. Rep. 825, 54 Atl. 1081, holding discrimination in peddler's license act in favor of honorably discharged soldiers unconstitutional.

Cited in footnotes to *Minnesota ex rel. Luria v. Wagener*, 38 L. R. A. 677, which holds invalid, statute requiring license for peddling, which exempts persons following specified occupations who sell their own products; *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement for peddling license; *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers, but not others, whose business less than \$1,000; *Bessette v. People*, 56 L. R. A. 558, which holds void, requirement that horseshoers practise business for four years, submit to examination, and pay license fee; *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license tax for sale of liquors on main street of town than elsewhere; *Morton v. Macon*, 50 L. R. A. 485, which denies power to subject to prohibitory license tax, business of loaning money on household furniture; *Banta v. Chicago*, 40 L. R. A. 611, which requires uniformity of license taxes on occupations, only as to class on which it operates; *Knisely v. Cotterel*, 50 L. R. A. 87, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though vendors of own products exempt; *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax; *Stull v. De Mattos*, 51 L. R. A. 892, which sustains license tax of \$25 per day on sales of merchandise at auction; *Price v. People*, 55 L. R. A. 588, which sustains license fee on employment agencies; *People ex rel. Valentine v. Coolidge*, 50 L. R. A. 493, which holds void, act requiring large bond from merchants selling farm produce.

Limitations as to exercise of police power.

Cited in footnote to *Bailey v. People*, 54 L. R. A. 839, which holds void, restriction on number that lodging-house keepers may permit to occupy one room.

Cited in *Adams Exp. Co. v. State*, 161 Ind. 346, 67 N. E. 1033, upholding as valid exercise of police power, statute forbidding discrimination by express companies.

34 L. R. A. 105, *NORFOLK & W. R. CO. v. COM.* 93 Va. 749, 57 Am. St. Rep. 827, 24 S. E. 837.

Acts affecting interstate commerce.

Cited in *Johnson v. Southern P. Co.* 54 C. C. A. 518, 117 Fed. 472, holding moving of empty car in yards not moving interstate traffic, within act requiring equipment of cars with automatic couplers.

Cited in footnote to *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L. R. A. 213, which denies power of state to require delivery of interstate freight to connecting carrier within its borders to enable freight to reach particular depot.

Cited in note (60 L. R. A. 645) on corporate taxation and the commerce clause. Distinguished in *Adkins v. Richmond*, 98 Va. 103, 47 L. R. A. 588, 81 Am. St. Rep. 702, 34 S. E. 907, denying validity of license tax on broker selling by sample solely for nonresident owners.

Constitutionality of Sunday or holiday laws.

Cited in footnote to *Watson v. Thomson*, 59 L. R. A. 602, which denies city's power to prevent carrying on of lawful avocation on Christmas day.

34 L. R. A. 110, *GREENE v. GREENE*, 49 Neb. 546, 59 Am. St. Rep. 560, 68 N. W. 947.

Allowance of alimony to husband.

Cited in *Groth v. Groth*, 69 Ill. App. 69, holding husband not entitled to alimony in absence of statute.

Cited in footnote to *Livingston v. County Superior Court*, 38 L. R. A. 175, which holds enforceable in equity, order to compel support of husband out of wife's separate estate.

Cross-petition in divorce proceeding.

Cited in *Berdolt v. Berdolt*, 56 Neb. 796, 77 N. W. 399, sustaining cross-petition for divorce by defendant in divorce action.

Incorporation of evidence in bill of exceptions.

Cited in *Dunn v. Eberly*, 52 Neb. 469, 72 N. W. 485, refusing to set aside verdict on appeal, where record does not contain copies of material books of account; *Davidson v. Gretna State Bank*, 59 Neb. 66, 80 N. W. 256, and *Alling v. Fisher*, 55 Neb. 240, 75 N. W. 536, refusing to consider on appeal, exceptions to findings of trial court, where material evidence omitted from bill.

34 L. R. A. 118, *FUCHS v. ST. LOUIS*, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508.

Liability for negligence.

Cited in *Dammann v. St. Louis*, 152 Mo. 196, 53 S. W. 932, holding municipality liable for injuries caused by negligent construction of water main; *Cobb v. St. Louis & H. R. Co.* 149 Mo. 629, 50 S. W. 894, holding railway liable for injuries received by express messenger, due to washout of bridge by stream notably turbulent in rainy season; *American Brewing Asso. v. Talbot*, 141 Mo. 686, 64 Am. St. Rep. 538, 42 S. W. 679 (dissenting opinion), majority holding warehousemen not liable to bailors whose goods were injured by sinking of building, due to phenomenal rise of river; *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 8, 32 L. R. A. 168, 34 S. W. 566 (dissenting opinion), majority holding street car company not liable for injury to passenger through careless throwing of lighted match on dress by fellow passenger; *Nicholson v. Detroit*, 129 Mich. 256, 56 L. R. A. 605, 88 N. W. 695, holding city not liable for death of employee engaged, without warning of danger, in rebuilding of smallpox hospital, where municipal obligation and duty statutory; *Aldrich v. St. Louis Transit Co.* 101 Mo. App. 91, 74 S. W. 141, holding carrier not liable for injury to one who, having time to cross track, hesitated, turned back, and was run down.

Cited in footnote to *Langenbaugh v. Anderson*, 62 L. R. A. 948, which denies liability of lessor of lot for production of oil or gas therefrom, for injury to adjoining owner's property through escape of oil by lessee's negligence.

Cited in note (29 L. R. A. 338, 356, 359) on liability for negligence in escape and explosion of gas.

Distinguished in *King v. National Oil Co.* 81 Mo. App. 163, holding oil company not liable to contractor repairing wagons, where notice of danger from oil gas given partner.

Cited as overruled in *Graney v. St. Louis, I M. & S. R. Co.* 157 Mo. 684, 50 L. R. A. 159, 57 S. W. 276, holding railway company not liable for injury to boy sucked under wheels by train moving at unlawful speed, where no evidence of defendant's knowledge of result of excessive speed.

Overruled on subsequent appeal in 167 Mo. 622, 57 L. R. A. 136, 67 S. W. 610, holding city not liable for injury by explosion of gas in sewer into which crude petroleum had escaped, though no provision for escape of gas made.

Act of God.

Cited in *Epperson v. Postal Telegr. Cable Co.* 155 Mo. 382, 50 S. W. 795, holding telegraph company not liable for injury due to overcharged wire, where caused by lightning.

Judicial notice.

Cited in *Poor v. Watson*, 92 Mo. App. 98, taking judicial notice of generation of gas in coal mines.

Municipal liability for sewers.

Cited in footnote to *Nevins v. Fitchburg*, 47 L. R. A. 312, which denies city's right to discharge sewer into private tailrace.

Cited in note (61 L. R. A. 697, 700) on duty and liability of municipality with respect to damage.

Ordinances relating to operation of railway.

Cited in *Gebhardt v. St. Louis Transit Co.* 97 Mo. App. 381, 71 S. W. 448, holding ordinance requiring motormen to keep a vigilant watch for vehicles and persons on tracks, to avoid collisions, reasonable.

Variance.

Cited in *Huston v. Tyler*, 140 Mo. 263, 36 S. W. 654, refusing recovery on implied warranty where express warranty pleaded.

32 L. R. A. 127, *STATE v. McCABE*, 135 Mo. 450, 58 Am. St. Rep. 589, 37 S. W. 123.

Freedom of speech.

Cited in footnote to *State v. McKee*, 49 L. R. A. 542, which sustains statute against papers, etc., devoted to publication of story of crimes.

34 L. R. A. 131, *LUND v. CHIPPEWA COUNTY*, 93 Wis. 640, 67 N. W. 927.

Taxation and appropriations for "public purpose."

Cited in *State ex rel. New Richmond v. Davidson*, 114 Wis. 577, 58 L. R. A. 743, 90 N. W. 1067, upholding appropriation of general tax funds to relieve city from debt incurred in recovering from cyclone; *Crafts v. Ray*, 22 R. I. 187, 49 L. R. A. 606, 46 Atl. 1043, upholding tax temporarily exempting new manufacturing enterprises.

Distinguished in *Wisconsin Keeley Institute v. Milwaukee County*, 95 Wis. 160, 36 L. R. A. 58, 60 Am. St. Rep. 105, 70 N. W. 68, denying constitutionality of statute taxing county for expense of treating indigent drunkards at private institution; *State ex rel. Garrett v. Froehlich*, 118 Wis. 140, 61 L. R. A. 349, 99 Am. St. Rep. 985, 94 N. W. 50, refusing to compel appropriation to redeem warrants issued under law providing for treatment of inebriates at public expense.

Employment of private enterprise for public purpose.

Cited in *Wisconsin Industrial School v. Clark County*, 103 Wis. 661, 79 Pac. 422, permitting recovery by private industrial school against county for care of children sent to it by order of court.

Private aid to public enterprise.

Cited in *State ex rel. Curtis v. Geneva*, 107 Wis. 8, 82 N. W. 550, holding determination of commissioners as to location of road not vitiated by pledge of private aid in construction of altered road, where decision not affected thereby.

Municipality.

Cited in *Wisconsin Industrial School v. Clark County*, 103 Wis. 661, 79 N. W. 422, holding county "municipality" within meaning of statute charging same with expense of maintaining children committed to industrial school.

Nature of incorporated institutions belonging to state.

Cited in footnotes to *Re Royer*, 44 L. R. A. 364, which holds state university an entity capable of taking bequest; *Watson Seminary v. County Court*, 45 L. R. A. 675, which holds charter provisions of educational corporation changeable at will of legislature.

34 L. R. A. 137, *ANNISTON TRANSFER CO. v. GURLEY*, 107 Ala. 600, 13 So. 209.

Effect of custom on liability created by contract.

Cited in footnote to *Pennsylvania R. Co. v. Naive*, 64 L. R. A. 443, which upholds custom of carrier not to deliver perishable freight on July 4th.

34 L. R. A. 141, *CLEVELAND, C. C. & ST. L. R. CO. v. MONEYHUN*, 146 Ind. 147, 44 N. E. 1106.

Contributory negligence at crossing.

Cited in *Louisville & N. R. Co. v. Williams*, 20 Ind. App. 580, 51 N. E. 128, upholding submission of question of contributory negligence to jury where plaintiff stopped twice within 300 feet of crossing; *Wabash R. Co. v. Biddle*, 27 Ind. App. 165, 50 N. E. 284, upholding submission of contributory negligence to jury where plaintiff stopped twice within 100 feet of crossing; *Chicago & E. R. Co. v. Thomas*, 155 Ind. 644, 58 N. E. 1040 (dissenting opinion), majority holding negligence established, as matter of law, by finding that deceased drove upon crossing from gully without looking for approaching trains.

Riding on platform.

Cited in *Graham v. McNeill*, 20 Wash. 475, 43 L. R. A. 303, footnote p. 300, 72 Am. St. Rep. 121, 55 N. E. 631, holding negligence of passenger riding on platform of crowded coach, for jury; *Cincinnati, H. & I. R. Co. v. Revaloe*, 17 Ind. App. 667, 46 N. E. 352, holding party thrown from platform by sudden start, while attempting to alight after train stops, not guilty of negligence because she went on platform before train stopped; *Cincinnati, L. & A. Electric Street R. Co. v. Lohe*, 68 Ohio St. 111, 67 N. E. 161, holding interurban electric railroad company not liable for killing of passenger on platform by derailment of car, where deceased was requested to take seat inside.

Cited in footnote to *Benedict v. Minneapolis & St. L. R. Co.* 57 L. R. A. 639, which holds exposure of body beyond side of moving train by passenger on platform, negligence.

Special verdict.

Cited in *Towers v. Lake Erie & W. R. Co.* 18 Ind. App. 687, 48 N. E. 1046, disregarding finding of freedom from contributory negligence where contrary ap-

pears, as matter of law, from finding of special verdict that plaintiff approached dangerous crossing at trot, without stopping; *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 602, 68 Am. St. Rep. 252, 52 N. E. 229 (dissenting opinion), majority holding general verdict for plaintiff overthrown by special finding that deceased, an intelligent boy of seven and one half years, went to sleep on railroad track at crossing; *Hancock v. Lake Erie & W. R. Co.* 21 Ind. App. 15, 51 N. E. 369, disregarding general finding of freedom from contributory negligence, where special verdict shows failure to hear train and see signal was due to inattention; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 585, 52 N. E. 1013, disregarding special verdict that child acted in manner usual for one of her age, where there was additional finding of *sui juris* and knowledge of danger of standing on tracks; *Indiana Pipe Line & Ref. Co. v. Neusbaum*, 21 Ind. App. 369, 52 N. E. 471, holding conflict between general and special findings to interrogatories insufficient to require reversal where all material points not covered by interrogatories; *Illinois C. R. Co. v. Cheek*, 152 Ind. 677, 53 N. E. 641, upholding general verdict for plaintiff where special findings inconclusive as to contributory negligence.

Presumptions in support of judgment.

Cited in *Hill v. Swihart*, 148 Ind. 323, 47 N. E. 705, holding no presumption on appeal that judgments claim to be superior lien on real estate were rendered in county in which realty situated, where special finding does not reveal forum.

Action by guardian.

Cited in *Kinsley v. Kinsley*, 150 Ind. 71, 49 N. E. 819, upholding action by guardian in his own name to enjoin injury to ward's estate.

34 L. R. A. 144, *GLEAVES v. TERRY*, 93 Va. 491, 25 S. E. 552.

Public inspection of election records.

Cited in *Keller v. Stone*, 96 Va. 668, 32 S. E. 454, issuing mandamus to compel custodian of poll books to permit inspection thereof.

34 L. R. A. 146, *BREIDENTHAL v. EDWARDS*, 57 Kan. 332, 46 Pac. 469.

Jurisdiction in mandamus proceeding.

Cited in note (58 L. R. A. 843, 867) on original jurisdiction of court of last resort in mandamus case.

34 L. R. A. 150, *STERLING v. UNIVERSITY OF MICHIGAN*, 110 Mich. 369, 68 N. W. 253.

Right of private party to mandamus.

Cited in *Brophy v. Schindler*, 126 Mich. 347, 85 N. W. 1114, holding owners of farm whose houses are separated from schoolhouse by river, have sufficient interest to support petition for mandamus to compel reconstruction of bridge.

Construction of charter.

Cited in *Farr v. Grand Rapids*, 112 Mich. 101, 70 N. W. 411, denying implied authority to raise bonded loan to meet expense of constructing authorized electric light works, under charter denying authority to incur debt against city except by vote of electors.

Legislative control of constitutional offices.

Cited in *Sunderlin v. Ionia County*, 119 Mich. 539, 78 N. W. 651, upholding statute providing for filing of security for costs or order of prosecuting attorney with justice of peace as condition to jurisdiction of justice of peace in criminal actions.

Nature of incorporated institution belonging to state.

Cited in footnotes to *Re Royer*, 44 L. R. A. 364, which holds state university an entity entitled to take bequest; *Trevett v. Prison Asso.* 50 L. R. A. 564, which holds prison association not controlled by state not a public corporation exempt from liability for its torts; *Moody v. State's Prison*, 53 L. R. A. 855, which denies liability of state to prison guard for injuries caused by defective ladder; *Watson Seminary v. County Court*, 45 L. R. A. 675, which holds charter provisions of educational corporation changeable at will of legislature; *Oklahoma Agri. & Mechanical College v. Willis*, 40 L. R. A. 677, which denies power to sue agricultural and mechanical college created by and existing under statute; *Maia v. Eastern State Hospital*, 47 L. R. A. 577, which denies liability of state hospital for injuries to inmate from negligence or misconduct of persons in charge; *Overholser v. National Home for Disabled Volunteer Soldiers*, 62 L. R. A. 937, which holds national home for disabled soldiers a part of United States government, not subject to action sounding in tort.

34 L. R. A. 156, *KUJEK v. GOLDMAN*, 150 N. Y. 176, 55 Am. St. Rep. 670, 44 N. E. 773.

Novelty as affecting right of action.

Cited in *Conley v. Blinebry*, 29 Misc. 373, 60 N. Y. Supp. 531, upholding action in tort by grantor against grantee for depriving former of mortgage security by resale of property and record of deed before recording of mortgage; *Graham v. Wallace*, 50 App. Div. 107, 63 N. Y. Supp. 372, holding action for damages maintainable by female ward after reaching majority, against guardian of her person for seduction by him while she was under age of consent.

Cited in footnote to *Holleman v. Harward*, 34 L. R. A. 803, which holds one selling laudanum as beverage to married woman liable to husband.

Effect of fraud upon marriage contract.

Cited in *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 472, 63 L. R. A. 94, 95 Am. St. Rep. 609, 67 N. E. 63, Reversing 71 App. Div. 518, 75 N. Y. Supp. 878, Reversed in 34 Misc. 692, 70 N. Y. Supp. 1012, annulling marriage induced by fraudulent representation of birth of child to plaintiff; *Svenson v. Svenson*, 178 N. Y. 58, 70 N. E. 120, holding venereal disease existing at time of marriage and fraudulently concealed sufficient ground for annulment, where marriage not consummated.

Actions for alienation of affections.

Cited in *Weston v. Weston*, 86 App. Div. 161, 83 N. Y. Supp. 528, holding pith of action for alienation of wife's affections to be loss of her society without justifiable reasons; *Servis v. Servis*, 172 N. Y. 444, 65 N. E. 270 (dissenting opinion), as to right of wife to conjugal society of her husband.

34 L. R. A. 159, *MARSHALL v. FRANKLIN F. INS. CO.* 176 Pa. 628, 35 Atl. 204.

Rescission of insurance contract.

Cited in *Kerns v. Prudential Ins. Co.* 11 Pa. Super. Ct. 213, holding insured

entitled to recover total premiums on refusal of insurer to accept those due; *Black v. Supreme Council*, A. L. of H. 120 Fed. 583, holding member of benefit society which arbitrarily reduced value of his certificate entitled to recover amount paid by him thereon.

34 L. R. A. 161, *MOHLER v. SHANK*, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981.

Effect of insanity on right to divorce.

Cited in footnote to *Iago v. Iago*, 39 L. R. A. 115, which holds maintenance of writ of error from decree against defendant in divorce suit not prevented by his insanity.

Marriage of person when insane.

Cited in note (40 L. R. A. 746) on marriage of person when insane.

Estoppel to deny divorce.

Cited in *Marvin v. Foster*, 61 Minn. 160, 52 Am. St. Rep. 586, 63 N. W. 484, holding husband estopped to assert invalidity of wife's divorce in order to share in her property, where he has remarried on strength thereof; *Hamill v. Talbott*, 81 Mo. App. 218, holding husband accepting void decree of divorce in favor of wife, by remarrying, estopped to deny validity to escape payment of alimony.

Cited in notes (57 L. R. A. 595) on right to contest validity of divorce decree after death of one or both of parties; (60 L. R. A. 305) on right of party obtaining or consenting to divorce, to contest its validity.

Estoppel by void agreement.

Cited in *Baird v. Connell*, 121 Iowa, 287, 96 N. W. 863, holding wife estopped, while retaining consideration, from reclaiming property transferred under void separation agreement.

34 L. R. A. 169, *LONG v. HARVEY*, 177 Pa. 473, 35 Atl. 169.

Jurisdiction of equity to compel surrender of church property.

Distinguished in *Dayton v. Carter*, 206 Pa. 497, 56 Atl. 30, holding bill in equity to compel surrender and control of church property not proper remedy when real controversy is validity of election of elders.

34 L. R. A. 172, *P. C. WIEST CO. v. WEEKS*, 177 Pa. 412, 35 Atl. 693.

Infringement of tradenames and devices.

Cited in *Tygert-Allen Fertilizer Co. v. J. E. Tygert Co.* 191 Pa. 338, 43 Atl. 224, Affirming 7 Pa. Dist. R. 434, 21 Pa. Co. Ct. 198, refusing to enjoin use of name by party selling to another right to use same "so far as necessary," where products of vendee sold under another name.

Distinguished in *Clark & S. Co. v. Scott*, 4 Lack. Legal News, 162, enjoining use of tobacco wrappers bearing fraudulent resemblance to those used by complainant.

34 L. R. A. 175, *SPENCER v. MYERS*, 150 N. Y. 269, 55 Am. St. Rep. 675, 44 N. E. 942.

Validity of contracts of insurance.

Cited in *Sanguinito v. Goldey*, 88 App. Div. 80, 84 N. Y. Supp. 989, holding

questions as to validity of policy and designation of beneficiary eliminated by payment of amount of policy into court by company interpleading beneficiary.

Cited in note (63 L. R. A. 843, 858) on conflict of laws as to contracts of insurance.

Provision against assignment of policy.

Cited in *Dannhauser v. Wallenstein*, 28 Misc. 692, 60 N. Y. Supp. 50, refusing to permit wife to repudiate assignment of policy to husband on ground that there was no "written consent" thereto, as required by policy.

Construction of statutes and ordinances.

Cited in *People ex rel. Cumisky v. Wurster*, 14 App. Div. 559, 43 N. Y. Supp. 1088, disregarding manifestly erroneous reference to section of charter in ordinance; *Miller v. Maujer*, 82 App. Div. 421, 81 N. Y. Supp. 575, holding right of next of kin to contest will, under Code, limited to such as would be entitled to participate in distribution of personal estate, were will set aside; *Kent v. Binghamton*, 40 Misc. 5, 81 N. Y. Supp. 198, denying that distinction should be made between words "consolidated with" and "consolidated into."

34 L. R. A. 178, *STATE v. HOWARD*, 66 Minn. 309, 61 Am. St. Rep. 403, 68 N. W. 1096.

Sufficiency of indictment or information.

Cited in *State v. Bradford*, 78 Minn. 393, 47 L. R. A. 147, 81 N. W. 202, holding indictment for injury to bicycle path insufficient where not alleged to be public way; *State v. Clements*, 82 Minn. 451, 85 N. W. 234, dismissing indictment for larceny in obtaining deposits while conducting "unlawful" banking business, without setting out facts constituting illegality; *State v. Dankwardt*, 107 Iowa, 709, 77 N. W. 495 (dissenting opinion), majority holding *scienter* sufficiently charged by allegation that accused attempted to influence "another as a juror, with intent to influence finding;" *Banks v. State*, 157 Ind. 197, 60 N. E. 1087, holding information on charge of bribery of election judge insufficient where it does not state who designated the judge for appointment and the authority therefor.

Cited in footnote to *Haughn v. State*, 59 L. R. A. 789, which holds indictment for bunco steering which follows statutory language, insufficient.

Distinguished in *State v. O'Neil*, 71 Minn. 402, 73 N. W. 1091, upholding indictment for robbery charging taking of property from person by force, although fear of immediate injury not alleged; *Kruse v. People*, 84 Ill. App. 622, upholding indictment charging embezzlement of "\$16" without stating value of same; *Towne v. People*, 89 Ill. App. 277, upholding indictment charging conspiracy by false representations to shareholders to induce them to join in petition for receiver of corporation, with malicious intent to injure business of corporation.

Variance between indictment and proof.

Cited in *State v. Meysenburg*, 171 Mo. 29, 71 S. W. 229, holding allegation that \$9,000 was received as bribe, and proof that accused received cashier's check for that amount, not fatal variance.

34 L. R. A. 182, *MITCHELL v. PRANGE*, 110 Mich. 78, 64 Am. St. Rep. 329, 67 N. W. 1096.

Negligence in blasting.

Cited in *Cary Bros. & Hannon v. Morrison*, 63 C. C. A. 270, 129 Fed. 180, hold-

ing blasting to be proper method in sparsely settled country, of removing ledges and rocks in grading for railroad.

Cited in footnotes to *Belleville Stone Co. v. Mooney*, 39 L. R. A. 834, which holds foreman's failure to give warning of blast in quarry not negligence of fellow servant of men working therein; *Sullivan v. Dunham*, 47 L. R. A. 715, which holds liable as trespasser, one firing blast on own land by which wood thrown on traveler in highway.

34 L. R. A. 184, *ST. PAUL v. CHICAGO, M. & ST. P. R. CO.* 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

Municipal control over land devoted to public use.

Cited in footnotes to *Louisiana Constr. & Improv. Co. v. Illinois C. R. Co.* 37 L. R. A. 661, which denies city's authority to grant exclusive right of occupation of batture to railroad company for ninety-nine years; *Reighard v. Flinn*, 43 L. R. A. 502, which holds invalid, lease by city of part of public landing to private person.

Cited in notes (48 L. R. A. 493) on power of legislature to impose burdens on municipalities and to control their local administration and property; (58 L. R. A. 761) on levees as public improvements.

Distinguished in *Manson v. South Bound R. Co.* 64 S. C. 122, 41 S. E. 832, refusing to enjoin taking of public park for railway terminal at suit of nonabutting property owners; *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 93 Fed. 137, holding no rights reserved to city in street condemned by railway under grant of constitutional right of eminent domain.

Impairment of right obtained under ordinance.

Cited in *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 146, 53 L. R. A. 183, 83 N. W. 527, holding ordinance arbitrarily compelling placing of telephone wires under ground at enormous expense, violation of rights acquired on construction of overhead wires under prior ordinance; *Alexandria v. Morgan's L. & T. R. & S. S. Co.* 109 La. 58, 33 So. 65, denying right of city to revoke, without notice, railroad company's franchise to occupy street, over which cars had been run for years.

Cited in note (50 L. R. A. 148) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

Meaning of term "levee."

Cited in *McAlpine v. Chicago G. W. R. Co.* 68 Kan. 212, 64 L. R. A. 88, 75 Pac. 73, upholding right to use as street, strips of land dedicated to city as "levee."

34 L. R. A. 193, *BRIGGS v. RUSSELLVILLE*, 99 Ky. 515, 36 S. W. 358.

Municipal taxation.

Cited in *Board of Councilmen v. Scott*, 101 Ky. 621, 42 S. W. 104, upholding taxation of rural property within city limits, at same rate as other property.

Cited in footnotes to *Kimball v. Grantsville City*, 45 L. R. A. 628, which upholds municipal tax on rural property within city; *Atchison, T. & S. F. R. Co. v. Clark*, 47 L. R. A. 77, which holds void, fire tax to which railroad property subject without being entitled to any of benefits; *Kaysville v. Ellison*, 43 L. R.

A. 81, which denies validity of city tax on business or property incapable of benefit from municipality.

34 L. R. A. 201, *POST v. MECHANICS' BLDG. & L. ASSO.* 97 Tenn. 408, 37 S. W. 216.

Accounting between member and building association on latter's insolvency.

Cited in *Hale v. Cairns*, 8 N. D. 151, 44 L. R. A. 263, 73 Am. St. Rep. 746, 77 N. W. 1010; *People's Bldg. & L. Asso. v. McPhilamy*, 81 Miss. 85, 59 L. R. A. 746, 32 So. 1001; *Phelps v. American Sav. & L. Asso.* 121 Mich. 355, 80 N. W. 120; *Hall v. Stowell*, 75 App. Div. 23, 77 N. Y. Supp. 953; *Woerheide v. Johnston*, 81 Mo. App. 201; *Columbia Finance & T. Co. v. Tharp*, 24 Ind. App. 86, 56 N. E. 265; *Young v. Improvement Loan Bldg. Asso.* 48 W. Va. 524, 38 S. E. 670; *Hale v. Kline*, 113 Iowa, 527, 85 N. W. 814, — holding that dues on collateral stock pledged by borrowing member cannot be credited against premiums on loan on foreclosure of mortgage by receiver of corporation; *Hale v. Gullick*, 13 S. D. 647, 84 N. W. 196 (dissenting opinion), majority holding borrowing member entitled to credit dues, interest, and premiums against loan, on surrender of stock at winding up of association; *Southern Bldg. & L. Asso. v. Johnson*, 49 C. C. A. 522, 111 Fed. 662, holding that dues on stock advanced as fixed premium on loan may be credited by borrowing member against loan on insolvency of corporation; *Boice v. Rabb*, 24 Ind. App. 373, 55 N. E. 880, holding dividends paid on stock chargeable as lien against such stock on insolvency of association, where there were no profits from which they could have been declared; *Clarke v. Olson*, 9 N. D. 373, 83 N. W. 519, holding that mortgage to secure payment of dues cannot be foreclosed for face amount of bond on insolvency of company, where dues paid; *Carpenter v. Richardson*, 101 Tenn. 178, 46 S. W. 452, holding principal and interest of loan, but not fines, recoverable by receiver of insolvent association, subject to deductions for payments of interest, premiums, etc., with interest thereon; *Breed v. Ruoff*, 54 App. Div. 150, 66 N. Y. Supp. 422, holding borrowing member entitled to credit interest paid and stock dues after insolvency of association, but not fines nor stock dues paid prior to insolvency; *Swope v. Jordan*, 107 Tenn. 183, 64 S. W. 52, holding account against member forfeiting while association going concern, properly made up as of that date and not as of date of subsequent insolvency; *Roberts v. Cronk*, 94 App. Div. 176, 88 N. Y. Supp. 103, denying right of borrowing member of insolvent association to have premium and dues credited on amount due on foreclosure of mortgage; *Anselme v. American Sav. & L. Asso.* 63 Neb. 528, 88 N. W. 665, denying right of borrowing member to credit dues paid on stock, upon insolvency of association.

Cited in footnotes to *Hale v. Cairns*, 44 L. R. A. 261, which denies right to apply dues paid on stock, on mortgage to insolvent loan association; *People's Bldg. & L. Asso. v. McPhillamy*, 59 L. R. A. 743, which requires stock payments of borrowing member to share losses and expenses of winding up loan association.

Effect of notice of withdrawal.

Cited in *Cook v. Emmet Perpetual & Mut. Bldg. Asso.* 90 Md. 291, 44 Atl. 1022, holding general creditor entitled to preference over shareholders giving notice of withdrawal prior to adjudication of insolvency of association; *Wilson v. Parvin*, 56 C. C. A. 275, 119 Fed. 659, and *Coltrane v. Baltimore Bldg. & L. Asso.*

110 Fed. 279, holding member who gives notice of withdrawal, maturing prior to insolvency of corporation, not entitled to preference over other members in distribution of assets; *Reitz v. Hayward*, 100 Mo. App. 224, 73 S. W. 374, holding borrowing member withdrawing before insolvency of association entitled to be credited with value of pledged stock and dividends declared at time of withdrawal; *Walker v. Terry*, 138 Ala. 432, 35 So. 466, denying that certificate of withdrawal entitles member of insolvent loan association to be declared a creditor thereof.

Usurious loans.

Cited in *Carpenter v. Lewis*, 60 S. C. 36, 38 S. E. 244, holding loan at fixed premium, secured by bond and mortgage together with principal debt, usurious where legal interest exceeded; *Edinger v. Missouri Guarantee Sav. & Bldg. Assn.* 83 Mo. App. 625, holding loan at premium fixed by agent of association usurious where premium and interest exceed lawful rate; *McIlwaine v. Iseley*, 96 Fed. 67; *McIlwaine v. Ellington*, 55 L. R. A. 953, 49 C. C. A. 450, 111 Fed. 582; *Douglass v. Kavanaugh*, 33 C. C. A. 109, 82 U. S. App. 38, 90 Fed. 374,—holding private loan at fixed premium in addition to legal interest, usurious.

Cited in footnotes to *National Mut. Bldg. & L. Assn. v. Brahan*, 57 L. R. A. 793, which holds usury in loan by foreign loan association to resident, secured by mortgage on land in state, determined by local law; *Floyd v. National Loan & Invest. Co.* 54 L. R. A. 536, which holds contract with foreign loan association not within exemption of domestic associations as to usury, unless in conformity to local law; *Borrowers' & I. Bldg. Assn. v. Eklund*, 52 L. R. A. 637, which holds loan effected by loan association by private contract not exempt from usury law, where statute requires it to be made in open meeting; *Smoot v. People's Perpetual Loan & Bldg. Assn.* 41 L. R. A. 589, which sustains retroactive statute relieving from usury all contracts with loan associations.

Cited in note (35 L. R. A. 244) on fixed premiums or fixed minimum of premiums in building and loan associations.

Distinguished in *Star Sav. & L. Assn. v. Woods*, 100 Tenn. 123, 42 S. W. 872, holding amount paid in excess of legal interest on loan at fixed premium not recoverable by borrowing member receiving full withdrawal value of shares paid up by him; *Deitch v. Staub*, 53 C. C. A. 144, 115 Fed. 316, holding that purchaser of property burdened with usurious mortgage assumed by him cannot set up usury to defeat foreclosure of mortgage by receiver of insolvent association.

34 L. R. A. 205, *ROBINSON v. SUPERIOR RAPID TRANSIT R. CO.* 94 Wis. 345, 59 Am. St. Rep. 896, 68 N. W. 961.

Res geste.

Cited in *Sample v. Consolidated Light & R. Co.* 50 W. Va. 479, 57 L. R. A. 190, footnote p. 186, 40 S. E. 597, holding declaration of motorman while car still on child run down, that he thought he could pass it, admissible as *res geste*; *Union P. R. Co. v. Elliott*, 54 Neb. 304, 74 N. W. 627, holding statement of engineer, made to party injured as soon as engine stopped and he could alight, admissible.

Exemplary damages.

Cited in *Gatzow v. Buening*, 106 Wis. 18, 49 L. R. A. 482, 80 Am. St. Rep. 17, 81 N. W. 1003, holding secretary of liverymen's association liable for exemplary damages in withdrawal of hearse from use at funeral, pursuant to by-law of association aimed against patrons of nonunion labor; *Rueping v. Chicago & N. W. R.*

Co. 116 Wis. 630, 96 Am. St. Rep. 1013, 93 N. W. 843, holding passenger not entitled to recover punitive damages from carrier for injuries suffered in collision; Eggett v. Allen, 119 Wis. 633, 96 N. W. 803, holding punitive damages recoverable from one commencing, authorizing, or participating in malicious prosecution.

Ratification of tort.

Cited in Cobb v. Simon, 119 Wis. 606, 100 Am. St. Rep. 909, 97 N. W. 276, holding retention of servant after notice to principal of tort committed by servant, evidence of ratification.

34 L. R. A. 207, HALL v. MANSON, 99 Iowa, 698, 68 N. W. 922.

Liability of municipality for condition of streets.

Cited in Goucher v. Sioux City, 115 Iowa, 640, 89 N. W. 24, holding negligence of municipality in permitting gutter ditch by side of walk to remain unprotected for long time, for jury.

Cited in footnote to Watertown v. Greaves, 56 L. R. A. 865, which holds question of defect in difference of 3 inches in height of concrete sidewalk and adjoining gravel one, for jury.

Physical examination of plaintiff.

Cited in South Bend v. Turner, 156 Ind. 426, 54 L. R. A. 400, 83 Am. St. Rep. 200, 60 N. E. 271, holding refusal of court to order physical examination of injured child reversible error, where defendant had no other means of determining extent of injury and examination could be made without pain or danger.

Cited in footnotes to Wanek v. Winona, 46 L. R. A. 448, which sustains court's power to order physical examination of plaintiff under penalty of dismissal of action; Lane v. Spokane Falls & N. R. Co. 46 L. R. A. 153, which sustains power of court to order physical examination of woman by experts in action for personal injuries; Bagwell v. Atlanta Consol. Street R. Co. 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal, after attaining majority, to submit to physical examination; Cleveland, C. C. & St. L. R. Co. v. Huddleston, 36 L. R. A. 681, which holds that production of plaintiff's urine for examination should be required where he claims to be suffering from albumen and sugar in urine as result of injury; O'Brien v. La Crosse. 40 L. R. A. 831, which denies power of court to order examination as to condition of plaintiff's bladder, under evidence that it might be dangerous; Stack v. New York, N. H. & H. R. Co. 52 L. R. A. 328, which denies power of court to compel plaintiff to submit to physical examination; State v. Height, 59 L. R. A. 438, which holds unlawful, disclosures by physicians of knowledge as to venereal disease, obtained by examination against his will of one accused of rape; Austin & N. W. R. Co. v. Cluck, 64 L. R. A. 494, which denies power, in absence of statutory authority, to require plaintiff to submit to physical examination; Atchison, T. & S. F. R. Co. v. Palmore, 64 L. R. A. 90, which holds that timely request for physical examination of injured eyes should be granted, though involving use of drugs for dilating pupils.

Distinguished in Vierling v. Binder, 113 Iowa, 342, 85 N. W. 621, upholding refusal to require physical examination of plaintiff where defendant only pleads her disease as tending to show nonexistence of marriage contract for breach of which action is brought.

Exhibition of injuries to jury.

Cited in *Faivre v. Mandercheid*, 117 Iowa, 731, 90 N. W. 76, upholding right of one injured to exhibit his hands and feet to jury to show extent of injury to them.

34 L. R. A. 215, *LEITZSEY v. COLUMBIA WATER POWER CO.* 47 S. C. 464, 25 S. E. 744.

Liability of grantee for grantor's nuisance.

Cited in *De Laney v. Georgia, C. & N. R. Co.* 58 S. C. 360, 79 Am. St. Rep. 843, 36 S. E. 699, holding lessee liable for private nuisance erected by grantor, only after notice and demand of removal; *Townes v. Augusta*, 52 S. C. 404, 29 S. E. 851, holding party entitled to damages for continuance of dam by grantee of constructor, rendering plaintiff's land unfit for cultivation.

Distinguished in *Jones v. Seaboard Air Line R. Co.* 67 S. C. 194, 196, 45 S. E. 188, holding consolidated railroad company liable for continuance of nuisance created by preceding company, without notice or demand of removal.

Exclusiveness of statutory remedies.

Cited in *Garraux v. Greenville*, 53 S. C. 579, 31 S. E. 597, holding compensation for damage from change of grade of street recoverable only in statutory proceeding before commissioners; *Rankin v. Sievern & K. R. Co.* 58 S. C. 544, 36 S. E. 997, holding compensation under condemnation statutes only remedy available for injury to property by construction of railway, where no objection in statutory manner made to its entry on the land.

Estoppel.

Cited in footnote to *Nunamaker v. Columbia Water Power Co.* 34 L. R. A. 222, which holds grant of right to flood part of farm by dam precludes action for injuries to remaining land.

Damage to property by construction or use of land.

Cited in *Jones v. Seaboard Air Line R. Co.* 67 S. C. 194, 45 S. E. 188, holding that grant of right of way contemplates only such damages as would result from skilful and proper construction of road.

Cited in note (61 L. R. A. 858, 859) on injury by construction and operation of canals.

What term "lands" includes.

Cited in *South Bound R. Co. v. Burton*, 67 S. C. 523, 46 S. E. 340, holding that term "lands," used in condemnation statute, embraces "all rights and easements growing thereout."

34 L. R. A. 222, *NUNAMAKER v. COLUMBIA WATER POWER CO.* 47 S. C. 465, 58 Am. St. Rep. 905, 25 S. E. 751.

Damages for flooding lands.

Cited in footnote to *Leitzsey v. Columbia Water Power Co.* 34 L. R. A. 215, which holds damages for flooding lands by dam recoverable under eminent domain law, not by suit for nuisance.

Damages included in grant of right of way.

Cited in *Jones v. Seaboard Air Line R. Co.* 67 S. C. 194, 45 S. E. 188, holding

that grant of right of way contemplates only such damages as would result from skilful and proper construction of road.

Cited in note (61 L. R. A. 858) on injury by construction and operation of canals.

34 L. R. A. 223, *McANALLY v. ALABAMA INSANE HOSPITAL*, 109 Ala. 109, 55 Am. St. Rep. 923, 19 So. 492.

Right of feme covert to contract.

Cited in *Cowan v. Motley*, 125 Ala. 372, 28 So. 70, holding contract for attorney's fees not invalid where entered into without statutory written consent of husband.

34 L. R. A. 227, *LANDELL v. HAMILTON*, 175 Pa. 327, 34 Atl. 663.

Covenants running with land.

Cited in *Hansell v. Downing*, 17 Pa. Super. Ct. 238, holding provision against erection of building on portion of granted premises and against overlooking windows on remainder, creates covenant running with granted premises in favor of adjoining land of grantor; *Kelly v. Nypano R. Co.* 23 Pa. Co. Ct. 186, holding grantee of railroad bound by its covenant in deed of right of way to construct fence; *Allen v. Hamilton*, 175 Pa. 339, 34 Atl. 667, holding land burdened with restriction defined by provision against erection of buildings attached to messuage "now" thereon erected; *Roth v. Jung*, 79 App. Div. 4, 79 N. Y. Supp. 822, refusing to enjoin erection of flat at street line, although covenant required erection of building at least 20 feet from street; *Bangor & P. R. Co. v. American Bangor Slate Co.* 8 Northampton Co. Rep. 157, refusing to decree specific performance of covenant to ship products of covenantor by railway of covenantee as against lessee of former; *Frantz v. Weaver*, 20 Lanc. L. Rev. 335, holding erection of one-story brick church not prevented by condition in deed forbidding erection of buildings "of a less character than a two-story brick house."

Cited in footnote to *Doty v. Chattanooga Union R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad.

Privity.

Cited in *Stone v. Marshall Oil Co.* 188 Pa. 610, 41 Atl. 748, holding covenant in gas lease to pay lessor one quarter of produce of well runs against assignee of lessee.

Who entitled to enforce.

Cited in *Vetter v. Flaherty*, 4 Lack. Legal News, 184, holding adjoining owners entitled to enforce restriction as to yard and bay windows, imposed by common grantor.

Enforcement of negative covenant in equity.

Cited in *Electric City Land & Improv. Co. v. West Ridge Coal Co.* 187 Pa. 512, 41 Atl. 458, holding proviso in deed reserving to grantor minerals lying under tract conveyed for subdivision into building lots, that shaft to obtain same shall not be opened from surface, enforceable in equity against purchaser of mineral rights acquiring several lots; *Landell v. Hamilton*, 177 Pa. 24, 38 W. N. C. 357, 35 Atl. 242, refusing to enjoin erection of building on lot owing servitude of light and air to adjoining lots, where solid side walls erected by adjoining owners; *Jones v. Pittsburgh, M. & Y. R. Co.* 11 Pa. Super. Ct. 206, refusing to enjoin

grading of street crossing to meet improvement of railway, as violation of covenant in grant of easement "not to interfere with roadway."

34 L. R. A. 232, *Re WHITING*, 150 N. Y. 27, 55 Am. St. Rep. 640, 44 N. E. 715.

Transfer tax on "property within the state."

Cited in *Re Morgan*, 150 N. Y. 36, 44 N. E. 1126, Affirming 74 N. Y. S. R. 35, 38 N. Y. Supp. 378, holding foreign registered bonds, owned by nonresident but kept on deposit in domestic bank, taxable; *Re Blackstone*, 69 App. Div. 129, 74 N. Y. Supp. 508, holding proceeds of sale of stock in foreign corporation as well as running bank account, deposited by nonresident owner in domestic bank, taxable; *Buck v. Miller*, 147 Ind. 590, 37 L. R. A. 387, 62 Am. St. Rep. 436, 45 N. E. 647, holding funds of nonresident, employed in loans, mortgages, etc., through resident agent, subject to tax, where notes not in hands of attorney merely temporarily for collection; *Re Chabot*, 44 App. Div. 342, 60 N. Y. Supp. 927, holding property passing to daughter on day of death under execution of power in will admitted to probate that day, subject to tax on transfer under will of daughter; *Re Gibbes*, 84 App. Div. 513, 83 N. Y. Supp. 53, Reversing 40 Misc. 582, holding foreign bonds of foreign testator, passing to nonresident, not subject to inheritance tax; *Western Assur. Co. v. Halliday*, 61 C. C. A. 273, 126 Fed. 259, holding bonds deposited with superintendent of insurance by foreign insurance company taxable under Ohio statute.

Cited in footnotes to *Re Houdayer*, 34 L. R. A. 235, which holds nonresident's money mingled with trust funds in bank, subject to transfer tax; *Re Bronson*, 34 L. R. A. 238, which holds stock, but not bonds, of domestic corporation in possession of nonresident decedent subject to transfer tax.

Distinguished in *Re Horn*, 39 Misc. 135, 78 N. Y. Supp. 979, holding amount due nonresident by domestic life insurance company, as well as open account, not taxable; *Augusta v. Kimball*, 91 Me. 609, 41 L. R. A. 477, 40 Atl. 666, holding nonresident trustees to whom property of decedent transferred and held in another state not subject to direct tax, though they have qualified in local probate court and beneficiaries of trust are resident; *Ruckgaber v. Moore*, 104 Fed. 950; *Eidman v. Martinez*, 184 U. S. 587, 46 L. ed. 703, 22 Sup. Ct. Rep. 515, holding bonds owned by nonresident alien, passing to nonresident alien son by will and foreign intestate laws, not subject to war tax of 1898, though held by local depositary.

On United States bonds.

Cited in *Re Sherman*, 153 N. Y. 5, 46 N. E. 1032, holding United States bonds owned by resident decedent exempted from transfer by Laws 1892, chap. 399, § 22; *Re Coogan*, 27 Misc. 565, 59 N. Y. Supp. 111, issuing mandamus to comptroller to procure refund of invalid tax on transfer of United States bonds; *Re Hoople*, 93 App. Div. 488, 77 N. Y. Supp. 842, holding bonds of United States government exempt from taxation under transfer tax law.

Distinguished in *Re Plummer*, 30 Misc. 20, 62 N. Y. Supp. 1024, holding transfer of United States bonds after going into effect of Laws 1898, chap. 88, taxable; *People ex rel. United States Aluminium Printing Plate Co. v. Knight*, 174 N. Y. 482, 63 L. R. A. 90, 67 N. E. 65, holding capital of domestic corporation invested in United States letters patent subject to franchise tax.

Situs of stocks and bonds.

Cited in *Simpson v. Jersey City Contracting Co.* 165 N. Y. 198, 55 L. R. A. 803,

58 N. E. 896, Affirming 47 App. Div. 22, 61 N. Y. Supp. 1033, holding shares of stock in foreign corporation pledged by nonresident owner with domestic creditor subject to attachment; *Page v. Boggess* 41 Misc. 50, 83 N. Y. Supp. 569, upholding right of domestic pledgee to have lien declared on foreign corporation stock deposited as collateral, and sale of same ordered.

34 L. R. A. 235, *Re HOUDAYER*, 150 N. Y. 37, 55 Am. St. Rep. 642, 44 N. E. 718. Writ of error dismissed for want of jurisdiction in *Scudder v. Coler*, 175 U. S. 34, 31 L. ed. 63, 20 Sup. Ct. Rep. 26.

Succession tax.

Cited in *Re Embury*, 19 App. Div. 219, 79 N. Y. S. R. 885, 45 N. Y. Supp. 881. holding estate of nonresident not chargeable with collateral inheritance tax made effective after removal of decedent's property from state, since not a tax on right of succession as to nonresidents.

— Property subject to.

Cited in *Re Morgan*, 150 N. Y. 36, 44 N. E. 1126, holding registered bonds of foreign corporation owned by nonresident decedent, taxable; *Re Newcomb*, 71 App. Div. 608, 76 N. Y. Supp. 222, holding interest in stock of domestic corporation, purchased by broker in his own name, assigned in blank and held by nonresident owner at domicil, taxable; *Blackstone v. Miller*, 188 U. S. 205, 47 L. ed. 445, 23 Sup. Ct. Rep. 277, Affirming 171 N. Y. 683, 64 N. E. 1118, Which Affirmed 69 App. Div. 129, 74 N. Y. Supp. 508, holding proceeds of sale of stock deposited for nonresident, and balance of deposit account, subject to local tax, though taxed once at owner's domicil; *Callahan v. Woodbridge*, 171 Mass. 598, 51 N. E. 176, holding real estate, cash on hand, corporate, municipal, and United States bonds transferable by delivery, belonging to nonresident decedent and not held within forum, taxable; *Re King*, 30 Misc. 577, 63 N. Y. Supp. 1100, holding share of nonresident partner in local firm assets subject to tax; *Buck v. Miller*, 147 Ind. 590, 37 L. R. A. 387, 45 N. E. 647, 62 Am. St. Rep. 436, holding funds of nonresident employed in loans, mortgages, etc., through resident agent, subject to tax, where notes not in hands of attorney merely temporarily for collection; *Re Chabot*, 44 App. Div. 346, 60 N. Y. Supp. 927 (dissenting opinion), majority holding right of legatee of daughter dying before administration of mother's estate in her favor not taxable as property right; *People ex rel. Kursheedt Mfg. Co. v. Feitner*, 32 Misc. 87, 66 N. Y. Supp. 179, holding permanent deposit by resident decedent in foreign bank to defray foreign expenses not taxable; *Re Gibbes*, 84 App. Div. 513, 83 N. Y. Supp. 53, holding foreign bonds of foreign testator, passing to nonresident, not subject to transfer tax; *Re Probst*, 40 Misc. 432, 82 N. Y. Supp. 396, holding profits allowed to remain on deposit with partnership, taxable.

Cited in footnotes to *Re Whiting*, 34 L. R. A. 232, which holds bonds of foreign corporation within state, though owned by nonresident, subject to transfer tax; *Re Bronson*, 34 L. R. A. 238, which holds stock, but not bonds, of domestic corporation in possession of nonresident decedent subject to transfer tax.

Distinguished in *Re Horn*, 39 Misc. 134, 78 N. Y. Supp. 979, holding debt on open account to nonresident decedent, not subject to tax; *Augusta v. Kimball*, 91 Me. 609, 41 L. R. A. 477, 40 Atl. 666, holding nonresident trustees to whom property of decedent transferred and held in another state not subject to direct tax, though they have qualified in local probate court and beneficiaries of trust are residents; *Re Bentley*, 31 Misc. 658, 66 N. Y. Supp. 95, holding claim of nonresi-

dent decedent against nonresident doing local banking business, not taxable because balance appears in favor of decedent in debtor's books, where claim payable at residence; *Ruckgaber v. Moore*, 104 Fed. 950; *Eidman v. Martinez*, 184 U. S. 587, 46 L. ed. 702, 22 Sup. Ct. Rep. 515, holding bonds owned by nonresident alien and passing to alien nonresident son by will and foreign intestate laws not subject to war tax though held by local depository.

Effect of franchise tax as to foreign corporations.

Cited in *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 85, 45 L. R. A. 130, 53 N. E. 685, holding good will of foreign corporation operating wholly within state, subject to franchise tax as capital employed within state.

34 L. R. A. 238, *Re BRONSON*, 150 N. Y. 1, 55 Am. St. Rep. 632, 44 N. E. 707.

Tax on "property within state."

Cited in *Re Whiting*, 150 N. Y. 33, 34 L. R. A. 234, 55 Am. St. Rep. 640, 44 N. E. 715, holding bonds, but not stock, of foreign corporation deposited in state by nonresident decedent, taxable; *Re Fitch*, 39 App. Div. 611, 57 N. Y. Supp. 786, Affirming 26 Misc. 354, 57 N. Y. Supp. 212, holding stock in domestic corporation held by nonresident decedent taxable, though ancillary letters of administration for former not taken out, estate administered and foreign tax paid; *Re Newcomb*, 71 App. Div. 607, 76 N. Y. Supp. 222, holding interest of nonresident in stock of domestic corporation purchased in name of brokers, assigned in blank and held by owner at domicil, taxable; *Re Bushnell*, 73 App. Div. 327, 77 N. Y. Supp. 4, holding interest of nonresident legatee, subject to life estate, in stock of domestic corporation held at domicil, taxable on transfer before termination of life estate; *Re Blackstone*, 69 App. Div. 129, 74 N. Y. Supp. 508, holding proceeds of sale of stock of foreign corporation deposited in trust company to credit of nonresident owner, taxable in same manner as balance of deposit account; *Re Kennedy*, 20 Misc. 531, 46 N. Y. Supp. 906, holding foreign legacy tax on devise of stock in domestic corporation by nonresident not to be deducted from appraisal for local taxation; *Re Houdayer*, 150 N. Y. 41, 34 L. R. A. 238, 55 Am. St. Rep. 642, 44 N. E. 718, holding trust deposit by nonresident trustee decedent, taxable; *Buck v. Miller*, 147 Ind. 590, 37 L. R. A. 387, 45 N. E. 647, 62 Am. St. Rep. 436, holding notes and mortgages owned by nonresident doing loan and investment business through local agent in whose possession they are, taxable; *Greves v. Shaw*, 173 Mass. 208, 53 N. E. 372, holding stock in domestic corporation and national banks, located in state taxable therein, though owned by nonresident decedent and transferred by his foreign administrator before qualification in state; *Re Fitch*, 160 N. Y. 90, 54 N. E. 701, holding stock of domestic corporation held by nonresident decedent taxable in county where corporate property situated; *Re Gibbes*, 84 App. Div. 513, 83 N. Y. Supp. 53, holding foreign bonds of foreign testator, passing to nonresident, not subject to transfer tax; *Re Cushing*, 40 Misc. 505, 82 N. Y. Supp. 795, holding domestic bank stock owned by nonresident subject to transfer tax; *Re Hellman*, 77 App. Div. 360, 79 N. Y. Supp. 201 (dissenting opinion), majority holding right to seat in New York stock exchange, passing to personal representatives of deceased member, not subject to transfer tax.

Distinguished in *Re Embury*, 19 App. Div. 217, 79 N. Y. S. R. 885, 45 N. Y. Supp. 881, holding succession to stock of domestic corporation and local bank deposits, by legatees of nonresident owner, not taxable where property removed be-

fore tax imposed by court; *Re Pullman*, 46 App. Div. 577, 62 N. Y. Supp. 395, holding domestic debts of nonresident decedent properly offset against bonds and stock in domestic corporations held by creditors as collateral, for purpose of taxation; *Re Crerar*, 56 App. Div. 483, 67 N. Y. Supp. 795, refusing to permit appraisal of stock in domestic corporations owned by nonresident decedent, where judgment remitting same unquestioned for six years; *Re Horn*, 39 Misc. 134, 78 N. Y. Supp. 979, holding debt due on open account to nonresident creditor not taxable; *Re Preston*, 75 App. Div. 251, 78 N. Y. Supp. 91, Affirming 37 Misc. 236, 75 N. Y. Supp. 251, holding bonds secured by local mortgages not taxable where held by nonresident owner at domicil; *Re Abbett*, 29 Misc. 570, 61 N. Y. Supp. 1067, holding insurance policy issued by domestic company on life of nonresident, and not within state at time of his death, not taxable; *Ruckgaber v. Moore*, 104 Fed. 949, and *Eidman v. Martinez*, 184 U. S. 587, 46 L. ed. 702, 22 Sup. Ct. Rep. 515, holding bonds owned by nonresident decedent, passing to nonresident by will and operation of foreign intestate laws, not subject to Federal war tax of 1898.

— **Burden of proof.**

Cited in *Re Thorne*, 44 App. Div. 10, 60 N. Y. Supp. 419, holding property received by grantee under agreement to care for grantor during life not taxable in absence of evidence clearly establishing intent of grantor to reserve beneficial use.

— **United States bonds.**

Cited in *Plummer v. Coler*, 178 U. S. 125, 44 L. ed. 1004, 20 Sup. Ct. Rep. 829, Affirming 30 Misc. 21, 62 N. Y. Supp. 1024, holding local transfer of nontaxable United States bonds, taxable.

Property taxable as personalty.

Cited in *Re Jones*, 172 N. Y. 584, 60 L. R. A. 479, 65 N. E. 570, holding shares in joint stock association owning real estate, taxable as personalty.

Situs of debts.

Cited in *Louisville & N. R. Co. v. Nash*, 118 Ala. 486, 41 L. R. A. 332, 72 Am. St. Rep. 181, 23 So. 825, denying jurisdiction of garnishment of debt due nonresident at domicil, in absence of personal service within state or voluntary appearance; *Simpson v. Jersey City Contracting Co.* 165 N. Y. 198, 55 L. R. A. 804, 58 N. E. 896, holding interest of nonresident owner of stock in foreign corporation pledged to domestic creditor, subject to attachment.

Cited in note (55 L. R. A. 797) on attachment of shares of stock in foreign corporation.

Right of life tenant to stock dividends.

Cited in *Lowry v. Farmers' Loan & T. Co.* 172 N. Y. 144, 64 N. E. 796, holding life tenant entitled to stock dividend based upon accumulation of earnings or profits.

34 L. R. A. 248, *PENNYAR v. KELSEY*, 150 N. Y. 77, 44 N. E. 788.

Construction of statutes.

Cited in *People ex rel. Hannan v. Board of Health*, 153 N. Y. 518, 47 N. E. 785, construing statute forbidding summary removal of veteran "holding a position" in civil service, to apply only in cases of legal appointment.

— **Attachment law.**

Cited in *Courtney v. Eighth Ward Bank*, 154 N. Y. 691, 49 N. E. 54, holding

statutory requirement of service of certified copy of attachment not satisfied by exact copy not certified to as such, though marked "copy" and signed by sheriff; *Robinson v. Columbia Spinning Co.* 31 App. Div. 241, 52 N. Y. Supp. 751, holding "actual custody" of property not taken where certified copies of attachment papers not served, and warehouseman's lien for charges not released nor goods actually delivered; *People v. St. Nicholas Bank*, 44 App. Div. 317, 60 N. Y. Supp. 719, holding verified complaint incompetent as affidavit to show existence of cause of action warranting issuance of attachment, where nothing in record to show its consideration by court; *Reedy Elevator Co. v. American Grocery Co.* 24 Misc. 682, 53 N. Y. Supp. 989, holding general statement of compliance with foreign corporation law insufficient for maintenance of attachment, where obtaining of receipt for license fee within thirteen months after beginning to do business not affirmatively shown; *Tausend v. Handlear*, 33 Misc. 590, 68 N. Y. Supp. 77, holding warrant directing marshal to attach property "within city" invalid where city includes territory beyond jurisdiction of marshal.

Distinguished in *Rosenzweig v. Wood*, 30 Misc. 298, 63 N. Y. Supp. 447, holding party having abode within state, "resident" within attachment statute, though legal domicile elsewhere; *Thorn v. Alvord*, 32 Misc. 462, 66 N. Y. Supp. 587, refusing to set aside attachment for irregularities in affidavit as to unessential matters.

34 L. R. A. 251, *SINGLETON v. STATE*, 38 Fla. 297, 56 Am. St. Rep. 177, 21 So. 21.

Conviction on new trial affirmed in 39 Fla. 521, 22 So. 876.

Power to pardon.

Cited in footnotes to *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations on pardoning power of governor; *People v. Marsh*, 51 L. R. A. 461, which sustains pardon granted while case pending on bill of exceptions.

Cited in note (35 L. R. A. 705) on power of public prosecutor to dismiss prosecution.

34 L. R. A. 256, *BELKNAP v. LOUISVILLE*, 99 Ky. 474, 59 Am. St. Rep. 573, 36 S. W. 1118.

Validity of election to authorize bond issue.

Cited in *Ashland v. Culbertson*, 103 Ky. 162, 44 S. W. 441, upholding favorable vote by four fifths of electors for issue of bonds for erection of school building at general municipal elections.

Sufficiency of vote.

Cited in *Re Denny*, 156 Ind. 119, 51 L. R. A. 728, footnote p. 722, 59 N. E. 359, holding constitutional requirement for adoption of constitutional amendment by majority of electors not satisfied by majority of those voting thereon, where not majority of all votes cast at election.

Cited in footnotes to *Bryan v. Stephenson*, 35 L. R. A. 752, which requires majority of all votes cast at election to authorize issue of bonds; *State ex rel. McClurg v. Powell*, 48 L. R. A. 652, which requires majority of all electors voting at election for any purpose, to adopt constitutional amendment; *De Soto Parish v. Williams*, 37 L. R. A. 761, which holds only majority of taxpayers actually voting at election necessary to authorize increase of taxes.

Distinguished in *Davis v. Brown*, 46 W. Va. 719, 34 S. E. 839, holding three fifths of votes upon question of relocation of county seat sufficient to authorize same, though not three fifths of "all votes cast."

Overruled in part in *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 639, 42 L. R. A. 742, footnote p. 738, 47 S. W. 773, holding vote of two thirds of those voting upon issue of bonds sufficient to authorize issue.

Stare decisis.

Cited in *Pratt v. Breckinridge*, 112 Ky. 27, 65 S. W. 136, holding court of appeals not bound to adhere to an erroneous decision by it.

34 L. R. A. 262, *MULLAN v. STATE*, 114 Cal. 578, 46 Pac. 670.

Amendment of Constitution.

Distinguished in *People ex rel. Atty. Gen. v. Curry*, 130 Cal. 90, 62 Pac. 516, holding amendment proposed at regular session of legislature not superseded by one proposed at subsequent special session, where not included in proclamation convening it.

34 L. R. A. 265, *PHILBROOK v. NEWMAN*, 114 Cal. 635, 46 Pac. 742.

Assignment of claim by foreign executrix.

Cited in *Bovard v. Dickenson*, 131 Cal. 164, 63 Pac. 162, holding title by assignment from foreign executrix not established in absence of proof of foreign law or order of court approving transfer.

34 L. R. A. 274, *MEMPHIS NAT. BANK v. NEELY*, 97 Tenn. 120, 56 Am. St. Rep. 788, 36 S. W. 716.

Obligation of contract by party non compos mentis.

Cited in *Flach v. Gottschalk Co.* 88 Md. 375, 42 L. R. A. 748, 71 Am. St. Rep. 418, 41 Atl. 908, enforcing contract where lunatic has had benefit of consideration and good-faith obligor cannot be placed *in statu quo*.

Cited in footnote to *American Trust & Bkg. Co. v. Boone*, 40 L. R. A. 250, which holds bank liable for paying check of one judged insane in other state, though insanity not known to bank.

Imputed notice.

Cited in *Curtice v. Crawford County Bank*, 110 Fed. 844, holding bank president's knowledge in individual capacity of pledge of stock of stockholder not imputable to bank so as to defeat statutory loan subsequently made thereon without his knowledge.

Contracts by married women.

Cited in footnote to *Harrisburg Nat. Bank v. Bradshaw*, 34 L. R. A. 597, which sustains renewal by married woman of accommodation indorsement made before marriage.

34 L. R. A. 279, *STATE v. ORR*, 68 Conn. 101, 35 Atl. 770.

Police regulations.

Cited in *Dupont v. District of Columbia*, 20 App. D. C. 487, upholding ordinance forbidding removal of garbage for feeding to pigs or use as fertilizer, though rights valuable; *California Reduction Co. v. Sanitary Reduction Works*,

61 C. C. A. 98, 126 Fed. 36, holding grant of exclusive franchise to remove garbage for period of fifty years valid under police power.

Cited in footnotes to *State ex rel. Moriarity v. McMahon*, 38 L. R. A. 675, which holds business of scavenger within control of city having power to make ordinances for protection of health; *State v. Hill*, 50 L. R. A. 473, which holds void, ordinance requiring license for scavenger work and empowering health board to decide who are competent bidders; *Iler v. Ross*, 57 L. R. A. 895, which denies city's right to grant monopoly by contract for removal of ashes, etc.; *State ex rel. Beek v. Wagener*, 46 L. R. A. 442, which sustains statute regulating business of commission merchants handling agricultural products.

Cited in notes (38 L. R. A. 314) on municipal power over nuisances affecting safety, health, and personal comfort; (38 L. R. A. 642) on municipal power over nuisances relating to trade or business.

34 L. R. A. 283, *HENDRY v. BENLISA*, 37 Fla. 609, 20 So. 800.

Delay as affecting right to specific performance.

Cited in footnote to *Reid v. Mix*, 55 L. R. A. 706, which requires one seeking to rescind contract for delay to show such wilful delay as to evince other party's intent to treat contract at end.

34 L. R. A. 286, *BAGLEY v. COLUMBUS SOUTHERN R. CO.* 98 Ga. 626, 58 Am. St. Rep. 335, 25 S. E. 638.

Fences as part of realty.

Cited in *Bagley v. Rose Hill Sugar Co.* 111 La. 278, 35 So. 539, holding that plantation fences pass with title to the land.

Crops as personalty.

Cited in *Knight v. Houston & T. C. R. Co.* 93 Tex. 418, 55 S. W. 558, holding action for burning grass transitory and maintainable in another county than that in which injury inflicted.

34 L. R. A. 293, *LOUISVILLE, N. A. & C. R. CO. v. LYNCH*, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471.

Presumption of negligence.

Cited in *Bishop v. Brown*, 14 Colo. App. 548, 61 Pac. 50, and *Omaha Packing Co. v. Murray*, 112 Ill. App. 239, holding negligence not presumed from mere fact of boiler explosion.

General findings and special verdict.

Cited in *Huntington County v. Bonebrake*, 146 Ind. 317, 45 N. E. 470, holding general interrogatory as to negligence improperly submitted to jury finding special verdict; *Boswell v. Wakley*, 149 Ind. 69, 48 N. E. 637, disregarding as conclusion of law, jury's answer to interrogatory as to plaintiff's "negligence;" *Roller v. Kling*, 150 Ind. 162, 49 N. E. 948, and *Bower v. Bower*, 146 Ind. 398, 45 N. E. 595, holding general instructions covering law of case improper where special verdict to be found on all issues; *Alexandria v. Young*, 20 Ind. App. 677, 51 N. E. 109, holding absence of general finding of negligence does not invalidate judgment based on special verdict in case involving negligence.

Boiler explosions, generally.

Cited in footnotes to *Boston Woven Hose & Rubber Co. v. Kendall*, 51 L. R. A. 781, which holds damages which purchaser of boiler is compelled to pay for injuries to employee by its explosion, recoverable against maker as damages for breach of warranty; *Vieth v. Hope Salt & Coal Co.* 57 L. R. A. 410, which denies liability for injury to neighbor by explosion of steam boiler operated on own premises with care and skill.

Allegation of negligence.

Cited in note (59 L. R. A. 218) on sufficiency of general allegations of negligence.

34 L. R. A. 297, *POTTER v. BERRY*, 53 N. J. Eq. 151, 51 Am. St. Rep. 626, 32 Atl. 259.

34 L. R. A. 301, *AMERICAN ACCL. CO. v. CARSON*, 99 Ky. 441, 59 Am. St. Rep. 473, 36 S. W. 169.

"Accidental" death.

Cited in *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 242, 76 N. W. 562, upholding recovery for injury inflicted by shot from robber, which jury finds unintentional; *Campbell v. Fidelity & C. Co.* 109 Ky. 670, 60 S. W. 492, holding death of insured, killed while making an assault on policeman, accidental, within policy.

Distinguished in *Butero v. Travelers' Acci. Ins. Co.* 96 Wis. 541, 65 Am. St. Rep. 61, 71 N. W. 811, holding death from wounds intentionally inflicted by another not "accidental," though unanticipated by insured; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 286, 68 Am. St. Rep. 306, 76 N. W. 683, holding burden on plaintiff to establish that death accidental where caused by morphine intentionally taken.

Conditions in policy, as matter of defense.

Distinguished in *Ætna Ins. Co. v. Glasgow Electric Light & Power Co.* 107 Ky. 82, 52 S. W. 975, holding that condition in policies relieving insurer from liability for loss from fire caused by electric current need not be negated by insurer suing on policies.

34 L. R. A. 303, *WHITELEY v. CENTRAL TRUST CO.* 22 C. C. A. 67, 43 U. S. App. 643, 76 Fed. 74.

Priority of railroad mortgage.

Cited in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 24 C. C. A. 512, 48 U. S. App. 324, 79 Fed. 227, holding mortgage takes precedence over subsequent judgment, based on negligence of company; *Columbus, S. & H. R. Co.'s Appeals*, 109 Fed. 196, holding creditors not given lien superior to mortgage by assumption agreement providing for payment of debts out of proceeds of bonds secured by mortgage.

Cited in footnote to *Illinois Trust & Sav. Bank v. Doud*, 52 L. R. A. 481, which holds claim for money loaned to pay interest on mortgage debt inferior to lien of prior mortgage.

34 L. R. A. 308, FULLER v. KANE, 110 Mich. 549, 64 Am. St. Rep. 362, 68 N. W. 267.

Taxation of judgments.

Cited in footnote to Hamilton v. Wilson, 48 L. R. A. 238, which holds void, statute for taxation of personal judgments with specified exceptions.

34 L. R. A. 309, MYERS v. BALTIMORE COUNTY, 83 Md. 385, 55 Am. St. Rep. 349, 35 Atl. 144.

Property subject to taxation.

Cited in Kelley v. Rhoads, 9 Wyo. 363, 87 Am. St. Rep. 959, 63 Pac. 935, holding herds of sheep feeding on public plains while in transit to another state, subject to local taxation.

Cited in footnotes to Kelley v. Rhodes, 39 L. R. A. 594, which holds right to tax sheep driven through state dependent on purpose to obtain grazing for them; Winkley v. Newton, 35 L. R. A. 756, which holds ice stored in ice houses taxable to nonresident owner.

Notice and hearing.

Cited in Monticello Distilling Co. v. Baltimore, 90 Md. 428, 45 Atl. 210, holding statute authorizing assessment without notice to owner or opportunity for hearing, unconstitutional; Western Ranches v. Custer County, 28 Mont. 281, 72 Pac. 659, holding assessors without jurisdiction to increase assessment where statutory notice to taxpayer not given.

34 L. R. A. 313, STATE *ex rel.* METCALF v. JOHNSON, 18 Mont. 548, 46 Pac. 533.

Validity of nomination.

Followed on substantially same facts in State *ex rel.* McLaughlin v. Bailey, 18 Mont. 555, 46 Pac. 1116.

Cited in State *ex rel.* Clarke v. Moran, 24 Mont. 445, 63 Pac. 390, holding nominations by rival conventions of delegates not selected at regular party call, invalid; State *ex rel.* Scharnikow v. Hogan, 24 Mont. 392, 62 Pac. 583, holding nominations by state convention in which delegates illegally appointed at mass meeting held without notice, immediately after adjournment of regular county convention, invalid.

Cited in footnote to State *ex rel.* Russell v. Tooker, 34 L. R. A. 315, which denies right to recognize nomination by political club.

Injunction to protect political rights.

Cited in State *ex rel.* Clarke v. Moran, 24 Mont. 437, 63 Pac. 390, restraining by injunction printing of ticket nominated by convention irregularly called.

Power of supreme court as to certiorari.

Distinguished in State *ex rel.* Whiteside v. First Judicial Dist. Court, 24 Mont. 561, 63 Pac. 395, holding authority of supreme court on certiorari to vacate discharge of prisoner in habeas corpus proceedings not granted by authorization to issue certiorari as original writ.

34 L. R. A. 315, *STATE ex rel. RUSSELL v. TOOKER*, 18 Mont. 540, 46 Pac. 530.

Validity of nomination.

Cited in *State ex rel. Scharnikow v. Hogan*, 24 Mont. 392, 62 Pac. 583, holding nominations by state convention in which delegates illegally appointed at mass meeting, held without notice immediately after adjournment of regular county convention, invalid; *State ex rel. Clarke v. Moran*, 24 Mont. 445, 63 Pac. 390, holding nominations by rival conventions of delegates not selected at regular party call, invalid; *Whipple v. Owen*, 24 Colo. 321, 50 Pac. 861, holding nomination by convention of delegates attempting to assume by petition, name of existing party, invalid; *State ex rel. Brooks v. Fransham*, 19 Mont. 285, 48 Pac. 1, holding erroneous placing of candidate's name on ballot, where nominated only by petition, not available to defeat election where objection not made before; *State ex rel. Wolfe v. Falley*, 9 N. D. 456, 83 N. W. 860, upholding nominee by delegate elected under direction of county central committee as against nominee of delegates elected in manner directed by judicial district committee.

Cited in footnote to *State ex rel. Metcalf v. Johnson*, 34 L. R. A. 313, which holds unavailing, attempt of twenty-one persons to form new political party.

Injunction to protect political rights.

Cited in *State ex rel. Clarke v. Moran*, 24 Mont. 437, 63 Pac. 390, restraining by injunction printing of parties nominated by convention irregularly called.

Power of supreme court as to certiorari.

Cited in *State ex rel. Whiteside v. First Judicial Dist. Court*, 24 Mont. 561, 63 Pac. 395, holding authority of supreme court on certiorari to vacate discharge of prisoner in habeas corpus proceedings not granted by authorization to issue certiorari as original writ.

Equity practice.

Cited in *State ex rel. Metcalf v. Johnson*, 18 Mont. 553, 34 L. R. A. 315, 46 Pac. 533, holding judgment in equity not controlled by prayer for relief.

34 L. R. A. 318, *STATE v. NELSON*, 66 Minn. 166, 61 Am. St. Rep. 399, 68 N. W. 1066.

Municipal police regulations.

Cited in *Norfolk v. Flynn*, 101 Va. 476, 62 L. R. A. 773, footnote p. 771, 99 Am. St. Rep. 918, 44 S. E. 717, sustaining ordinance requiring inspection of milk sold within city limits and providing for licensing of vendors.

Cited in footnotes to *State v. Zeno*, 48 L. R. A. 88, which sustains requirement of license for barber; *State v. Crescent Creamery Co.* 54 L. R. A. 466, which sustains statute against selling cream containing less than 20 per cent of fat; *People v. Biesecker*, 57 L. R. A. 178, which denies legislative power to prohibit sale of certain preservatives or of dairy products containing same; *State v. Layton*, 62 L. R. A. 164, which sustains statutory prohibition against manufacture or sale of baking powder containing alum; *St. Louis v. Fischer*, 64 L. R. A. 679, which sustains ordinance prohibiting maintenance of dairy within city limits.

Cited in note (48 L. R. A. 261) on legal restrictions on department stores.

Distinguished in *St. Paul v. Peck*, 78 Minn. 498, 81 N. W. 389, denying validity of ordinance requiring local dairyman to pay fee for inspection of cattle:

State v. Elofson, 86 Minn. 105, 90 N. W. 309, holding ordinance requiring inspection of cattle kept outside municipal limits, "without expense to city," invalid.

34 L. R. A. 321, HASTINGS v. FOXWORTHY, 45 Neb. 676, 63 N. W. 955.

Statement of unliquidated claim against municipality.

Limited in Dovey v. Plattsmouth, 52 Neb. 645, 73 N. W. 11, holding filing of detailed statement not condition precedent, except in action based on negligence.

Decision on former hearing as res judicata.

Cited in Fuller v. Cunningham, 48 Neb. 859, 67 N. W. 879, refusing to consider correctness of instruction given by trial court on second trial in accordance with judgment on first appeal; State *ex rel.* Seth Thomas Clock Co. v. Cass County, 60 Neb. 573, 83 N. W. 733, holding construction of contract on first appeal governs second appeal in absence of manifest error; Smith v. Neufeld, 61 Neb. 701, 85 N. W. 898, holding evidence of fraud in sale of exempt property properly excluded where held immaterial on former appeal; First Nat. Bank v. Farmers' & M. Bank, 2 Herdman (Neb.) 115, 95 N. W. 1062, holding that doctrine of "law of the case" should be restricted to such questions as have been presented and decided at a former hearing of the same cause.

Cited in footnote to Illinois C. R. Co. v. Benz, 58 L. R. A. 690, which holds ruling on reversal of judgment and remanding of action which had been removed to Federal court not law of case if action dismissed and new one begun in other county.

Annotation in 34 L. R. A. 321, referred to with approval in Jones v. Charleston & W. C. R. Co. 65 S. C. 420, 43 S. E. 884, holding principles of law decided on first appeal, *res judicata* on later appeal; Bridges v. McAlister, 106 Ky. 802, 45 L. R. A. 804, 90 Am. St. Rep. 267, 51 S. W. 603, holding *dicta* of court on point not in issue on former trial not conclusive on subsequent trial of issue raised by amended pleadings.

Effect of general demurrer.

Cited in Barr v. Little, 54 Neb. 556, 74 N. W. 850, overthrowing complaint on demurrer to answer.

34 L. R. A. 350, EVERETT v. LOS ANGELES CONSOL. ELECTRIC R. CO. 115 Cal. 105, 46 Pac. 889, 43 Pac. 207.

Liability for injury to person on street railway track.

Cited in Cawley v. La Crosse City R. Co. 101 Wis. 151, 77 N. W. 179, holding railway not liable for injury to driver of wagon turning onto railway tracks without looking or listening or heeding warning signals given; Morrissey v. Bridgeport Traction Co. 68 Conn. 218, 35 Atl. 1126, holding railway not liable for injury to wagon by car, approach of which apprehended but not avoided as it might reasonably have been; Wahlgren v. Market Street R. Co. 132 Cal. 664, 62 Pac. 308, holding question of contributory negligence for jury where pedestrian injured at night by car switching backward across sidewalk into barn, without light or signals; Ames v. Waterloo & C. F. Rapid Transit Co. 120 Iowa, 643, 95 N. W. 161, denying right of recovery for death of person stepping directly upon street car track from behind covered wagon, without looking for car; Harrington v. Los Angeles R. Co. 140 Cal. 523, 63 L. R. A. 242, 98 Am. St. Rep. 85, 74 Pac. 15, holding

railway liable for death due to reckless collision of car with bicycle rider racing in violation of ordinance.

Distinguished in *Abrahams v. Los Angeles Traction Co.* 124 Cal. 413, 57 Pac. 216, holding railway liable for injury due to reckless collision of car with sprinkling cart, rightfully on car tracks; *Clark v. Bennett*, 123 Cal. 280, 55 Pac. 908, holding party driving wagon across tracks in front of approaching car not negligent where car not seen until wagon almost on tracks, and car still sufficiently distant to have been stopped; *Schneider v. Market Street R. Co.* 134 Cal. 491, 66 Pac. 734, upholding verdict for pedestrian struck at public crossing by electric car approaching at excessive speed without signal.

Proximate cause.

Cited in footnote to *Rider v. Syracuse Rapid Transit R. Co.* 58 L. R. A. 125, which holds proximate cause that which, in natural sequence, unbroken by new cause, produced event.

Negligence in riding bicycle.

Cited in footnote to *Moore v. District of Columbia*, 41 L. R. A. 208, which holds reasonableness of ordinance prohibiting riding bicycle with handle bars more than 4 inches below saddle a question of fact.

Cited in note (47 L. R. A. 303) on bicycle law.

34 L. R. A. 360, *VAN EPPS v. REDFIELD*, 68 Conn. 39, 35 Atl. 809.

Presumption on demurrer.

Cited in *Francis v. Earle*, 77 Fed. 713, holding agreement alleged in defense of action on note not presumed oral on demurrer.

Specific performance of agreement.

Second appeal in *Van Epps v. Redfield*, 69 Conn. 114, 36 Atl. 1011, holding fact of occupancy of premises without payment of rent insufficient evidence of oral agreement to justify decree of specific performance; *Clowes v. Miller*, 74 Conn. 296, 50 Atl. 728, holding that specific performance of contract will not be decreed where it would defeat primary object of the agreement.

34 L. R. A. 363, *SANDAGE v. STUDEBAKER BROS. MFG. CO.* 142 Ind. 148, 51 Am. St. Rep. 165, 41 N. E. 380.

Actions relating to patent rights.

Cited in *Eclipse Wind Engine Co. v. Zimmerman Mfg. Co.* 16 Ind. App. 500, 44 N. E. 1115, enforcing notes given for right to use patented appliance, though not marked "given for patent right;" *Mason v. McLeod*, 57 Kan. 109, 41 L. R. A. 550, 57 Am. St. Rep. 327, 45 Pac. 76, holding vendee entitled to recover consideration paid to vendor of patent right who fails to conform to statutory requirements of sale.

Contracts in violation of statutes.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 21, 71 Am. St. Rep. 301, 49 N. E. 582, holding acceptance of benefits under contract stipulating release thereby of all claims for damages, not a compromise, but a release made void by employers liability act.

Injunction against foreign action.

Cited in footnote to *Miller v. Gittings*, 37 L. R. A. 654, which enjoins oppressive action in another state, brought to evade local laws.

Distribution of insolvent's estate.

Cited in *Combs v. Union Trust Co.* 146 Ind. 691, 46 N. E. 16, holding foreign creditor attaching insolvent debtor's property in his jurisdiction accountable for proceeds before sharing *pro rata* in general assignment.

34 L. R. A. 368, *BRIDAL VEIL LUMBERING CO. v. JOHNSON*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790.

"Public use" within eminent domain law.

Cited in *Fanning v. Gilliland*, 37 Or. 374, 82 Am. St. Rep. 758, 61 Pac. 636, holding condemnation of land for public road, public use though only single family thereby benefited; *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein*, 63 Kan. 497, 65 Pac. 684, upholding exercise of eminent domain by private corporation organized for distribution of waters for irrigation; *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 13, 56 L. R. A. 245, footnote p. 240, 88 Am. St. Rep. 918, 87 N. W. 849, upholding condemnation of property for open track, though but single industry thereby benefited; *Ulmer v. Lime Rock R. Co.* 98 Me. 590, 66 L. R. A. 393, 57 Atl. 1001, upholding right of railroad company to condemn land for branch track to quarry.

Cited in footnotes to *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.* 51 L. R. A. 936, which holds railroad company entitled to exercise of eminent domain, though railroad short and built chiefly to transport coal of particular company; *Healy Lumber Co. v. Morris*, 63 L. R. A. 821, which denies power to acquire easement over land for transportation to market of logs of private owner.

Distinguished in *Apex Transp. Co. v. Garbade*, 32 Or. 587, 62 L. R. A. 517, 52 Pac. 573, holding skidway for logs, beginning and terminating in land of private corporation and not connecting with public road, not subject to exercise of eminent domain.

34 L. R. A. 369, *STATE ex rel. ST. LOUIS UNDERGROUND SERVICE CO. v. MURPHY*, 134 Mo. 548, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132.

Municipal powers and liabilities as to streets and water.

Cited in *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 340, 105 Fed. 8, upholding ordinance granting right to use city water for electric light plant in consideration of furnishing certain lights free of charge, and conferring other benefits upon city; *McWethy v. Aurora Electric Light & P. Co.* 202 Ill. 226, 67 N. E. 9, upholding right of municipal corporation owning fee of street to authorize erection of electric light poles therein; *Pettit v. Grand Junction*, 119 Iowa, 358, 93 N. W. 381, holding abutting owner entitled to abatement of nuisance caused by erection of public buildings in dedicated street.

Cited in footnotes to *Prince v. Crocker*, 32 L. R. A. 610, which holds right to enter on public garden in Boston to make suitable connection between surface tracks and subway implied from rights given by statute; *State ex rel. National Subway Co. v. St. Louis*, 42 L. R. A. 113, which sustains right of subway company under ordinance consenting to underground conduit.

Cited in notes (38 L. R. A. 311) on municipal power over nuisances affecting safety, health, and personal comfort; (39 L. R. A. 621) on municipal control over public nuisances on public streets and highways, created by street railroads and other electric companies.

Overruled in *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 565, 42 L. R. A. 118, 46 S. W. 981, upholding power of municipality to compel telegraph company, constructing underground conduit under valid ordinance, to permit other telegraph company to use same.

Ultra vires act.

Cited in *State ex rel. Kansas City v. East Fifth Street R. Co.* 140 Mo. 556, 33 L. R. A. 223, 62 Am. St. Rep. 742, 41 S. W. 955, holding forfeiture of franchise not prevented by *ultra vires* ordinance declaring nonuser should not work forfeiture; *Unionville v. Martin*, 95 Mo. App. 38, 68 S. W. 605, upholding action by municipality to recover money paid under *ultra vires* contract for digging well unauthorized by ordinance.

Distinguished in *Chenoweth v. Pacific Exp. Co.* 93 Mo. App. 195, holding annuity contract by railroad superintendent with injured express messenger enforceable, though *ultra vires*, provided contract not forbidden by law.

— Estoppel.

Cited in *Wheeler v. Poplar Bluff*, 149 Mo. 46, 49 S. W. 1088, holding city not estopped to deny liability on contract to grade streets, made without authorizing ordinance, though contract fulfilled; *Noel v. San Antonio*, 11 Tex. Civ. App. 586, 33 S. W. 263, holding city not estopped to deny liability on notes issued pursuant to unconstitutional contract, though latter performed and benefits received; *Macon Consol. Street R. Co. v. Macon*, 112 Ga. 787, 38 S. E. 60, holding *ultra vires* agreement of mayor and council not to compel change of tracks cannot be used as estoppel to prevent enforcement of subsequent ordinance requiring such change; *Simpson v. Stoddard County*, 173 Mo. 491, 73 S. W. 700 (dissenting opinion), majority holding county estopped from questioning sale of swamp lands after acquiescing therein for thirty years; *Stealey v. Kansas City*, 179 Mo. 407, 78 S. W. 599, holding city not estopped by *ultra vires* ordinance from denying that defective sidewalk was within limits of city.

Liabilities of quasi public corporations.

Distinguished in *Rockingham County Light & Power Co. v. Hobbs*, 72 N. H. 533, 66 L. R. A. 586, 58 Atl. 46, holding electric company with power to exercise right of eminent domain bound to supply electricity at reasonable rates to public.

34 L. R. A. 378, *CLARK v. STANWOOD*, 166 Mass. 379, 44 N. E. 537.

Liability of partner's property for firm debts.

Cited in *Priesing v. Crampton*, 181 Mass. 493, 63 N. E. 936, holding retiring partner liable to firm creditor, though debt proved against insolvent estate of continuing partner assuming firm debts; *Very v. Clarke*, 177 Mass. 53, 83 Am. St. Rep. 260, 58 N. E. 151, holding that partnership debt cannot be set off against individual claim of member against third person; *Re Beck*, 110 Fed. 140, holding that trustee should be appointed by individual and not firm creditors on bankruptcy of individual partner.

Cited in footnote to *McCord-Brady Co. v. Mills*, 46 L. R. A. 737, which holds individual property not necessarily included in assignment for creditors by partners.

34 L. R. A. 384, *Re HULETT*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31.

Revocation of will by marriage.

Cited in *Kelly v. Stevenson*, 85 Minn. 249, 56 L. R. A. 756, footnote p. 754, 89

Am. St. Rep. 545, 88 N. W. 739, holding wife's antenuptial will not revoked by marriage.

Cited in footnotes to *Ingersoll v. Hopkins*, 40 L. R. A. 191, which holds will giving testator's property to woman made executor, revoked by testator's subsequent marriage to her; *Glascott v. Bragg*, 56 L. R. A. 258, which holds will in favor of third person revoked by marriage and adoption of child; *Hudnall v. Ham*, 48 L. R. A. 557, which holds widow precluded by antenuptial contract agreeing to release all interest in his estate, from contesting husband's will, on ground that it was revoked by marriage.

Validity of secret marriage.

Cited in *Hilton v. Roylance*, 25 Utah, 139, 58 L. R. A. 728, 95 Am. St. Rep. 821, 69 Pac. 660, holding party "sealed" to another under law of Mormon church entitled to inherit as widow.

Cited in note (41 L. R. A. 449) on entries in family Bible or other religious book as evidence.

Distinguished in *Heminway v. Miller*, 87 Minn. 128, 91 N. W. 428, holding no presumption of marriage arises from secret cohabitation and concealed relationship.

Admissibility of party's testimony as to conversation with deceased.

Distinguished in *Lowe v. Lowe*, 83 Minn. 209, 86 N. W. 11, excluding oral testimony of conversation between appellant and deceased relating to contents of letter tending to show contract alleged, where deceased not shown to have read letter.

34 L. R. A. 389; *KRAMER v. OLD*, 119 N. C. 1, 56 Am. St. Rep. 650, 25 S. E. 813.

Contracts in restraint of trade.

Cited in *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 919, 53 C. C. A. 489, 116 Fed. 309, enjoining employee from violating agreement not to become interested in rival concern within radius of 1500 miles of specified city, during term of his employment; *Shute v. Heath*, 131 N. C. 282, 42 S. E. 704, holding contract of one selling business, not to engage in same business in any territory in which he had secured patronage, void; *Teague v. Schaub*, 133 N. C. 465, 45 S. E. 762 (dissenting opinion), majority holding contract of physician with another to locate elsewhere at specified time, if "the field is not larger," void; *Disosway v. Edwards*, 134 N. C. 257, 46 S. E. 501, holding contract not to engage in liquor business in specified city for twenty years, valid; *Robinson v. Suburban Brick Co.* 62 C. C. A. 487, 127 Fed. 807, upholding contract not to engage in specified business within radius of 50 miles from specified place, for ten years.

Cited in footnotes to *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; *Bancroft v. Union Embossing Co.* 64 L. R. A. 298, which sustains contract by one selling right to manufacture and sell machine invented by him, to make, or transfer to others right to make, such machines.

— Duration.

Cited in *Hauser v. Harding*, 126 N. C. 299, 35 S. E. 586, holding physician's valid contract to refrain from practice enforceable during entire lifetime in absence of limitation.

— Breach.

Cited in *Jefferson v. Markert*, 112 Ga. 505, 37 S. E. 758, holding contract void

lated by taking exclusive management of competitive business organized under sham arrangement; *Love v. Stidham*, 18 App. D. C. 315, 53 L. R. A. 401, holding sales by single member of partnership in violation of restrictive agreement by firm renders all liable for breach.

34 L. R. A. 392, *STATE v. YANDLE*, 119 N. C. 874, 25 S. E. 796.

Right to compel prisoners to labor.

Cited in *State v. Nelson*, 119 N. C. 801, 25 S. E. 863, holding sentence to twelve months' hard labor excessive, where prisoner in default for only \$60 fine and allowance in bastardy proceeding; *Herring v. Dixon*, 122 N. C. 425, 29 S. E. 363, holding statute authorizing county commissioners to employ convicts on roads, constitutional; *State v. White*, 125 N. C. 683, 34 S. E. 532 (dissenting opinion), majority holding bastardy prisoner relieved from fine and allowance by taking insolvent debtor's oath.

34 L. R. A. 393, *ILLINOIS C. R. CO. v. IHLENBERG*, 21 C. C. A. 546, 43 U. S. App. 726, 75 Fed. Rep. 873.

Self-executing laws.

Cited in *Adams v. Kuykendall*, 83 Miss. 589, 35 So. 830, holding constitutional provision that property shall be assessed for taxes under general laws and by uniform rules, self-executing.

Cited in footnote to *State v. Kyle*, 56 L. R. A. 115, which holds self-operating constitutional amendment for criminal prosecution by indictment or information only.

Distinguished in *State v. Bradford*, 12 S. D. 215, 80 N. W. 143, holding appropriate legislation necessary to render effectual, constitutional amendment providing for state control of liquor traffic.

Conflict of laws as to liability for negligence.

Cited in *Cincinnati, H. & D. R. Co. v. Thiebaud*, 52 C. C. A. 542, 114 Fed. 922, holding liability for injury through negligence of fellow servant governed by law of place where accident happened; *Dormidy v. Sharon Boiler Works*, 127 Fed. 485, 34 Pittsb. L. J. N. S. 237, holding that Federal court will adopt construction of fellow servant statute by courts of state where injury occurs.

Cited in footnotes to *Chicago & E. I. R. Co. v. Rouse*, 44 L. R. A. 410, which holds master's liability for fellow servant's act governed by law of place where cause of action arises; *Kansas City, Ft. S. & M. R. Co. v. Becker*, 46 L. R. A. 814, which holds servant's assumption of risks from fellow servant's negligence governed by laws of state where injury occurs; *Jones v. Chicago, St. P. M. & O. R. Co.* 49 L. R. A. 640, which holds statute of state where railroad employee injured, as to presumptive evidence of employer's knowledge of defect in appliance, does not govern in action in other state; *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which denies right to recover in another state for injury from fellow servant's negligence in state where no remedy given.

Cited in note (56 L. R. A. 221) on conflict of laws as to action for death or bodily injuries.

34 L. R. A. 398, *Re MILLER*, 110 Mich. 676, 64 Am. St. Rep. 376, 68 N. W. 90.

Ex post facto legislation.

Cited in *Judd v. Judd*, 125 Mich. 234, 84 N. W. 134, enforcing payment of alimony by punishment for contempt under statute passed after decree awarding alimony.

Cited in footnotes to *State v. Kyle*, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed; *State v. Martijn*, 43 L. R. A. 94, which holds that imprisonment for felony, terminated by unconditional pardon, is not to be counted as former imprisonment in determining whether accused an habitual criminal.

What constitutes jeopardy.

Cited in footnote to *Re Ascher*, 57 L. R. A. 806, which holds accused not put in jeopardy by discharge of jury after trial commenced, because jurors prejudiced in his favor.

34 L. R. A. 408, *RATHBONE v. WIRTH*, 150 N. Y. 459, 45 N. E. 15.

Local self government.

Cited in *Re Brenner*, 170 N. Y. 190, 63 N. E. 133, Affirming 35 Misc. 308, 71 N. Y. Supp. 44, holding statute authorizing appointment of county commissioner of jurors by judges of supreme court, void; *People ex rel. Balcom v. Mosher*, 163 N. Y. 41, 79 Am. St. Rep. 552, 57 N. E. 88, Affirming 45 App. Div. 73, 61 N. Y. Supp. 452, holding statute requiring appointment of party standing highest in civil service list, void; *O'Connor v. Fond du Lac*, 109 Wis. 265, 53 L. R. A. 836, 85 N. W. 327; *People ex rel. Lovett v. Randall*, 151 N. Y. 500, 45 N. E. 841; *People ex rel. Eldred v. Palmer*, 21 App. Div. 106, 47 N. Y. Supp. 403,—holding extension of term of elective office by statute void as to existing incumbent; *Lexington v. Thompson*, 113 Ky. 551, 57 L. R. A. 778, 68 S. W. 477, denying validity of statute fixing salary of municipal firemen; *State ex rel. Geake v. Fox*, 158 Ind. 132, 56 L. R. A. 896, 63 N. E. 19, holding statute creating municipal board of safety, void; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 492, 41 L. R. A. 628, footnote p. 624, 76 N. W. 175, holding statute authorizing governor to appoint municipal fire and police commissioners, void; *People v. Dooley*, 69 App. Div. 533, 75 N. Y. Supp. 350, concurring opinion as to proposition that statute providing for election of city magistrates in one borough, and appointment in another, is void; *Re Haase*, 41 Misc. 118, 83 N. Y. Supp. 932, holding act enlarging term of city chamberlain and depriving common council of right to fill vacancy, unconstitutional; *Corscadden v. Haswell*, 41 Misc. 63, 82 N. Y. Supp. 347, holding act relating to Albany penitentiary to be local bill, embracing more than one subject.

Cited in footnote to *State ex rel. McCausland v. Freeman*, 47 L. R. A. 67, which sustains statute arbitrarily establishing high school and requiring its maintenance by people of county.

Cited in notes (48 L. R. A. 481, 483) on power of legislature to impose burdens on municipalities and to control their local administration and property; (50 L. R. A. 333) on local self-government in Rhode Island.

Distinguished in *Newport v. Horton*, 22 R. I. 207, 50 L. R. A. 338, 47 Atl. 312, upholding appointment of chief of police by board of municipal police commissioners, established by statute; *Pearce v. Stephens*, 18 App. Div. 105, 79 N. Y. S. R. 425, 45 N. Y. Supp. 422, upholding statute requiring that police commis-

sioners shall not be of same political party; *People ex rel. Devery v. Coler*, 173 N. Y. 114, 65 N. E. 956, upholding statute abolishing municipal board of police commissioners and chief of police; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 446, 63 L. R. A. 894, 67 N. E. 69, Reversing 79 App. Div. 188, 80 N. Y. Supp. 85; upholding special franchise tax, although tangible property connected therewith is thereby transferred from municipal to state board of assessors.

Disapproved in *Americus v. Perry*, 114 Ga. 879, 57 L. R. A. 234, 40 S. E. 1004, upholding authority of municipal police board created by statute in derogation of charter rights.

Actions by and against taxpayers.

Cited in *Chittenden v. Wurster*, 152 N. Y. 383, 37 L. R. A. 821, 46 N. E. 857, Reversing 14 App. Div. 487, 43 N. Y. Supp. 1035 (dissenting opinion), majority holding that taxpayer cannot maintain action to restrain payment of salaries to officers alleged to have been appointed in violation of Constitution.

Distinguished in *Rogers v. O'Brien*, 153 N. Y. 362, 47 N. E. 456, refusing to enjoin eviction of taxpayer from municipal property by dock department merely because in excess of department's authority.

Implied prohibitions in statute.

Cited in *Adirondack R. Co. v. Indian River Co.* 27 App. Div. 334, 50 N. Y. Supp. 245, enjoining conveyance of forest land to preserve board subject to railway easement, where board empowered to take subject to ten-year leases only; *Chittenden v. Wurster*, 152 N. Y. 387, 37 L. R. A. 823, 46 N. E. 857 (dissenting opinion), majority upholding appointments without examination to competitive position, where no method of examination provided by legislature; *People ex rel. Burby v. Howland*, 155 N. Y. 277, 41 L. R. A. 840, 49 N. E. 775, Affirming 17 App. Div. 169, 45 N. Y. Supp. 347, holding statute nullifying constitutional office of justice of peace as criminal court, by depriving it of compensation, void.

Representative character of elective office.

Cited in *People v. Dooley*, 171 N. Y. 88, 63 N. E. 815 (concurring opinion), to proposition that statute authorizing election of city magistrates by congressional districts is void.

Eligibility to office.

Cited in *People ex rel. Price v. Woodbury*, 38 Misc. 196, 77 N. Y. Supp. 241, holding charter provision for noneligibility of pensioners to municipal offices unconstitutional.

Cited in footnote to *State ex rel. Goodell v. McGeary*, 44 L. R. A. 446, which holds building and furnishing new house with intention of living in same does not make owner elector of ward, so as to be eligible to office of alderman.

Jurisdiction to try title to office.

Distinguished in *People ex rel. Corscadden v. Howe*, 177 N. Y. 508, 66 L. R. A. 664, 69 N. E. 1114, holding that determination of title to office belongs exclusively to courts of law.

34 L. R. A. 431, *WESTERN U. TELEG. CO. v. ROBINSON*, 97 Tenn. 638, 37 S. W. 545.

Damages for mental anguish.

Cited in *Western U. Teleg. Co. v. Frith*, 105 Tenn. 172, 58 S. W. 118, holding

telegraph company liable for mental anguish of father, due to failure to deliver message announcing son's death; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 79, 54 L. R. A. 851, footnote p. 846, 60 N. E. 1080 (dissenting opinion), majority holding damages for mental anguish alone not maintainable by sendee for failure to deliver message informing of grandmother's death and funeral.

Cited in footnotes to *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398, which sustains recovery for mental anguish for failure to promptly deliver telegram announcing serious illness of grandchild; *Simmons v. Western U. Teleg. Co.* 57 L. R. A. 607, which sustains statute rendering telegraph companies liable for delay in delivering messages; *Cowan v. Western U. Teleg. Co.* 64 L. R. A. 540, which holds that mental anguish will sustain action for breach of contract to promptly transmit telegram.

Disapproved in *Western U. Teleg. Co. v. Arnold*, 96 Tex. 496, 73 S. W. 1043, holding telegraph company not liable for mental anguish of relatives of deceased, caused by not securing clergyman desired through failure of company to deliver message.

Unknown rules as part of contract.

Cited in *Hendricks v. Western U. Teleg. Co.* 126 N. C. 311, 78 Am. St. Rep. 658, 35 S. E. 543, holding company not relieved from duty to deliver by unknown regulation requiring extra charge for delivery outside "free limits."

34 L. R. A. 436, *BUCHANAN v. SUPREME CONCLAVE I. O. OF H.* 178 Pa. 465, 56 Am. St. Rep. 774, 35 Atl. 873.

Necessity of giving notice.

Cited in footnote to *Matthews v. American Cent. Ins. Co.* 39 L. R. A. 433, which denies right to maintain action on fire policy for loss occurring after death of insured and before appointment of representative, for failure to give notice and proofs of loss and bring suit within prescribed time.

Notice of forfeiture for nonpayment of premium.

Cited in footnotes to *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default, without notice of any condition affixed; *Johnson v. New York L. Ins. Co.* 50 L. R. A. 99, which holds necessity of giving notice before forfeiting policy for nonpayment of premium dispensed with by converting life policy into nonforfeitable policy for fixed term of years; *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, which requires notice of accrual of premium before forfeiting policy for nonpayment.

34 L. R. A. 439, *HARRISBURG, C. & C. TURNP. ROAD CO. v. HARRISBURG & M. ELECTRIC R. CO.* 177 Pa. 585, 35 Atl. 850.

Security for compensation under eminent domain law.

Cited in *Zanziger v. Wayne Electric Light Co.* 7 Del. Co. Rep. 12, 6 Pa. Dist. R. 578, imposing penal bond to cover damage sustained by owner on whose property electric light poles erected; *Philadelphia, M. & S. Street R. Co.'s Petition*, 203 Pa. 355, 53 Atl. 191, holding act giving street railway company right to use portion of another company's tracks unconstitutional because not providing adequate security for damages.

Cited in footnote to *Steinhart v. Superior Court*, 59 L. R. A. 404, which holds

payment into court of sufficient to compensate landowner not payment authorizing giving possession of land sought to be condemned.

34 L. R. A. 440, *BATES v. CULLUM*, 177 Pa. 633, 52 Am. St. Rep. 753. 35 Atl. 861.

Vested rights under statute of limitation.

Cited in *Com. v. Geary*, 21 Pa. Co. Ct. 219, 7 Pa. Dist. R. 542, holding extension of limitation period on constable's bond not retroactive; *Philadelphia v. Armstrong*, 16 Pa. Super. Ct. 58, holding that retroactive statute making effective, if valid, municipal lien filed too late, does not dispense with proof of ordinance authorizing work on which lien founded.

Cited in footnotes to *Osborne v. Lindstrom*, 46 L. R. A. 715, which holds invalid, statute shortening period of limitation without leaving reasonable time to sue; *Gilbert v. Ackerman*, 45 L. R. A. 118, which denies validity of statute shortening limitation period without providing reasonable time for bringing action after act goes into effect; *Hogg v. Hartley*, 54 L. R. A. 215, which holds personal judgment against one previously leaving state not excused from statute of limitations by absence.

Cited in note (45 L. R. A. 613) on vested right in defense of statute of limitations.

34 L. R. A. 442, *CHATTANOOGA ELECTRIC R. CO. v. JOHNSON*, 97 Tenn. 667, 37 S. W. 558.

Statutes affecting rights of action.

Cited in *Whaley v. Catlett*, 103 Tenn. 354, 53 S. W. 131, holding statute of limitations runs from date of injury and not from date of deceased's death; *Hooper v. Atlanta, K. & N. R. Co.* 107 Tenn. 719, 65 S. W. 405, holding action not barred by amendment substituting another beneficiary after period of limitations, where action begun before; *Elliott v. Felton*, 56 C. C. A. 79, 119 Fed. 275, holding state decision in action under statute, that party is vice principal, not binding upon Federal court on transfer of cause; *Davidson Benedict Co. v. Severson*, 109 Tenn. 602, 72 S. W. 967, holding damages for wrongful injury to deceased himself, and damages suffered by his widow and children or next of kin, recoverable under statutes in single action.

Distinguished in *Watson v. St. Paul City R. Co.* 70 Minn. 518, 73 N. W. 400, holding husband not "next of kin" of wife under statute providing for survival of actions for death by wrongful act.

— Action by administrator.

Cited as *obiter* in *D'Arcy v. Mutual L. Ins. Co.* 108 Tenn. 580, 69 S. W. 768, holding husband entitled to sue on policy taken out by third person in wife's favor, where wife dies before insured.

34 L. R. A. 445, *THIRD NAT. BANK v. DIVINE GROCERY CO.* 97 Tenn. 603, 37 S. W. 390.

Regulation of contracts.

Cited in *Dayton Coal & I. Co. v. Barton*, 103 Tenn. 611, 53 S. W. 970, and *Harbison v. Knoxville Iron Co.* 103 Tenn. 430, 56 L. R. A. 318, 76 Am. St. Rep. 682, 53 S. W. 955, upholding statute requiring redemption of store orders in

cash on any regular pay day, where given as wages; *Neas v. Borches*, 109 Tenn. 404, 97 Am. St. Rep. 851, 71 S. W. 50 (dissenting opinion), majority upholding act providing that sales of merchandise in bulk shall be presumed fraudulent, unless seller and buyer comply with certain statutory requirements.

Cited in note (36 L. R. A. 335, 338) on right of creditor to buy property from his debtor in satisfaction of debt.

Sufficiency of title of statute.

Distinguished in *Ryan v. Louisville & N. Terminal Co.* 102 Tenn. 129, 45 L. R. A. 309, 50 S. W. 744, upholding provisions empowering contracting railroads to guarantee bonds of terminal company in statute purporting to amend act to provide for organization of railroad terminal corporation and to define powers, duties, and liabilities thereof; *Carroll v. Alsup*, 107 Tenn. 267, 64 S. W. 193, upholding discriminating assessment of corporations under statute enacted "to provide more just and equitable laws for assessment and collection of revenue for state, county, and municipal purposes;" *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 729, 78 Am. St. Rep. 941, 59 S. W. 1033, upholding exclusion of certain articles from operation of statute purporting to regulate all trusts.

34 L. R. A. 449, *DENNIS v. DENNIS*, 68 Conn. 186, 57 Am. St. Rep. 95, 36 Atl. 37.

Grounds for divorce.

Cited in *Allen v. Allen*, 73 Conn. 55, 49 L. R. A. 143, 84 Am. St. Rep. 135, 46 Atl. 242, holding evidence of intemperate habits of husband pending action for divorce, admissible; *Morehouse v. Morehouse*, 70 Conn. 427, 39 Atl. 516, granting divorce on ground of cruel treatment of wife by husband having infectious disease; *Tirrell v. Tirrell*, 72 Conn. 569, 47 L. R. A. 751, 45 Atl. 153, holding regular payment of money by husband to wife under order of court does not prevent granting of divorce for wilful desertion and "total neglect of duty."

Connivance in securing evidence of infidelity.

Cited in *Torlotting v. Torlotting*, 82 Mo. App. 203, refusing divorce to husband employing agent to secure ocular proof of wife's infidelity, where agent himself participated in act of adultery.

34 L. R. A. 459, *SAVANNAH, F. & W. R. CO. v. WALLER*, 97 Ga. 164, 25 S. E. 823.

Contributory negligence of children.

Cited in footnote to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground.

Duty to trespassing children.

Cited in footnote to *Ashworth v. Southern R. Co.* 59 L. R. A. 502, which holds company liable for injury to young child while riding on running board of engine according to known custom of children.

34 L. R. A. 464, *SHEFFER v. WILLOUGHBY*, 163 Ill. 518, 54 Am. St. Rep. 483, 45 N. E. 253.

Liability for negligent supply of unwholesome food.

Distinguished in *Wiedeman v. Keller*, 171 Ill. 99, 49 N. E. 210, holding retail

meat dealer liable on implied warranty of wholesomeness of meat sold, whether aware of its condition or not.

34 L. R. A. 466, *ROSS v. HAWKEYE INS. CO.* 93 Iowa, 222, 61 N. W. 852.

Objections first urged on appeal.

Cited in *Chase v. Wright*, 116 Iowa, 557, 90 N. W. 357, holding that objection to judgment because rendered on same day that motion to strike out portion of answer was sustained not available where made for first time on appeal.

34 L. R. A. 469, *ZEILER v. CENTRAL R. CO.* 84 Md. 304, 35 Atl. 932.

Validity of ordinance passed by "majority" vote.

Cited in *North Platte v. North Platte Waterworks Co.* 56 Neb. 410, 76 N. W. 906, upholding suspension of rule requiring reading of ordinance on successive days, where ordered by four councilmen, being all in attendance out of total of six.

34 L. R. A. 472, *RATLIFF v. BEALE*, 74 Miss. 247, 20 So. 865.

Liability of exempt property for taxes.

Distinguished in *White v. Martin*, 75 Miss. 650, 65 Am. St. Rep. 616, 23 So. 289, holding laborer's wages subject to tax sale though exempt from creditor's garnishment.

Discrimination against negroes.

Cited in *Williams v. Mississippi*, 170 U. S. 222, 42 L. ed. 1015, 18 Sup. Ct. Rep. 583, upholding educational qualifications for franchise imposed by Mississippi Constitution.

Poll taxes generally.

Cited in footnote to *Russell v. Ayer*, 37 L. R. A. 246, which holds constitutional provision for levying capitation tax equal to tax on property valued at \$300 not self-executing.

34 L. R. A. 477, *WESTERVELT v. MOHRENSTECHER*, 22 C. C. A. 93, 40 U. S. App. 221, 76 Fed. 118.

Report of second appeal in 30 C. C. A. 587, 57 U. S. App. 618, 87 Fed. 160.

Construction of contract.

Cited in *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 655, 29 C. C. A. 225, 56 U. S. App. 393, 85 Fed. 403, holding notice by beneficiary, of insured's death sufficient under policy requiring immediate notice of accident or death, though no notice of accident given.

— Bonds.

Cited in *North St. Louis Bldg. & L. Asso. v. Obert*, 169 Mo. 515, 69 S. W. 1044, holding surety bound on "renewal bond" from date of expiration of previous term, and not only for balance of new term remaining after payment of renewal premium; *Meads v. United States*, 26 C. C. A. 237, 54 U. S. App. 150, 81 Fed. 692, holding sureties on bond of receiver of land district liable for moneys paid by settlers before due, under regulations of Interior Department.

Cited in footnotes to *First Nat. Bank v. Briggs*, 37 L. R. A. 845, which holds

cashier's bond conditioned for faithful discharge of duties as long as position occupied extends only over year for which elected; *Lieberman v. First Nat. Bank*, 48 L. R. A. 514, which denies release of surety on bank teller's bond for unauthorized statements by cashier.

34 L. R. A. 481, *DOSTER v. CHARLOTTE STREET R. CO.* 117 N. C. 651, 23 S. E. 449.

Liability for injuries caused by frightening horses.

Cited in *Terre Haute Electric R. Co. v. Yant*, 21 Ind. App. 489, 69 Am. St. Rep. 376, 51 N. E. 732, holding street railway not liable for injury caused by fright of horse at car properly run; *Everett v. Richmond & D. R. Co.* 121 N. C. 522, 27 S. E. 991, upholding charge that railway liable for injuries caused by frightening horses by "negligently, wantonly, or maliciously" blowing engine whistle.

Cited in footnotes to *Oates v. Metropolitan Street R. Co.* 58 L. R. A. 447, which holds company liable for motorman sounding gong or ringing bell after seeing horse is frightened; *McCann v. Consolidated Traction Co.* 38 L. R. A. 236, which holds running tank car on street railway track, with black coats waving from it, frightening horse, negligence.

When negligence question for jury.

Distinguished in *Moore v. Charlotte Electric Street R. Co.* 128 N. C. 458, 39 S. E. 57, holding question of negligence for jury where carriage struck between squares while crossing to watering trough, by car running at excessive speed without signal.

Assumption of risk and contributory negligence.

Cited in *Rittenhouse v. Wilmington Street R. Co.* 120 N. C. 546, 26 S. E. 922, holding voluntary assumption of risk included in instruction submitting "contributory negligence" to jury.

Cited in note (49 L. R. A. 60) on contributory negligence in entering or remaining in employment.

Jurisdiction of justice of peace.

Cited in *Malloy v. Fayetteville*, 122 N. C. 484, 29 S. E. 880, upholding jurisdiction of justice in action for damages laid in amount not exceeding \$50, though property injured of greater value.

34 L. R. A. 487, *UNION BANK v. OXFORD*, 119 N. C. 214, 25 S. E. 966.

Followed by Federal court on removal thereto in 37 C. C. A. 493, 96 Fed. 295, Reversing 90 Fed. 8.

Validity of municipal indebtedness.

Cited in *Mays v. Washington*, 122 N. C. 12, 40 L. R. A. 166, 29 S. E. 343, enjoining issue of bonds in purchase of electric light plant prior to authorizing statute and favorable vote of majority of qualified voters; *Glenn v. Wray*, 126 N. C. 732, 36 S. E. 167, holding amendment of charter unnecessary to empower town to vote issue of auxiliary bonds, where authorized by provision in railway charter; *Graves v. Moore County*, 135 N. C. 52, 47 S. E. 134, holding bonds issued under authority of invalid statute, void.

Distinguished in *Stanly County v. Coler & Co.* 190 U. S. 442, 47 L. ed. 1131, 23

Sup. Ct. Rep. 811, holding bona fide purchasers of bonds to aid in construction of railroad entitled to rely on recitals therein that they were issued in compliance with Code.

— **Entry of yeas and nays on passage of enabling statute.**

Cited in *Stanly County v. Snuggs*, 121 N. C. 398, 39 L. R. A. 440, footnote p. 439, 28 S. E. 539, holding statute imposing tax void where yeas and nays on second and third readings not entered in journal; *Rodman v. Washington*, 122 N. C. 41, 30 S. E. 118, holding statute providing for tax in excess of constitutional limit to support public schools void where yeas and nays not entered; *Buncombe County v. Payne*, 123 N. C. 487, 31 S. E. 711; *Wilkes County v. Call*, 123 N. C. 310, 44 L. R. A. 253, 31 S. E. 481; *Charlotte v. Shepard*, 122 N. C. 605, 29 S. E. 842,—holding issue of municipal bonds under statute impliedly authorizing same, void, where yeas and nays not entered on journal; *Wilkes County v. Coler*, 180 U. S. 513, 45 L. ed. 648, 21 Sup. Ct. Rep. 458, Same case in 51 C. C. A. 400, 113 Fed. 726, holding county bonds void in hands of purchasers for value without actual notice, where yea and nay vote on enabling statute not entered in journal; *Debnam v. Chitty*, 131 N. C. 677, 43 S. E. 3, holding constitutional provision commanding entry of yeas and nays in journal on second and third reading of bill, mandatory; *Graves v. Moore County*, 135 N. C. 54, 47 S. E. 134, holding invalid, act authorizing township to issue bonds to raise money for purchase of railroad stock, passed without recording names of representatives voting therefor on journals.

Cited in footnote to *Cohn v. Kingsley*, 38 L. R. A. 74, which requires journals to show compliance with mandatory provision as to enacting bills by yea and nay vote after three several readings.

— **Speaker's certificate of ratification.**

Cited in *Smathers v. Madison County*, 125 N. C. 486, 34 S. E. 554, denying validity of bonds issued under enabling statute not properly passed, where certificate of speaker shows ratification, but not compliance with mandatory provision for entry of yeas and nays; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 294, 41 S. E. 488, holding municipal tax imposed under charter certified to have been regularly passed and ratified, invalid where yeas and nays not taken as provided in Constitution; *Brown v. Stewart*, 134 N. C. 362, 46 S. E. 741, raising, but not deciding, question as to admissibility of journals or other evidence to invalidate certificates of presiding officers as to compliance with Constitution in passage of bill.

— **Evidence.**

Cited in *New Hanover County v. De Rosset*, 129 N. C. 279, 40 S. E. 43, holding transcript, denoting by asterisks names of parties voting, insufficient to show entry thereof in journal; *New Hanover County v. Armour Packing Co.* 135 N. C. 67, 47 S. E. 411, holding journals of assembly to be conclusive evidence of passage of act; *Wilson v. Markley*, 133 N. C. 621, 45 S. E. 1023, holding that journal of legislature may be examined by court to determine whether yeas and nays have been duly entered.

— **Conclusiveness of enrolled bill.**

Cited in footnotes to *People v. Dettenthaler*, 44 L. R. A. 164, which holds bill in which enacting clause added without authority by clerk of one branch of legislature void; *Montgomery Beer Bottling Works v. Gaston*, 51 L. R. A. 396, which holds permanent record delivered to secretary of state, to be legislative journal;

State *ex rel.* Cheyenne v. Swan, 40 L. R. A. 195, which sustains court's right to examine journals to determine whether alleged statutes passed.

— **Presumptions and burden of proof.**

Cited in Slocomb v. Fayetteville, 125 N. C. 365, 34 S. E. 436, refusing to enjoin issue of municipal bonds in purchase of electric light plant, where pleadings do not show invalidity of enabling statute.

Validity of ultra vires consent judgment.

Cited in McLeod v. Williams, 122 N. C. 454, 30 S. E. 129, setting aside on her motion, consent judgment entered against *feme covert* on husband's debt.

Attempt to cure defective statute.

Cited in Russell v. Ayer, 120 N. C. 211, 37 L. R. A. 254, 27 S. E. 133 (dissenting opinion), majority holding statute imposing tax failing to meet constitutional requirements cannot be upheld by altering amount laid thereby.

34 L. R. A. 492, REED v. WESTERN U. TELEG. CO. 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904.

Telegraph company as common carrier.

Cited in State *ex rel.* National Subway Co. v. St. Louis, 145 Mo. 575, 42 L. R. A. 123, 46 S. W. 981, upholding ordinance granting, without reservation, right to lay wire conduit under street, since power impliedly reserved to compel admission of other wires thereto.

Liability for negligence in transmission of message.

Cited in footnote to Coit v. Western U. Teleg. Co. 53 L. R. A. 678, which holds transmission of telegram while wires working badly not gross negligence if wires working well when actually sent.

Distinguished in Reynolds v. Western U. Teleg. Co. 81 Mo. App. 231, denying right of recovery for loss by sale in low market, due to delay in delivery of telegram, where vendor might have averted same by telegram to agent.

— **Presumption.**

Cited in Hughes v. Western U. Teleg. Co. 79 Mo. App. 137, holding telegraph company presumptively negligent in transmitting word "invitation" for plainly written "irritation" in cipher message.

— **Conflict of laws.**

Cited in Gray v. Western U. Teleg. Co. 108 Tenn. 47, 56 L. R. A. 309, 91 Am. St. Rep. 706, 64 S. W. 1063, holding sender of message may recover for mental anguish due to negligent delay in delivery in forum, where recoverable under local law, though not under *lex loci celebrationis*; Western U. Teleg. Co. v. Cooper, 29 Tex. Civ. App. 593, 69 S. W. 427, and Bryan v. Western U. Teleg. Co. 133 N. C. 607, 45 S. E. 938, holding telegraph contract governed by laws of state where message is delivered to company for transmission.

Cited in footnote to Shaw v. Postal Teleg. Cable Co. 56 L. R. A. 486, which denies power to enforce in another state, liability for mistakes in transmitting cipher telegram, without payment of additional fee required to insure against mistakes.

Cited in note (63 L. R. A. 525, 532) on conflict of laws as to carrier's contracts.

Duty to lessen damages.

Cited in Hasbrouck v. Western U. Teleg. Co. 107 Iowa, 167, 70 Am. St. Rep. 181,

77 N. W. 1034, holding principal under no obligation to rescind settlement made in reliance upon telegram erroneously transmitted.

34 L. R. A. 498, *STATE ex rel. BATEMAN v. BODE*, 55 Ohio St. 224, 60 Am. St. Rep. 696, 45 N. E. 195.

Limitation of candidate to one place on official ballot.

Cited in *State ex rel. Runge v. Anderson*, 100 Wis. 533, 42 L. R. A. 243, 76 N. W. 482, refusing to order candidate's name to be printed second time on ballot under statute providing for its placement under column of political party first nominating him.

Cited in footnote to *State ex rel. Blydenburgh v. Burdick*, 34 L. R. A. 845, which denies right to have name of candidate for elector of president appear on ballot more than once.

Disapproved in *Murphy v. Curry*, 137 Cal. 481, 59 L. R. A. 98, footnote p. 97, 70 Pac. 461, holding statute requiring candidate to choose party column under which he will appear, unconstitutional.

34 L. R. A. 500, *HARTWELL v. TEFFT*, 19 R. I. 644, 35 Atl. 882.

Status of adopted child.

Cited in *New York L. Ins. & T. Co. v. Viele*, 161 N. Y. 18, 76 Am. St. Rep. 238, 55 N. E. 311, Affirming 22 App. Div. 86, 47 N. Y. Supp. 841, holding status immaterial where contest is under will excluding adopted child from participation; *Re Winchester*, 140 Cal. 469, 74 Pac. 10, holding that children of adopted child take by inheritance as issue of the adopting father.

Cited in footnotes to *Butterfield v. Sawyer*, 52 L. R. A. 75, which holds adopted child within deed to woman for life, with remainder to her "child," if any, otherwise to her "heirs generally;" *Clarkson v. Hatton*, 39 L. R. A. 748, which holds adopted child not within statute giving remainder to children or heirs of life tenant; *Glascott v. Bragg*, 56 L. R. A. 258, which holds will in favor of third person revoked by marriage and adoption of child.

Devise to "issue."

Cited in *Ridley v. McPherson*, 100 Tenn. 409, 43 S. W. 772, holding grandchildren take *per capita* with children, under unlimited devise to "issue."

34 L. R. A. 503, *EINGARTNER v. ILLINOIS STEEL CO.* 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664.

Liability of master for injury to servant.

Cited in *Jarnek v. Manitowoc Coal & Dock Co.* 97 Wis. 540, 73 N. W. 62, holding employer liable for injury to coal heaver by fall of beam negligently attached by carpenters under direction of foreman.

Who are vice principals.

Cited in note (54 L. R. A. 80) on vice principalship as determined with reference to character of act which caused injury.

Transitory actions.

Cited in *MacCarthy v. Whitcomb*, 110 Wis. 123, 85 N. W. 707, holding action for injuries due to negligence of fellow servants in another state triable in forum where employer found; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 82, 41 C. C. A.

28, 100 Fed. 744, sustaining jurisdiction of state court in action by passenger against foreign railway company for injuries sustained in collision in another state, where agent served in forum; Pullman Palace Car Co. v. Lawrence, 74 Miss. 800, 22 So. 53, upholding jurisdiction of tort action between nonresidents for injury inflicted in foreign state; Thoen v. Harnstrom, 98 Wis. 233, 73 N. W. 1011, holding nonresident creditor entitled to bring action against nonresident debtor in forum with collateral garnishment proceedings; Williams v. Pope Mfg. Co. 52 La. Ann. 1432, 50 L. R. A. 822, 78 Am. St. Rep. 390, 27 So. 851, holding married woman domiciled in foreign state, by laws of which she is entitled to maintain separate action, may maintain action against foreign corporation for malicious prosecution and false imprisonment in forum.

Cited in footnote to Jones v. Chicago St. P. M. & O. R. Co. 49 L. R. A. 640, which holds that statute of state where railroad employee injured, as to presumptive evidence of employer's knowledge of defect in appliance, does not govern in action in another state.

Cited in note (56 L. R. A. 202, 218, 220) on conflict of laws as to actions for death or bodily injury.

Master's duty to provide safe place to work.

Cited in The Pioneer, 78 Fed. 608, holding duty not discharged by ordering employee to give warnings of danger, where such employee has other duties preventing giving of proper warnings.

Conflict of laws as to contracts.

Cited in Second Nat. Bank v. Smith, 118 Wis. 26, 94 N. W. 664, holding that law of state where note made controls as to days of grace and manner of giving notice of dishonor, while law of forum controls as to evidence necessary to prove notice.

Validity of assignment statutes.

Cited in Duryea v. Muse, 117 Wis. 407, 94 N. W. 365, upholding act declaring voluntary assignments void, unless assignee be resident of state.

34 L. R. A. 509, HOWARD v. UNITED STATES, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986.

Multifariousness.

Cited in Tingle v. United States, 30 C. C. A. 670, 58 U. S. App. 140, 87 Fed. 324, holding consolidation of separate indictments for distinct offenses not multifarious.

Consideration of assignments of error in habeas corpus proceedings.

Cited in De Bara v. United States, 40 C. C. A. 197, 99 Fed. 944, refusing to consider in habeas corpus proceeding, assignment of error as to consolidation of indictments.

Validity of sentence.

Cited in footnote to People v. Burns, 60 L. R. A. 270, which holds void for uncertainty as to offense punishable with life imprisonment, statute making penalty for attempt, half that for offense.

Cited in note (34 L. R. A. 254) on legislative power to grant pardon or amnesty. Distinguished in Hanley v. United States, 61 C. C. A. 669, 126 Fed. 945, Reaffirming on Rehearing, 59 C. C. A. 157, 123 Fed. 853, holding that court can only
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impose one sentence upon conviction of prisoner on consolidation of three indictments charging each a separate offense.

When rules of common law govern.

Cited in *Withaup v. United States*, 62 C. C. A. 332, 127 Fed. 534, raising, but not deciding, question whether, in absence of Federal or state statute, rules of evidence of common law would govern in United States court.

34 L. R. A. 518, *ILLINOIS TRUST & SAV. BANK v. ARKANSAS CITY*, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271.

Municipal "business" contracts.

Cited in *Ouray County v. Geer*, 47 C. C. A. 453, 108 Fed. 481, holding interest coupons from municipal bonds bear statutory interest after maturity, like obligations of any debtor; *State ex rel. Godard v. Topeka Water Co.* 61 Kan. 561, 60 Pac. 337, holding right to occupy street with water pipes granted to corporation by municipal ordinance, subject to mortgage; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 10, 43 L. ed. 346, 19 Sup. Ct. Rep. 77, holding Federal question as to power to impair contract obligation raised by ordinance authorizing construction of municipal water works, where prior contract for supply from private corporation exists; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 103, 60 L. R. A. 827. 66 N. E. 436, upholding power of municipality in contract permitting gas company to pipe streets, to stipulate as to maximum rates for gas; *Westminster Water Co. v. Westminster*, 98 Md. 563, 64 L. R. A. 636, footnote p. 630, 56 Atl. 990, denying city's power to contract to pay water company specified percentage of assessed valuation in perpetuity for water supply.

Cited in footnote to *Fawcett v. Mt. Airy*, 63 L. R. A. 870, which sustains municipality's power to incur expense of owning and operating water and electric light plants without submitting proposition to voters.

Cited in note (61 L. R. A. 65, 69, 70, 71, 80) on establishment and regulation of municipal water supply.

Distinguished in *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 59 C. C. A. 241, 123 Fed. 237, holding city contracting and paying for water from year to year not bound to continue such annual payments beyond term of contract.

— Manner of execution.

Cited in *Ogden City v. Weaver*, 47 C. C. A. 490, 108 Fed. 569, holding municipality bound by contract for water supply adopted only by resolution, where ordinance not required by statute; *Crebs v. Lebanon*, 98 Fed. 551, enforcing valid contract with water company, though submitted to popular vote by resolution instead of by ordinance, where essentials of latter embodied in resolution; *Centerville v. Fidelity Trust & Guaranty Co.* 55 C. C. A. 352, 118 Fed. 336, holding formal acceptance of ordinances by water company thereby authorized to construct and operate system, not essential to validity of contract where put into execution; *Morgan v. Johnson*, 45 C. C. A. 426, 106 Fed. 457, upholding authorization of deed by adoption of motion directing conveyance, where manner of exercise of power of disposition not prescribed; *Denver v. Webber*, 15 Colo. App. 517, 63 Pac. 804, holding appointment of special counsel by majority of council present, ratified by subsequent vote of majority of all members of council elected, ordering payment of costs or fees in case conducted by him.

Cited in footnote to *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two-

thirds majority of all members elected to council to pass ordinance over veto, though some seats vacant.

Distinguished in *Morristown v. East Tennessee Teleph. Co.* 53 C. C. A. 135, 115 Fed. 307, holding amendment of franchise to telephone company, by resolution, invalid where city authorized to grant same only "by ordinance."

— **Validity.**

Cited in *Cunningham v. Cleveland*, 39 C. C. A. 218, 98 Fed. 663, upholding validity of contract with water company extending over number of years; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 665, upholding thirty-year contract with water company at rates not unreasonable at time of contract, where no fraud practised and contract executed by company; *Reed v. Anoka*, 85 Minn. 298, 88 N. W. 981, upholding municipal contract with private corporation for construction and operation of water works for period of thirty-one years; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 342, 105 Fed. 10, holding succeeding councils bound by contract for enlargement and operation of water-works system by private corporation; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 572, 42 L. R. A. 122, 46 S. W. 981, upholding grant of right to construct telegraph wire conduit under street; *Bartholomew v. Austin*, 29 C. C. A. 578, 52 U. S. App. 512, 85 Fed. 368, upholding exemption from taxation "in consideration of" free use of water for municipal purposes; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 730, holding ordinance reducing water rates below minimum provided for by contract with supplying company, void; *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 730, holding ordinance reducing rates below minimum provided for by contract the term of which had expired, but which is kept in force by continued demands of municipality in conformity therewith, void; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 741, enjoining city from shutting off electricity from street railway to which it was under contract obligation to furnish same; *State ex rel. White v. Barker*, 116 Iowa, 104, 57 L. R. A. 250, 93 Am. St. Rep. 222, 89 N. W. 204, denying authority of state to deprive appointees of municipality of control of municipal water works; *Denver v. Hubbard*, 17 Colo. App. 368, 68 Pac. 993, upholding contract of city with electric light company as legitimate exercise of business powers of municipality.

Distinguished in *Knoxville v. Knoxville Water Co.* 107 Tenn. 679, 61 L. R. A. 897, 64 S. W. 1075, upholding regulation of water rates by municipality, where company's charter provides therefor, although different schedule previously established.

— **"Exclusive" contracts.**

Cited in *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 533, 49 Pac. 15, compelling levy of water tax to meet fixed rentals due under exclusive contract for supply for fifteen years; *Westerly Waterworks Co. v. Westerly*, 80 Fed. 617, holding town not excluded from erection of competing water-works system, by contract providing for town supply of water and eventual sale of works by private corporation; *Monroe Waterworks Co. v. Monroe*, 110 Wis. 17, 85 N. W. 685, permitting recovery of taxes levied and collected from water company in violation of contract, though latter void in so far as it grants exclusive franchise.

Cited in footnote to *Thrift v. Elizabeth*, 44 L. R. A. 427, which holds invalid, grant of exclusive privilege for thirty years to maintain water works within city limits.

Enforcement of divisible contracts.

Cited in *Greenville v. Greenville Waterworks Co.* 125 Ala. 640, 27 So. 764, holding municipal contract for rental of hydrants enforceable, though grant of franchise and lease by same ordinance invalid; *Raton Waterworks Co. v. Raton*, 9 N. M. 94, 49 Pac. 898, holding contract for water supply at rental above amount allowable under law, enforceable only to legal amount; *McGillivray v. Joint School Dist. No. 1*, 112 Wis. 359, 58 L. R. A. 102, 88 Am. St. Rep. 969, 98 N. W. 310, enforcing payment up to constitutional limit for materials furnished under contract calling for amount in excess thereof; *Lincoln Sav. Bank & S. D. Co. v. Allen*, 27 C. C. A. 92, 49 U. S. App. 498, 82 Fed. 153, holding agreement of creditor to surrender collateral and accept partial payment in full satisfaction enforceable as to former on debtor's performance, though void as to latter provision; *Coit v. Grand Rapids*, 115 Mich. 496, 73 N. W. 811, upholding contract exempting property owners granting right of way for sewer, from assessment for construction, though void as to exemption from assessment for maintenance.

Estoppel.

Cited in *Newton v. Levis*, 25 C. C. A. 163, 49 U. S. App. 266, 79 Fed. 717, upholding preliminary injunction against municipality to prevent destruction of electric poles and wires erected by private company in reliance on ordinance, repealed only after eight years' recognition of validity; *Speer v. Kearney County*, 32 C. C. A. 110, 60 U. S. App. 38, 88 Fed. 758, holding municipality estopped to assert invalidity of bonds regular on face, against innocent purchasers for value; *Independent School Dist. v. Rew*, 55 L. R. A. 369, 49 C. C. A. 202, 111 Fed. 5, holding municipality estopped against bona fide purchaser to assert invalidity of indebtedness which bonds purchased recite they were issued to refund; *Willis v. Wyandotte County*, 30 C. C. A. 450, 58 U. S. App. 665, 86 Fed. 876, holding municipality estopped to refuse payment of money collected to meet certificates issued to contractor in payment for construction of road under unconstitutional contract; *United States v. Northern P. R. Co.* 37 C. C. A. 306, 95 Fed. 880, refusing to revoke patent to public lands, though route and terminus selected and completed after expiration of time limited, where accepted by government; *Davenport v. Buffington*, 46 L. R. A. 380, 38 C. C. A. 457, 97 Fed. 238, holding Indian Nation estopped from revoking dedication of property as park, where lots sold and improvements made by taxpayers in reliance thereon; *Pacific Mill & Min. Co. v. Leete*, 36 C. C. A. 594, 94 Fed. 975, holding vendor estopped by acquiescence in vendee's claim of right to recover entry payment on cancelation of public land claim, to retain money afterwards collected by it on account thereof; *Given v. Times-Republican Printing Co.* 52 C. C. A. 43, 114 Fed. 95, holding sole stockholders in corporation estopped by silence as to its indebtedness to him, to assert same as against party induced thereby to purchase stock; *Mohrenstecher v. Westervelt*, 30 C. C. A. 592, 57 U. S. App. 618, 87 Fed. 165, holding bank estopped on cashier's insolvency, to deny officers' statements to cashier's sureties, that purchases made for its benefit; *Daniels v. Benedict*, 33 C. C. A. 607, 97 Fed. 382, refusing to set aside separation agreement and restore wife to rights of inheritance, where benefits thereof accepted and retained by her during husband's life; *Valparaiso v. Valparaiso City Water Co.* 30 Ind. App. 328, 65 N. E. 1063, holding that city cannot plead *ultra vires* in defense to action against it to recover rentals for hydrants.

Determination of entire controversy in equity.

Cited in *Springfield Mill. Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 394, 49 U. S. App. 438, 81 Fed. 266, upholding in bill to foreclose lien, cross-bill for waste of mill property.

Necessary parties to action.

Cited in *City Water Supply Co. v. Ottumwa*, 120 Fed. 311, holding foreign corporations not necessary parties in action to restrain city from entering into illegal contract with them.

Jurisdiction of equity to determine title.

Cited in *Re Leeds Woolen Mills*, 129 Fed. 928, upholding jurisdiction of equity to determine ownership of property surrendered without authority to adverse claimant, by trustee in bankruptcy.

34 L. R. A. 532, *BRUNER v. FIRST NAT. BANK*, 97 Tenn. 540, 37 S. W. 286.

Deposit in insolvent bank.

Cited in *State v. Eifert*, 102 Iowa, 205, 38 L. R. A. 490, 63 Am. St. Rep. 433, 71 N. W. 248 (dissenting opinion), majority holding banker criminally liable where receipt of deposit by teller after known insolvency not repudiated, but amount included in general assignment; and referring particularly to annotation in 34 L. R. A. 532.

— Right to follow as trust fund.

Cited in *Williams v. Cox*, 99 Tenn. 404, 42 S. W. 3, holding depositor entitled to recover from receiver proceeds of check received by it after known insolvency, and not collected until after failure.

Cited in footnotes to *Richardson v. New Orleans Debenture Redemption Co.* 52 L. R. A. 67, which sustains right to recover from receiver deposit received while bank insolvent; *Shute v. Hinman*, 47 L. R. A. 265, which holds identity of trust funds destroyed by general deposit in bank by administrator, and drawing of checks thereon; *Lincoln Sav. Bank & S. D. Co. v. Morrison*, 57 L. R. A. 885, which holds *cestui que trust* entitled to preference only to extent trustee's estate shown to have been increased by misappropriation of trust property; *Richardson v. Olivier*, 53 L. R. A. 113, which sustains shareholder's right to recover back deposit fraudulently taken while bank insolvent.

Distinguished in *Union Nat. Bank v. Citizens Bank*, 153 Ind. 49, 54 N. E. 97, holding collecting bank not trustee for forwarding bank where draft on correspondent solvent debtor bank for amount of collection accepted and forwarded for payment.

34 L. R. A. 536, *KLEPPER v. COX*, 97 Tenn. 534, 56 Am. St. Rep. 823, 37 S. W. 284.

Collections by insolvent bank.

Cited in *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 54, 54 N. E. 97, holding collecting bank not trustee for forwarding bank where draft on correspondent solvent debtor bank for amount of collection is accepted and forwarded for payment.

34 L. R. A. 538, *COWAN v. MURCH*, 97 Tenn. 590, 37 S. W. 393.

Power of majority.

Cited in *Carroll v. Alsop*, 107 Tenn. 271, 64 S. W. 193, upholding valuations

concurrent in by two of three members of state board of equalization; *Re Schuylkill Haven Nominations*, 20 Pa. Co. Ct. 420, holding change of place of ward caucus by vote of minority of borough committee, void.

Cited in footnote to *Harroun v. Brush Electric Light Co.* 38 L. R. A. 615, which holds decision unanimous, so as to require leave to appeal therefrom when all judges sitting, agree.

Code definitions.

Cited in *Union Bank & T. Co. v. Wright* (Tenn. Ch. App.) 52 L. R. A. 471, 58 S. W. 755, upholding power of corporation to act as administrator under charter authorizing executorship.

34 L. R. A. 541, *BURNETT v. MALONEY*, 97 Tenn. 697, 37 S. W. 689.

Special tax.

Cited in *Felton v. Hamilton County*, 38 C. C. A. 433, 97 Fed. 824, holding special tax for centennial purposes not authorized by statute authorizing "appropriations" of money by counties.

— Repeal.

Cited in *Zickler v. Union Bank & T. Co.* 104 Tenn. 295, 57 S. W. 341, holding special inheritance tax not impliedly repealed by subsequent general revenue tax not mentioning same.

Validity of classification.

Cited in *State v. Frost*, 103 Tenn. 696, 54 S. W. 986, upholding statute applying 4-mile liquor law to municipalities not exceeding 2,000 inhabitants.

Contract for payment in gold coin.

Cited in footnotes to *Murphy v. San Luis Obispo*, 39 L. R. A. 444, which sustains power of city to issue bonds payable in gold coin only; *Dennis v. Moses* 40 L. R. A. 302, which denies power to take away right to contract for payment in gold coin.

34 L. R. A. 548, *THOMPSON v. GIBBS*, 97 Tenn. 489, 37 S. W. 277.

Removal of school teachers.

Cited in footnote to *Freeman v. Bourne*, 39 L. R. A. 510, which holds dismissal of school superintendent justified by indictment for, and conviction of, adultery.

34 L. R. A. 550, *WAIT v. O'NEIL*, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408.

Construction of contracts.

Cited in *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* 26 C. C. A. 152, 47 U. S. App. 91, 80 Fed. 772, construing fidelity insurance contract most favorably to insured, like indemnity bond.

Lease of landing place.

Cited in footnote to *California Nav. & Improv. Co. v. Union Transportation Co.* 46 L. R. A. 825, which holds public use as landing place of shore of navigable waters outside municipality not included in dedication for highway.

Liability for cost of rebuilding structures on leased premises.

Distinguished in *Felton v. Cincinnati*, 37 C. C. A. 92, 95 Fed. 341, holding lessor of railroad not chargeable with cost of rebuilding bridges.

Waiver by answer.

Cited in *Ryder v. Bateman*, 93 Fed. 22, questioning whether lack of possession by complainant on bill to remove cloud from title is waived by filing of answer.

Jurisdiction of equity.

Cited in *Chelsea Sav. Bank v. Ironwood*, 130 Fed. 414, upholding jurisdiction of equity in action by bondholders against city and receiver to enforce equitable rights of bondholders in judgment against city in favor of receiver, for amount paid for invalid bonds.

34 L. R. A. 557, *RYDER v. KINSEY*, 62 Minn. 85, 54 Am. St. Rep. 623, 64 N. W. 94.

Presumptive negligence.

Cited in *Isherwood v. H. L. Jenkins Lumber Co.* 84 Minn. 425, 87 N. W. 931, holding fall of pile of scantling, piled without cross sticks and bulging near bottom, prima facie evidence of want of care; *Lowe v. Salt Lake City*, 13 Utah, 97, 57 Am. St. Rep. 708, 44 Pac. 1050, holding owner liable for injuries to one lawfully on premises, caused by fall into unprotected and unlighted hatchway beside path, on way to outhouse at night.

Cited in footnotes to *Esberg-Gunst Cigar Co. v. Portland*, 43 L. R. A. 435, which holds bursting of water main for third time under ordinary pressure, evidence of negligence; *Wolf v. Downey*, 51 L. R. A. 242, which denies liability of contractor for either carpenter or mason work for injury from fall of brick from unknown cause.

Distinguished in *Kletschka v. Minneapolis & St. L. R. Co.* 80 Minn. 241, 83 N. W. 133, holding negligence not presumable where injury results from unexpected fall of earth from side of ditch where employee is working.

Liability for falling walls.

Cited in footnotes to *Lauer v. Palms*, 58 L. R. A. 67, which holds owner liable for injury by fall of walls left standing after fire; *Waterhouse v. Joseph Schlitz Brew. Co.* 48 L. R. A. 157, which holds liable, purchaser continuing to use, or permit use of, negligently constructed building; *Ainsworth v. Lakin*, 57 L. R. A. 132, which denies obligation of owner to remove or protect walls left standing after fire until after reasonable time to investigate.

Cited in note (34 L. R. A. 616) on liability of landlord for injuries to tenant's guests and servants from defect in premises.

Distinguished in *Kitchen v. Carter*, 47 Neb. 782, 66 N. W. 855, reversing verdict for plaintiff where injury was caused during fire by fall of walls sufficient to maintain building in usual condition.

34 L. R. A. 564, *PHILADELPHIA USE OF McCANN v. PHILADELPHIA & R. R. CO.* 177 Pa. 292, 35 Atl. 610.

Liability of right of way to assessment.

Followed without opinion in *Philadelphia use of Pugh v. Philadelphia & R. Co.* 177 Pa. 300, 35 Atl. 1133.

Cited in footnotes to *Chicago, R. I. & P. R. Co. v. Ottumwa*, 51 L. R. A. 763, which denies liability of railroad running alongside of street to street-paving assessment; *Cincinnati, L. & N. R. Co. v. Cincinnati*, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway, on remaining land

of same owner; *Storrie v. Houston City Street R. Co.* 44 L. R. A. 716, which holds street railway company required to pave between rails and 6 inches each side.

Cited in notes (57 L. R. A. 47) on taxation of corporate franchises in United States; (58 L. R. A. 382) on who is liable for expense of drainage.

Power to compel railroad company to pave street.

Cited in *Mt. Joy v. Harrisburg, P. & Mt. J. & L. R. Co.* 8 Northampton Co. Rep. 250, 19 Lanc. L. Rev. 218, upholding power of borough to compel railroad company to pave street in front of its property.

34 L. R. A. 567, *WHITE v. MEADVILLE*, 177 Pa. 643, 35 Atl. 693.

Municipal water works and lighting plants — Power to construct.

Cited in *Hughes v. Parnassus*, 23 Pa. Co. Ct. 201, upholding power of borough to construct waterworks under general borough law, though not expressly authorized.

— Effect of supply by private company.

Cited in *Metzger v. Beaver Falls*, 178 Pa. 4, 35 Atl. 1134, enjoining erection of water works by borough already supplied under contract with company organized for that purpose; *Tyrone Gas & Water Co. v. Tyrone*, 195 Pa. 578, 46 Atl. 134, restraining erection of plant by borough where contract with water company implied from acceptance of its supply and levy of water tax to meet charges; *Troy Water Co. v. Troy*, 200 Pa. 456, 50 Atl. 259, holding that failure of company to supply in accordance with contract does not give borough right to erect independent works; *Carlisle Gas & Water Co. v. Carlisle Water Co.* 188 Pa. 53 43 W. N. C. 110, 41 Atl. 321, holding contract by borough with second water company for supply void though stock and management of first relinquished; *Bennett Water Co. v. Millvale*, 200 Pa. 617, 50 Atl. 155, holding company holding contract for supply of water to borough entitled to damages against latter for building and operating independent works; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 29, enjoining municipality from operating public electric light plant in competition with private plant previously erected under franchise granted by city; *Carlisle Gas & Water Co. v. Carlisle Water Co.* 182 Pa. 20, 37 Atl. 821, enjoining corporation organized under general incorporation law from operating in borough already supplied by water company under special contract; *Baily v. Philadelphia*, 20 Pa. Co. Ct. 180, 6 Pa. Dist. R. 732, holding lease granting exclusive right to supply gas to municipality not void *in toto*, whether exclusive feature valid or not; *Schroeder v. Scranton Gas & Water Co.* 20 Pa. Super. Ct. 258, denying power of municipal corporation, under statute, to regulate water rates of private company.

Cited in footnotes to *North Springs Water Co. v. Tacoma*, 47 L. R. A. 214, which sustains city's right to build own water works after granting franchise to water company; *Helena Consolidated Water Co. v. Steele*, 37 L. R. A. 412, which holds statute allowing city to acquire water plant only by purchase from private parties void.

Cited in notes (50 L. R. A. 145) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts; (61 L. R. A. 34, 38) on establishment and regulation of municipal water supply.

Distinguished in *Boyertown Water Co. v. Boyertown*, 200 Pa. 404, 50 Atl. 189,

and Centre Hall Water Co. v. Centre Hall, 186 Pa. 81, 40 Atl. 153, refusing to enjoin construction of water works by borough previously supplied by company, but not under contract with borough; Philipsburg Water Co. v. Citizens' Water Co. 189 Pa. 31, 41 Atl. 979, holding corporation organized under general corporation law, supplying borough without special contract, not entitled to injunction against rival corporation, where 8 per cent dividends earned for five years; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 366, 46 L. ed. 591, 22 Sup. Ct. Rep. 400; Colby University v. Canandaigua, 96 Fed. 453; Thomas v. Grand Junction, 13 Colo. App. 89, 56 Pac. 665; North Springs Water Co. v. Tacoma, 21 Wash. 531, 47 L. R. A. 220, 58 Pac. 773,—holding municipality granting to private family franchise not exclusive not estopped from thereafter constructing municipal water works; Bienville Water Supply Co. v. Mobile, 95 Fed. 542, refusing to enjoin erection of municipal water works by town not refusing to pay stipulated rent under prior nonexclusive contract with private company; Philipsburg Water Co. v. Philipsburg, 203 Pa. 565, 53 Atl. 347, upholding right of borough upon expiration of contract with water company, to contract with another company for supply, where first company had forfeited right of exclusive privilege.

— Remedies available to municipality for breach of contract.

Cited in Tyrone Gas & Water Co. v. Burley, 19 Pa. Super. Ct. 354, holding members of borough committee turning on water from plugs of private water company, illegally and by force, liable for statutory penalty.

Construction of contemporary statutes.

Cited in Sprague v. Baldwin, 18 Pa. Co. Ct. 572, *dictum* that compulsory education act and act for compulsory vaccination of school children should be harmoniously construed; Brooke v. Kaufman, 6 Pa. Dist. R. 514, construing statutes of May 4 and 23, 1889, to impose lien for two years after levy and assessment of taxes, and thereafter until paid, if necessary steps of entry and revival taken.

34 L. R. A. 572, NORTHERN C. R. CO. v. HARRISBURG & M. ELECTRIC R. CO. 177 Pa. 142, 35 Atl. 624.

Remittitur for issuance of injunction in 180 Pa. 11, 36 Atl. 321.

Right to cross railway.

Cited in Cumberland Valley R. Co. v. Harrisburg & M. Electric R. Co. 177 Pa. 158, 35 Atl. 1133, enjoining construction of street railway beneath superstructure of steam railway without consent, at point not public highway; Speese v. Schuylkill River East Side R. Co. 23 Pa. Co. Ct. 22, 8 Pa. Dist. R. 587, 44 W. N. C. 497, enjoining construction of overhead bridge without consent by grantor of right of way, for purpose of access to premises; Trenton Cut-Off R. Co. & Pennsylvania R. Co. v. Newtown Electric Street R. Co. 8 Pa. Dist. R. 551, denying right of electric railway company to take land of railway company on each side of actual crossing, without its consent, although it is used as public highway; Pennsylvania R. Co. v. Glenwood & D. Electric Street R. Co. 41 W. N. C. 444, holding steam railway company estopped to enjoin construction of overhead crossing by electric railway, where grade crossing objected to and purchase of land for bridge encouraged.

Cited in footnotes to Chester Traction Co. v. Philadelphia, W. & B. R. Co. 44 L. R. A. 269, which holds imperious necessity for additional street railway crossing

over railroad not shown by increase of traffic preventing quick movement of cars: *Southern R. Co. v. Atlanta R. & Power Co.* 51 L. R. A. 125, which sustains right of street railway to cross steam railroad tracks; *General Electric Co. v. Chicago, I. & L. R. Co.* 58 L. R. A. 231, which sustains right of railroad company to injunction against construction under invalid ordinance, of street railway which would specially injure former company.

Distinguished in *Pennsylvania R. Co. v. Inland Traction Co.* 18 Montg. Co. L. Rep. 135, denying right of steam railroad company to prevent trolley company from laying tracks on highway in front of its property and under its overhead bridge.

— **Interest in right of way.**

Cited in *Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co.* 6 Pa. Dist. R. 578, holding interest of railway in land covered by its right of way sufficient to support action against party obstructing access thereto from nighway.

Grade crossing; cost of construction.

Cited in *Perkiomen R. Co. v. Collegeville Electric Street R. Co.* 14 Montg. Co. L. Rep. 21, authorizing trolley railway crossing at grade over steam railroad track where cost of other crossing would prevent its construction.

34 L. R. A. 575, *OAKFORD v. NIXON*, 177 Pa. 76, 35 Atl. 588.

Eviction.

Cited in *Walters v. Transue*, 6 Northampton Co. Rep. 408, holding eviction question for jury where landlord erects fence excluding tenant from portion of leased premises.

34 L. R. A. 577, *VAN STEUBEN v. CENTRAL R. CO.* 178 Pa. 367, 35 Atl. 992.

Judgment for plaintiff affirmed on second appeal in 185 Pa. 293, 39 Atl. 1118.

Validity of railroad leases.

Cited in *Hanlon v. Philadelphia & W. C. Turnp. Road Co.* 182 Pa. 121, 40 W. N. C. 523, 37 Atl. 943, holding exemption of lessor of railroad by lessee, from liability for injuries, unavailing as defense in absence of statutory authority for such contract.

Cited in note (44 L. R. A. 739, 742) on liability of lessor of railroad for injuries caused by negligence of another company using road under lease, license, or other contract.

Distinguished in *Pinkerton v. Pennsylvania Traction Co.* 193 Pa. 235, 44 Atl. 284, Affirming 16 Lanc. L. Rev. 118, upholding implied statutory power of traction railway companies to lease to motor power companies; *Pittsburg, J. E. & E. R. Co. v. Altoona & B. C. R. Co.* 196 Pa. 466, 46 Atl. 431, refusing to declare lease void as *ultra vires* between parties, where executed and lessor received profits thereof.

Public policy.

Cited in *Northern C. R. Co. v. Walworth*, 193 Pa. 215, 44 Atl. 253, holding purchase of noncompeting road by railway corporation not against public policy; *Com. ex rel. Luden v. Kutz*, 6 Pa. Dist. R. 574, holding auctioneer's licenses issuable by county treasurers and not by governor, under P. L. 1874, chap. 332.

Class legislation.

Cited in *Com. v. Morton*, 23 Pa. Co. Ct. 387, 9 Pa. Dist. R. 133, upholding statute relating only to use of trademarks or trade labels by labor unions.

Fires caused by sparks from engine.

Cited in *Thomas v. New York, C. & St. L. R. Co.* 182 Pa. 542, 41 W. N. C. 146, 38 Atl. 413, admitting evidence of other fires set same day by same locomotive; *Matthews v. Pittsburg & L. E. R. Co.* 18 Pa. Super. Ct. 15, holding negligence for jury where evidence tends to show fire caused by sparks from engine, though sufficient spark arrester provided.

34 L. R. A. 581, *HAY v. PETERSON*, 6 Wyo. 419, 45 Pac. 1073.

Account books as evidence.

Cited in notes (52 L. R. A. 552, 573, 576) on party's books of account as evidence in his own favor; (52 L. R. A. 710) on what is provable by books of account.

Presumption from spoliation of evidence.

Cited in footnotes to *Western & A. R. Co. v. Morrison*, 40 L. R. A. 84, which holds request to charge that production of defendant's employee in court for examination by plaintiff overcomes any presumption from defendant's failure to introduce him, properly refused; *McHugh v. McHugh*, 41 L. R. A. 805, which holds attempt to procure false testimony or corrupt jurors admissible to raise presumption against guilty parties.

Burden of proof.

Cited in footnote to *Tucker v. State*, 46 L. R. A. 181, which holds person wrongfully killing another with deadly weapon has burden of proving justification or legal excuse in action for damages.

34 L. R. A. 593, *PETERSON v. ATLANTIC CITY R. CO.* 177 Pa. 335, 35 Atl. 621.

Review of exercise of discretion.

Cited in *Smith v. Times Pub. Co.* 178 Pa. 511, 35 L. R. A. 834, 36 Atl. 296, reversing for excessive damages where motion for new trial denied in lower court; *Re Huntingdon County Line*, 11 Pa. Super. Ct. 394, overruling action of trial court in ordering hearing on exceptions alleging matters of fact, on same day presented, without opportunity to meet new facts by testimony.

34 L. R. A. 595, *BENNETT v. EASTERN BLDG. & L. ASSO.* 177 Pa. 233, 55 Am. St. Rep. 723, 35 Atl. 684.

Law governing contract with nonresident.

Cited in *Elmira Mut. Bldg. & L. Asso. v. Wahoo Tribe No. 119*, I. O. R. M. 9 Kulp, 489, and *People's Bldg. & L. & Sav. Asso. v. Berlin*, 201 Pa. 4, 88 Am. St. Rep. 764, 50 Atl. 308, holding foreign usury laws control loan through agent to resident debtor on property situated in forum, where debt payable at foreign office; *Mutual Guarantee Bldg. & L. Asso. v. Fallen*, 4 Lack. Legal News, 352, 21 Pa. Co. Ct. 618, holding loan by corporation organized under foreign laws, but doing principal business in forum, governed by foreign usury laws, where so stipulated in bond; *Russell v. Pierce*, 121 Mich. 212, 80 N. W. 118, and *United States Sav. & L. Co. v. Shain*, 8 N. D. 141, 77 N. W. 1006, foreclosing mortgage securing loan by foreign association to resident secured on local property, where not usurious

under foreign law expressly stipulated to govern; *Baltimore Bldg. & L. Asso. v. Titlow*, 19 Pa. Co. Ct. 521, enforcing premium and interest on loan by foreign building association to resident, where made payable at foreign office and foreign law permits charge; *Neal v. New Orleans Loan, Bldg. & Sav. Asso.* 100 Tenn. 614, 46 S. W. 755, refusing to cancel unmatured mortgage to secure loan by foreign association, payable at foreign office, though loan and lawful interest under laws of forum repaid; *Guarantee Sav. Loan & Invest. Co. v. Alexander*, 96 Fed. 873, foreclosing mortgage on property in forum given to secure loan by foreign association, where not usurious under foreign law where payable; *Manship v. New South Bldg. & L. Asso.* 110 Fed. 859, holding foreign law governs usury of fixed premium on loan by foreign association to domestic debtor, where payable at foreign office though payment to local agents permitted for convenience; *McKean v. New York Nat. Bldg. & L. Asso.* 24 Pa. Co. Ct. 459, holding member of foreign building association not entitled to attachment for nonpayment of stock maturing at fixed time, where foreign law provides for maturity only when earnings bring stock to par; *United States Sav. & L. Co. v. Beckley*, 137 Ala. 122, 62 L. R. A. 40, 97 Am. St. Rep. 19, 33 So. 934, holding note and mortgage given to foreign loan association to be contracts of state where such mortgage resides.

Cited in footnotes to *National Mut. Bldg. & L. Asso. v. Braham*, 57 L. R. A. 793, which holds usury in loan by foreign loan association to resident, secured by mortgage on land in state, determined by local law; *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds contract treated as domestic, where application for loan made to association doing business in state, through resident agent, secured by mortgage on land in state, where money also used.

Cited in notes (55 L. R. A. 950) on whether *lex rei sitæ* with respect to interest and usury necessarily controls in action to foreclose real estate mortgage; (62 L. R. A. 65, 71) on conflict of laws as to interest and usury.

Distinguished in *Beso v. Eastern Bldg. & L. Asso.* 16 Pa. Super. Ct. 226, holding mortgage of property situated in forum, executed by resident as security for loan by foreign building association, governed by domestic law; *Floyd v. National Loan & Invest. Co.* 49 W. Va. 344, 54 L. R. A. 543, footnote p. 536, 87 Am. St. Rep. 805, 38 S. E. 653, enjoining foreclosure sale under mortgage to foreign association where premium on loan not definite and certain at inception as required by domestic law, though loan payable at foreign office.

Usury in loans by building association.

Cited in *Peoples' Bldg. Loan & Sav. Asso. v. Backus*, 2 Herdman (Neb.) 464, 89 N. W. 315, holding foreign law as to usury, where not pleaded nor proved, presumed to be same as that of forum.

Cited in footnotes to *Gray v. Baltimore Bldg. & L. Asso.* 54 L. R. A. 217, which holds percentage payable to loan association indefinitely usurious, though called "premium;" *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds exaction of monthly premium which, with interest, exceeds legal rate, unauthorized; *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 56 L. R. A. 163, which holds requirement that borrower bid for stock and pay dues on same, device to cover usury.

34 L. R. A. 597, *HARRISBURG NAT. BANK v. BRADSHAW*, 178 Pa. 180, 35 Atl. 629.

Confession of judgment by married woman.

Cited in *Stahr v. Brewer*, 186 Pa. 625, 42 W. N. C. 357, 65 Am. St. Rep. 883, 40 Atl. 1016, holding that judgment against married woman on her judgment note, should not be stricken off where no defects appear of record.

Married woman's liability in relation to negotiable paper.

Cited in footnote to *Kitchen v. Chapin*, 57 L. R. A. 914, which holds married woman liable on her guaranty of note owned by her and payable to her order.

34 L. R. A. 600, *HELLER v. ROYAL INS. CO.* 177 Pa. 262, 35 Atl. 726.

34 L. R. A. 602, *SCHWEISS v. DISTRICT COURT*, 23 Nev. 226, 45 Pac. 289.

34 L. R. A. 604, *Re SPITZ BROS.* 8 N. M. 622, 45 Pac. 1122.

34 L. R. A. 609, *McCONNELL v. LEMLEY*, 48 La. Ann. 1433, 55 Am. St. Rep. 319, 20 So. 887.

Liability of landlord for injuries through defect of premises.

Followed without discussion in *Prechter v. Lemley*, 48 La. Ann. 1440, 20 So. 1019.

Cited in *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 309, 40 L. R. A. 380, 64 Am. St. Rep. 229, 39 Atl. 1032, holding lessor of pulp mill not liable to employee of lessee for injuries received through defective digester not dangerous unless used.

Cited in footnotes to *Texas Loan Agency v. Fleming*, 44 L. R. A. 279, which denies liability of landlord for injury to persons stepping out of unguarded door opening into space, while lessee in possession; *Smith v. State*, 51 L. R. A. 772, which denies landlord's liability for injury to subtenant's child from defective balustrade on porch; *Henson v. Beckwith*, 38 L. R. A. 716, which denies landlord's liability for injury to one delivering goods to tenant, by falling into elevator well which tenant had covenanted to repair; *Towne v. Thompson*, 46 L. R. A. 748, which denies boarding-house lessor's liability to tenant's boarders for illness from unsanitary condition of premises; *Barman v. Spencer*, 44 L. R. A. 815, which holds landlord liable to guest of tenant for leaving well open and unguarded; *Brady v. Klein*, 62 L. R. A. 909, which denies right of action by licensee of tenant on landlord's covenant to repair, for injury due to defective condition of premises.

Cited in notes (34 L. R. A. 825, 832) on liability of landlord for injury to tenant from defect in premises; (34 L. R. A. 562) on individual liability for falling walls or buildings.

Liability of third persons for injuries to servants.

Cited in note (46 L. R. A. 83) on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

Liability of lessor for negligence of lessee.

Cited in *Muntz v. Algiers & G. R. Co.* 111 La. 428, 64 L. R. A. 227, 100 Am. St. Rep. 495, 35 So. 624, holding railroad company leasing road liable for negligence of lessee.

34 L. R. A. 615, *STENBERG v. WILLCOX*, 96 Tenn. 163, 33 S. W. 917.

Rehearing denied in 96 Tenn. 328, 34 L. R. A. 832, 54 Am. St. Rep. 823, 33 S. W. 914.

Liability of landlord for injuries due to defects in premises.

Cited in *Willcox v. Hines*, 100 Tenn. 539, 41 L. R. A. 278, 66 Am. St. Rep. 770, 46 S. W. 207, upholding recovery by guest of lessee against landlord for injury due to defective condition of porch, of which latter could have been aware by exercise of reasonable diligence; *Schwalbach v. Shinkle*, W. & K. Co. 97 Fed. 484, holding landlord not liable for injury to lessee's employee, due to defective condition of warehouse of which lessee had notice at time of lease.

Cited in footnotes to *Texas Loan Agency v. Fleming*, 44 L. R. A. 279, which denies liability of landlord for injury to persons stepping out of unguarded door opening into space while lessee in possession; *Towne v. Thompson*, 46 L. R. A. 748, which denies boarding-house lessor's liability to tenant's boarders for illness from unsanitary condition of premises; *Smith v. State*, 51 L. R. A. 772, which denies landlord's liability for injury to subtenant's child from defective balustrade on porch; *Brady v. Klein*, 62 L. R. A. 909, which denies right of action by licensee of tenant on landlord's covenant to repair, for injury due to defective condition of premises.

Cited in note (34 L. R. A. 609) on landlord's liability for injury to tenant's guests and servants from defect in premises.

Disapproved in *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 308, 40 L. R. A. 380, 64 Am. St. Rep. 229, 39 Atl. 1032, holding owner not liable to employee of lessee for injury due to defective pulp digester, not dangerous unless used, and referring with approval to annotation in 34 L. R. A. 615.

Parol evidence of contract.

Cited in *Lewis v. Turnley*, 97 Tenn. 202, 36 S. W. 872, admitting evidence of contemporary parol contract for transfer of insurance policies to vendee, where purposely omitted from deed.

34 L. R. A. 620, *OTTENBERG v. CORNER*, 22 C. C. A. 163, 40 U. S. App. 320, 76 Fed. 263.

Effect of state decisions in Federal courts.

Cited in *First Nat. Bank v. Glass*, 25 C. C. A. 154, 49 U. S. App. 228, 79 Fed. 709, following construction of Kansas homestead and exemption laws by state court; *Union P. R. Co. v. Reed*, 25 C. C. A. 394, 49 U. S. App. 233, 80 Fed. 239, following state decisions on admissibility of records of deeds under state registration laws.

Findings of fact by trial court.

Cited in *Denver & R. G. R. Co. v. Ristine*, 23 C. C. A. 14, 40 U. S. App. 579, 77 Fed. 59, sustaining finding of trial court as to existence and terms of oral contract, in absence of obvious error in law or serious mistake in consideration of evidence.

34 L. R. A. 625, *RICHMOND & I. CONSTR. CO. v. RICHMOND, N. I. & B. R. CO.* 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 105.

Subsequent appeal by intervener in *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 45 C. C. A. 61, 105 Fed. 804.

Identity of corporations.

Cited in *White v. Pecos Land & Water Co.* 18 Tex. Civ. App. 637, 45 S. W. 207.

holding land and water company and irrigation company not identical though organized by same parties and operated in same interest; *Chase v. Michigan Teleph. Co.* 121 Mich. 634, 80 N. W. 717, holding company purchasing and operating plant of similar company not liable for injury to employee of latter where not made so by statute or purchase agreement; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah; 481, 90 Am. St. Rep. 705, 65 Pac. 735, holding corporation *de facto* under local laws entitled to local condemnation statutes though foreign corporation controls stock; *United Mines Co. v. Hatcher*, 25 C. C. A. 47, 49 U. S. App. 139, 79 Fed. 519, holding lessor of mining property not liable for debts of lessee as same party, though lessee by agreement organized corporation, stock of which taken entirely by lessor.

Lien law.

Cited in *Re West Norfolk Lumber Co.* 112 Fed. 766, holding lien for supplies furnished to lumber company engaged in buying and selling lumber incidentally to principal business of preparing rough lumber for use, enforceable under Federal bankruptcy act of 1898.

34 L. R. A. 634, *CARR v. STATE*, 106 Ala. 35, 54 Am. St. Rep. 17, 17 So. 350.

Imprisonment for debt.

Cited in footnote to *Second Nat. Bank v. Becker*, 51 L. R. A. 860, which denies right to imprison sureties for refusal to pay judgment against principal.

Criminal liability for fraud.

Cited in footnote to *State v. Eifert*, 38 L. R. A. 485, which holds guilty, banker failing to repudiate son's reception of deposit after bank's insolvency known.

Cited in note (31 L. R. A. 124) on criminal liability for receiving deposit in bank, knowing of its insolvency.

Distinguished in *Chauncey v. State*, 130 Ala. 73, 89 Am. St. Rep. 17, 30 So. 403, upholding statute making it criminal offense to obtain board by fraud.

Contempt of court.

Cited in *McKissack v. Voorhees*, 119 Ala. 105, 24 So. 523, denying right to imprison party for failure to pay over money charged to be fraudulently withheld from creditors, where not shown to be in his possession or fraudulently disposed of after suit, to avoid court's anticipated order.

34 L. R. A. 656, *STATE v. YARDLEY*, 95 Tenn. 546, 32 S. W. 481.

Construction of statute.

Cited in *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 704, 53 L. R. A. 929, 43 S. W. 115, and *Henley v. State*, 98 Tenn. 706, 39 L. R. A. 132, 41 S. W. 352, holding that construction of statute which will uphold it will be favored.

Plurality of subjects in statute.

Cited in *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 727, 78 Am. St. Rep. 941, 59 S. W. 1033, holding anti-trust law valid, though dealing with both domestic and imported goods; *State v. McMinnville*, 106 Tenn. 389, 61 S. W. 785, upholding provision for dismissal of pending, and prohibition against similar, actions in future in statute relieving state from costs of litigation, collection of which in police court neglected; *Carroll v. Alsup*, 107 Tenn. 267, 64 S. W. 193, upholding statute not void as embracing more than one subject because it pro-

vides for assessment of certain corporate property and the exemption of certain other property; *State v. Brown*, 103 Tenn. 456, 53 S. W. 727, upholding provision for punishment of aiders and abettors in statute to "prevent" unlawful carnal knowledge of infant females.

Sufficiency of title of statute.

Cited in *Quinlan v. Houston & T. C. R. Co.* 89 Tex. 371, 34 S. W. 738, holding statute extending operation of previous act to new subjects not void for reference to prior act merely by title; *Ryan v. Louisville & N. Terminal Co.* 102 Tenn. 127, 45 L. R. A. 309, 50 S. W. 744, upholding authorization of railroads to own stock and guarantee bonds of terminal company in statute to amend act providing for organization and defining powers of terminal companies; *State ex rel. Smith v. State Dental Examiners*, 31 Wash. 499, 72 Pac. 110, holding title of act "to regulate practice of dentistry" broad enough to include provision for penalty.

Repeal of statute.

Cited in *Memphis v. American Exp. Co.* 102 Tenn. 341, 52 S. W. 172, holding general repealing clause of no effect where laws repealed thereby not recited in caption or body of act; *Bailey v. Drane*, 96 Tenn. 19, 33 S. W. 573, holding tax upon inheritance of estate from brother or sister impliedly repealed by statute expressly exempting such transfer.

Validity of statute prescribing rules of evidence.

Cited in footnotes to *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which holds void, statute preventing railroad company from setting up, in defense of suit for injury to employee, decisions of state where injury occurred; *Missouri. K. & T. R. Co. v. Simonson*, 57 L. R. A. 765, which holds void, statute making specifications of weights in bills of lading conclusive.

Imprisonment for debt.

Cited in footnote to *State v. Cook*, 58 L. R. A. 625, which holds decree for alimony not within prohibition against imprisonment for debt.

34 L. R. A. 674, *RATHBONE v. HOPPER*, 57 Kan. 240, 45 Pac. 610.

What constitutes a municipality.

Cited in *State v. Wilson*, 65 Kan. 238, 69 Pac. 172, holding school district a "municipality" within meaning of "eight hour" law.

Sufficiency of title to statute.

Cited in *Otto Gas-Engine Works v. Hare*, 64 Kan. 81, 67 Pac. 444, upholding, in act to "regulate" conditional sales, provision for making and preserving record thereof.

Unauthorized bond issues.

Cited in *Edminson v. Abilene*, 7 Kan. App. 307, 54 Pac. 568, holding municipal funding bonds issued under authority of resolution instead of ordinance, void in hands of innocent purchaser.

Cited in footnote to *Wilkes County v. Call*, 44 L. R. A. 252, which holds void, county bonds issued under authority of unconstitutional statute.

34 L. R. A. 678, *TILLINGHAST v. MERRILL*, 151 N. Y. 135, 56 Am. St. Rep. 612, 45 N. E. 375.

Liability of public officers for loss of public moneys.

Cited in *Gartley v. People*, 24 Colo. 160, 49 Pac. 272, and *Van Trees v. Territory*, 7 Okla. 364, 54 Pac. 495, holding county treasurer liable for loss of public money through failure of bank in which deposited, though without negligence; *Johnstown v. Rodgers*, 20 Misc. 265, 45 N. Y. Supp. 661, holding city chamberlain liable for public moneys stolen from safe provided by municipality for preservation thereof; *Lamb v. Dart*, 108 Ga. 613, 34 S. E. 160, holding liability of county treasurer for loss of public moneys through failure of bank of deposit, enforceable against his estate; *People ex rel. Pennell v. Treanor*, 15 App. Div. 510, 44 N. Y. Supp. 528, compelling by mandamus payment of municipal bonds by town commissioner, proceeds of which lost through failure of broker by whom negotiated; *Mercer v. Floyd*, 24 Misc. 165, 53 N. Y. Supp. 433, holding tax to relieve tax collector from loss through failure of bank of deposit void; *Kilby v. First Nat. Bank*, 32 Misc. 374, 66 N. Y. Supp. 579, holding guarantor of bank of deposit entitled to set off amount due from bank to creditors on insolvency, against bank's claim upon lien.

Cited in footnotes to *Thomssen v. Hall County*, 57 L. R. A. 303, which holds county treasurer liable on bond for loss of money by bank failure; *Maloy v. Bernalillo County*, 52 L. R. A. 126, which holds county liability on bond, absolute, except for overruling necessity.

Disapproved in *State v. Gramm*, 7 Wyo. 354, 40 L. R. A. 698, 52 Pac. 533, holding county treasurer not liable for public moneys lost through failure of bank in which deposited in good faith and in exercise of due care.

Town supervisor.

Cited in *People ex rel. Bowers v. Allen*, 19 Misc. 469, 44 N. Y. Supp. 566, refusing mandamus to compel payment of public money to school district by town supervisor.

Positions of confidence.

Cited in *Chittenden v. Wurster*, 152 N. Y. 361, 37 L. R. A. 814, 46 N. E. 857, holding that public officers and their subordinates, for whose honesty, superior is responsible, hold positions of confidence within exception of civil service law; *People ex rel. Tate v. Dalton*, 24 Misc. 11, 53 N. Y. Supp. 108, holding office of "water registrar" confidential within exception of veterans' law; *People ex rel. Letts v. Collier*, 78 App. Div. 624, 79 N. Y. Supp. 671, holding certain positions in registrar's office, on fidelity of incumbent of which registrar's protection defends, confidential within civil service law.

Limited in *People ex rel. Speight v. Coler*, 31 App. Div. 526, 52 N. Y. Supp. 197, holding collector of fees at public market not within exception of veterans' law.

34 L. R. A. 682, *ADAMS v. NEW JERSEY S. B. CO.* 151 N. Y. 163, 56 Am. St. Rep. 616, 45 N. E. 369.

Liability of innkeeper.

Cited in *Briggs v. Todd*, 28 Misc. 211, 59 N. Y. Supp. 23, holding hotel keeper liable for theft of silver cutlery and gold watch, from locked trunk placed in

guest's locked room; *Wies v. Hoffman House*, 28 Misc. 228, 59 N. Y. Supp. 38, holding hotel keeper liable for theft from locked room of silver mounted traveling bag containing suit of clothes.

— **Carrier as innkeeper.**

Cited in *Lincoln v. New York & C. Mail S. S. Co.* 30 Misc. 753, 62 N. Y. Supp. 1085, holding steamship company liable for loss of money from locked traveling bag placed in stateroom while passenger went for key.

Distinguished in *Whicher v. Boston & A. R. Co.* 176 Mass. 277, 79 Am. St. Rep. 314, 57 N. E. 601, denying right of recovery to passenger leaving satchel unprotected in sleeping car, while he was in smoking car.

34 L. R. A. 685, *OHIO & M. R. CO. v. TABER*, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18.

Validity of carrier's stipulations against liability for negligence.

Cited in *Brown v. Illinois C. R. Co.* 100 Ky. 527, 38 S. W. 862, holding stipulation for written notice within ten days of loss ineffective to relieve carrier from liability for injury by negligence not reported; *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 605, 66 Am. St. Rep. 361, 38 S. W. 1068, 36 L. R. A. 715, denying validity of stipulation exempting telegraph company from liability for negligence in transmission of cipher message; *Pittman v. Pacific Exp. Co.* 24 Tex. Civ. App. 598, 59 S. W. 949, denying validity of limitation of liability irrespective of value of goods, where prohibited by law of state where made, though shipment without state.

Cited in footnotes to *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for wet; *Ullman v. Chicago & N. W. R. Co.* 56 L. R. A. 248, which sustains carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance; *Rosenthal v. Weir*, 57 L. R. A. 527, which holds failure to comply with agreement for stoppage *in transitu* not within contract limiting liability to specified amount; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 41 L. R. A. 511, which sustains state statute making initial carrier liable for whole distance in absence of written contract to contrary.

Cited in note (63 L. R. A. 529, 534) on conflict of laws as to carrier's contracts.

Distinguished in *Grieve v. Illinois C. R. Co.* 104 Iowa, 662, 74 N. W. 192, holding burden on shipper undertaking to care for stock during transportation to show injury is due, not to his own omission, but to negligence of carrier; *Teumseh Mills v. Louisville & N. R. Co.* 108 Ky. 577, 49 L. R. A. 560, 57 S. W. 9, upholding provision for exemption from liability by fire in contract made in another state by domestic corporation for transportation between points wholly outside state.

Error not available on appeal.

Cited in *Morrill v. Hershfield*, 19 Mont. 248, 47 Pac. 997, holding appellant not in condition to complain of harm done him by improper hypothetical question as to value of services, where verdict otherwise supported by uncontradicted testimony of witnesses having knowledge of the facts.

34 L. R. A. 690, *FRAME v. SLITER*, 29 Or. 121, 54 Am. St. Rep. 781, 45 Pac. 290.
Vendor's lien.

Cited in *Smith v. Allen*, 18 Wash. 7, 39 L. R. A. 84, 63 Am. St. Rep. 864, 50 Pac. 783, holding action to recover unpaid portion of purchase money of land, transitory, since no vendor's lien exists in absence of statute.

Cited in footnote to *Doty v. Deposit Bldg. & L. Asso.* 43 L. R. A. 551, which holds vendor's lien enforceable against realty for entire amount remaining unpaid on sale for gross amount of realty and personalty.

34 L. R. A. 694, *MUTUAL F. INS. CO. v. PHOENIX FURNITURE CO.* 108 Mich. 170, 62 Am. St. Rep. 693, 66 N. W. 1095.

Assessment in insolvency as res judicata.

Cited in *Mallen v. Langworthy*, 70 Ill. App. 377, denying right of stockholder in mutual insurance company to question assessment imposed by court in proceedings by receiver to which stockholder not party; *Commonwealth Mut. F. Ins. Co. v. Hayden Bros.* 60 Neb. 639, 83 N. W. 922, and *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 134, 83 N. W. 36, holding absent stockholders bound by court's assessment on unpaid stock in insolvent building association, though not parties thereto, the latter case referring with approval to annotation in 34 L. R. A. 694; *Warner v. Delbridge & C. Co.* 110 Mich. 593, 34 L. R. A. 702, 64 Am. St. Rep. 367, 68 N. W. 283, enforcing assessment against nonresident policy holders if in mutual insurance company where valid under laws of latter's domicile.

Cited in footnote to *Parker v. C. Lamb & Sons*, 34 L. R. A. 704, which holds assessment on premium notes by receiver of mutual company not binding on courts of another state.

Cited in notes (32 L. R. A. 487, 504) on liability of members of mutual life insurance company; (34 L. R. A. 740) on right to enforce stockholder's liability outside of state of incorporation; (45 L. R. A. 647) on assessments on paid-up stock.

Right to enforce stockholder's liability outside state of incorporation.

Cited in footnote to *Bank of China v. Morse*, 56 L. R. A. 139, which holds that English judgment against resident of United States on service here does not bind defendant personally or property here.

Conclusiveness of foreign judgments.

Cited in *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 17, 64 N. E. 525, holding foreign judgment of court having jurisdiction of parties and subject-matter conclusive on the merits until reversed.

34 L. R. A. 701, *WARNER v. DELBRIDGE & C. CO.* 110 Mich. 590, 64 Am. St. Rep. 367, 68 N. W. 283.

Assessment against nonresident stockholders.

Cited in *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 134, 83 N. W. 36, holding absent stockholders bound by court's assessment on unpaid stock in insolvent building association though not parties thereto.

Cited in notes (63 L. R. A. 853) on laws of state of incorporation as limitation on powers of insurance company; (34 L. R. A. 701) on effect of assessment on stockholders made under order of court in another state as *res judicata*.

34 L. R. A. 704, PARKER v. C. LAMB & SONS, 99 Iowa, 265, 68 N. W. 686.

Authority of foreign receiver.

Cited in *State Bank v. McElroy*, 106 Iowa, 261, 76 N. W. 715, sustaining refusal to permit receiver of nonresident corporation to open default judgment entered by assignee thereof, voluntarily appearing on service of summons by publication; *Wyman v. Eaton*, 107 Iowa, 219, 43 L. R. A. 698, 70 Am. St. Rep. 193, 77 N. W. 865, refusing to permit foreign receiver to sue on inequitable claims, in derogation of right of citizens of forum; *Spinney v. Miller*, 114 Iowa, 216, 89 Am. St. Rep. 351, 86 N. W. 317, holding mortgagor to insolvent building association not concluded by adjudication of Federal court appointing receiver, as to manner of settlement.

Cited in footnote to *Castleman v. Templeman*, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors.

Cited in note (34 L. R. A. 701) on effect of assessment on stockholders made under order of court in another state as *res judicata*.

Distinguished in *Hale v. Harris*, 112 Iowa, 373, 83 N. W. 1046, holding foreign receiver entitled to foreclose mortgage on property within forum, assigned to him after appointment.

Restrictions on business of foreign insurance company.

Cited in footnotes to *Bankers' L. Ins. Co. v. Howland*, 57 L. R. A. 374, which denies insurance commissioners' power to question foreign company's mode of computing reserve set forth in statement for license; *People ex rel. Traders' F. Ins. Co. v. Van Cleave*, 47 L. R. A. 795, which sustains right to license of foreign insurance company complying with requirements, regardless of similarity of name to that of domestic corporation.

Cited in note (63 L. R. A. 851) on conflict of laws as to contracts of insurance.

34 L. R. A. 707, NEAL v. BLACK, 177 Pa. 83, 35 Atl. 561.

Validity of deed by weak-minded grantor.

Cited in *Coleman's Estate*, 193 Pa. 611, 44 Atl. 1085, sustaining as against his subsequent wife, deed of spendthrift son to mother conveying all his property in consideration of payment of large annual income.

Irrevocable trusts.

Cited in *Chestnut Street Nat. Bank v. Fidelity Ins. Trust & S. D. Co.* 42 W. N. C. 317, Reversing 7 Pa. Dist. R. 110, holding property conveyed in absolute trust for son, subsequently protected by spendthrift trust on his insolvency, not subject to garnishment on parent's death confirming trust by will.

Cited in footnotes to *Wilson v. Anderson*, 44 L. R. A. 542, which holds trust by intemperate to pay income during life, without power of revocation, irrevocable; *Neisler v. Pearsall*, 52 L. R. A. 874, holding trust expressly made irrevocable not revoked by release by beneficiaries and conveyance by trustee to settlor.

Distinguished in *Steeley v. Steeley*, 24 Pa. Co. Ct. 611, holding entire principal subject to immediate order of settlor where collected by trustee on judgments transferred for collection, and payable to settlor on demand, any balance remaining on death of settlor to go to trustee.

34 L. R. A. 718, *DAVIDSON v. HANNON*, 67 Conn. 312, 52 Am. St. Rep. 282, 34 Atl. 770.

Exemptions from execution.

Cited in footnotes to *Terry v. McDaniel*, 46 L. R. A. 559, which holds barber's chair and looking-glass exempt; *Re Klemp*, 39 L. R. A. 340, which holds combined harvester of farmer exempt from execution.

34 L. R. A. 720, *McAFEE v. HUIDEKOPER*, 9 App. D. C. 36.

Passenger's contributory negligence.

Cited in *Harbison v. Metropolitan R. Co.* 9 App. D. C. 69, holding contributory negligence not established, as matter of law, by fact that passenger remained on running-board of car next adjoining track; *Brightwood R. Co. v. Carter*, 12 App. D. C. 160, upholding instruction for defendant if handle bar on open electric car was constructed merely to aid passengers in entering or alighting and was strong enough for such purpose, though it gave away while plaintiff was holding thereto during passage.

Cited in footnotes to *Piper v. New York C. & H. R. R. Co.* 41 L. R. A. 724, which holds experienced traveler negligent in stepping out of vestibule door of sleeping car by mistake, while attempting to enter water closet; *Gannon v. New York, N. H. & H. R. Co.* 43 L. R. A. 833, which holds carrier liable for injury to passenger while impulsively trying to escape from car in which oil lamp caught fire.

Presumption of carrier's negligence from accident.

Cited in footnotes to *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance; *Harrison v. Sutter Street R. Co.* 55 L. R. A. 608, which denies presumption of negligence from injury to street car passenger by collision of car with vehicle.

34 L. R. A. 723, *BROWN v. PETTIT*, 178 Pa. 17, 56 Am. St. Rep. 742, 35 Atl. 865.

Discount of firm paper for individual credit.

Cited in footnote to *Lamson v. Beard*, 45 L. R. A. 822, which holds brokers taking from bank president drafts signed by him for individual debt not bona fide purchaser.

Liability of bank for misappropriated proceeds of paper paid by it.

Distinguished in *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 445, denying liability of bank for funds drawn upon in regular course of business by proper agent, but misappropriated, where not party to fraud.

34 L. R. A. 725, *REELFOOT LAKE LEVEE DISTRICT v. DAWSON*, 97 Tenn. 151, 36 S. W. 1041.

Equal and uniform taxation.

Cited in *Jones v. Memphis*, 101 Tenn. 192, 47 S. W. 136, holding statute exempting newly added portion of city from taxation for current expense for which remaining portion is still taxable, unconstitutional; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 702, 53 L. R. A. 928, 43 S. W. 115, holding that exemption of railroad from ad valorem tax does not relieve it from liability for privilege tax; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 551, 60 U. S. App. 166, 88 Fed. 363

and Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 317, restraining enforcement of tax based upon assessment of telephone and railroad property at real value, where other property in state assessed for less; Pryor v. Bryan, 11 Okla. 365, 66 Pac. 348, upholding power of legislature to tax for territorial and court funds only, Indian reservation attached to organized county.

— **Self-executing provision.**

Cited in Railroad & Teleph. Cos. & Board of Equalizers, 85 Fed. 306, holding provision of Constitution for uniform taxation mandatory and self-executing.

Assessment.

Distinguished in Carroll v. Alsop, 107 Tenn. 289, 64 S. W. 193, holding actual cash value at fair sale constitutional basis of assessment for taxation.

Classification of municipalities.

Cited in State v. Frost, 103 Tenn. 696, 54 S. W. 986, upholding statute applying four-mile liquor law to municipalities of less than 2,000 inhabitants created thereafter.

Taxation of property in specie.

Cited in footnote to Pingree v. Dix, 44 L. R. A. 679, which holds void, taxation of telephone lines at average rate of taxes levied throughout state during previous year.

Legislative policy.

Cited in Henley v. State, 98 Tenn. 683, 39 L. R. A. 132, 41 S. W. 352, upholding statute requiring attendance of witnesses residing within certain distance from court, without compensation, where violation of no express constitutional provision; Leeper v. State, 103 Tenn. 511, 48 L. R. A. 169, 53 S. W. 962, upholding "uniform text book act" as valid exercise of legislative discretion; Illinois C. R. Co. v. Wells, 104 Tenn. 710, 59 S. W. 1041, refusing to consider wisdom or policy of statute creating attorney's lien for fees on cause of action; Harbison v. Knoxville Iron Co. 103 Tenn. 441, 56 L. R. A. 320, 76 Am. St. Rep. 682, 53 S. W. 955, and Dayton Coal & I. Co. v. Barton, 103 Tenn. 613, 53 S. W. 970, refusing to overthrow statute compelling payment by corporations of "nontransferable" store orders, etc., in hands of transferees, for infringement of natural equity, where no constitutional right impaired; Memphis v. American Exp. Co. 102 Tenn. 340, 52 S. W. 172, holding statute taxing privileges for state revenue impliedly repeals municipal and county taxes thereon.

Police regulation and taxation for revenue.

Cited in Blaufield v. State, 103 Tenn. 601, 53 S. W. 1090, holding statute forbidding under penalty, sale of cigarettes, not impliedly repealed by tax on sale thereof "not in violation of criminal law."

Taxation for "public purpose."

Cited in footnotes to Pritchard v. Magoun, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes, toll bridge owned by private corporation; Dodge v. Mission Twp. 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation; Bush v. Orange County, 45 L. R. A. 556, which holds void, statute authorizing counties to raise by taxation money to pay drafted men or their heirs.

Cited in note (58 L. R. A. 758, 759, 761) on levees as public improvements.

Statutes void in part.

Cited in *State v. Scott*, 98 Tenn. 262, 36 L. R. A. 463, 39 S. W. 1, holding entire revenue act not invalidated by single unconstitutional provision taxing interstate commerce; *Edwards v. Bruorton*, 184 Mass. 531, 69 N. E. 328, holding statute authorizing laying out of street not invalidated by unconstitutional provision directing assessment upon abutters.

Distinguished in *Weaver v. Davidson County*, 104 Tenn. 333, 59 S. W. 1105, holding entire "Estes fee bill" avoided by invalidity of section making vicious classification, on which statute rests.

34 L. R. A. 733, *REUTER v. LAWE*, 94 Wis. 300, 59 Am. St. Rep. 891, 68 N. W. 955.

Estoppel to assert dedication.

Cited in *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 403, 80 N. W. 1101, holding city not estopped to assert dedication of street, where ordinance vacating dedication repealed before action by former owners, other than payment of taxes.

Cited in footnote to *Davenport v. Buffington*, 46 L. R. A. 377, which holds municipality estopped to revoke dedication of public park after property rights acquired in reliance thereon.

Distinguished in *Davis v. Appleton*, 109 Wis. 588, 85 N. W. 515, holding that survey and establishment of street on supposed line of dedication does not work estoppel on city to claim additional strip against abutting owner who has made no improvements in reliance on former street line.

34 L. R. A. 737, *CUSHING v. PEROT*, 175 Pa. 66, 52 Am. St. Rep. 835, 34 Atl. 447.

Enforcement of stockholder's liability.

Cited in *Whitman v. Oxford Nat. Bank*, 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. Rep. 477, and *Hancock Nat. Bank v. Ellis*, 172 Mass. 45, 42 L. R. A. 401, footnote p. 396, 70 Am. St. Rep. 232, 51 N. E. 207, enforcing liability of resident stockholder in Kansas corporation in action by judgment creditor; *Remington Paper Co. v. Darling*, 9 Kulp, 377 and *Ball v. Anderson*, 196 Pa. 88, 79 Am. St. Rep. 693, 46 Atl. 366, upholding individual creditor's right to pursue statutory remedy directly against single resident stockholder in Kansas corporation where right accrued prior to Kansas statute abolishing same; *Warrington v. Ball*, 33 C. C. A. 610, 62 U. S. App. 413, 90 Fed. 466, holding fraud in judgment upon which action against resident stockholder in Kansas corporation based, available as defense without suit in equity to annul; *Love v. Pusey & J. Co.* 3 Penn. (Del.) 579, 52 Atl. 542, holding stockholder's individual liability enforceable under Kansas statute in any state where personal service is had on stockholders.

Cited in footnotes to *Kirtley v. Holmes*, 52 L. R. A. 738, which sustains right to enforce stockholder's liability in courts of his domicile; *Howarth v. Lombard*, 49 L. R. A. 301, which authorizes suit to enforce stockholders' liability in foreign jurisdiction; *Bell v. Farwell*, 42 L. R. A. 804, which holds action to enforce stockholder's liability maintainable in other states; *Ferguson v. Sherman*, 37 L. R. A. 622, which authorizes action to enforce stockholder's liability in any state where personal service obtainable; *Fidelity Ins. Trust & S. D. Co. v. Mechanic's Sav. Bank*, 56 L. R. A. 228, which holds stockholder's liability enforceable in Federal court, or any court where personal service obtainable; *Blair v. Newbegin*, 58 L. R. A. 644, which sustains right to enforce stockholder's liability in other state, with-

out making corporation a party; *Crippen, L. & Co. v. Loughton*, 46 L. R. A. 467, which denies enforceability of stockholder's liability in other state; *Finney v. Guy*, 49 L. R. A. 486, which holds action to enforce stockholder's liability not maintainable out of state; *Bank of China v. Morse*, 56 L. R. A. 139, which holds assessment under English statute in proceeding to wind up corporation will not be enforced here against resident.

Cited in note (47 L. R. A. 255) on effect of transfers of shares of stock on liability for unpaid subscription.

Distinguished in *Bates v. Day*, 198 Pa. 516, 82 Am. St. Rep. 811, 48 Atl. 407, denying right of portion of creditors of Colorado corporation to enforce statutory liability of stockholder in equitable proceeding in which he is only stockholder defendant, and corporation not party.

— **By receiver or assignee.**

Cited in *Barton Nat. Bank v. Atkins*, 72 Vt. 42, 47 Atl. 176, holding receiver proper party to enforce stockholder's liability in equity under Vermont statute; *Childs v. Cleaves*, 95 Me. 509, 50 Atl. 714, holding liability of local stockholder for assessment of foreign court in suit by receiver of insolvent corporation there domiciled, enforceable by such receiver; *Hale v. Haddon*, 37 C. C. A. 244, 95 Fed. 751, upholding appointment of receiver in another jurisdiction to enforce at law, equitable contribution of local stockholders in insolvent Minnesota corporation; *Lewis v. Clark*, 129 Fed. 574, upholding as matter of comity, action in Idaho by Wisconsin receiver of Minnesota corporation specially appointed to foreclose securities deposited in Wisconsin to authorize corporation to do business there.

Cited in footnotes to *Stoddard v. Lum*, 45 L. R. A. 551, which authorizes action in New York by Illinois assignee for creditors of Illinois corporation to enforce liability of all domestic stockholders; *Howarth v. Angle*, 47 L. R. A. 725, which sustains foreign receiver's right of action against stockholder in foreign corporation; *Runner v. Dwiggins*, 36 L. R. A. 645, which denies right of bank assignee to enforce stockholder's liability.

Distinguished in *Colton v. Mayer*, 90 Md. 718, 47 L. R. A. 621, footnote p. 617, 78 Am. St. Rep. 456, 45 Atl. 874, and *McLaughlin v. Kimball*, 20 Utah, 263, 77 Am. St. Rep. 908, 58 Pac. 685, holding creditor, but not receiver, either general or special, entitled to enforce statutory liability of stockholder.

Presumption as to foreign law.

Cited in footnote to *Aslanian v. Dostumian*, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

34 L. R. A. 742, *RHODES v. UNITED STATES NAT. BANK*, 13 C. C. A. 612, 24 U. S. App. 607, 66 Fed. Rep. 512.

Enforcement of stockholder's personal liability.

Cited in *Whitman v. Oxford Nat. Bank*, 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. Rep. 477, Affirming 28 C. C. A. 411, 83 Fed. 295; *Western Nat. Bank v. Lawrence*, 117 Mich. 673, 76 N. W. 105; *Hancock Nat. Bank v. Ellis*, 172 Mass. 44, 42 L. R. A. 400, 70 Am. St. Rep. 232, 51 N. E. 207; *Ferguson v. Sherman*, 116 Cal. 175, 37 L. R. A. 625, 47 Pac. 1023,—upholding action by judgment creditor to enforce statutory liability of local stockholders in Kansas corporation; *Dexter v. Edmands*, 89 Fed. 469, and *McVickar v. Jones*, 70 Fed. 756, upholding action in Federal court corresponding in form to mode of enforcement under Kansas procedure; *Fidelity Ins. Trust & S. D. Co. v. Mechanic's Sav. Bank*, 56 L. R. A. 230, 38 C. C.

A. 196, 97 Fed. 299, Affirming 87 Fed. 116, 7 Pa. Dist. R. 367, holding stockholder or his estate individually liable in action by single creditor of insolvent Kansas corporation, although receiver appointed; *Hutchings v. Lamson*, 37 C. C. A. 565, 96 Fed. 720, holding statute of limitations of forum controls right to maintain action to enforce stockholder's liability under Kansas statute; *American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. 952, holding allegation of judgment against Kansas corporation, without stating original debt on which based, sufficient in proceeding in Federal court sitting in New York to enforce local stockholder's liability; *Lamson v. Hutchings*, 55 C. C. A. 246, 118 Fed. 322, holding plaintiff entitled to prove in action at law to enforce liability, that transfer of stock averred in defense was fraudulent and void; *Western Nat. Bank v. Reckless*, 96 Fed. 73, holding statute of another state preventing enforcement of creditor's statutory remedy against individual stockholder in Kansas corporation, resident in such state, unconstitutional; *Howarth v. Lombard*, 175 Mass. 580, 49 L. R. A. 307, 56 N. E. 888, sustaining action by receiver of Washington corporation there appointed, to enforce statutory liability of stockholders resident in forum; *Hale v. Hardon*, 37 C. C. A. 244, 95 Fed. 751, upholding appointment of ancillary receiver in another jurisdiction to enforce at law, equitable contribution of local stockholders in insolvent Minnesota corporation; *Lewis v. Clark*, 129 Fed. 574, upholding, as matter of comity, action in Idaho by Wisconsin receiver of Minnesota corporation specially appointed to foreclose securities deposited in Wisconsin to authorize corporation to do business there.

Cited in note (34 L. R. A. 763) on right to enforce stockholder's liability outside state of incorporation.

Findings by court without jury.

Cited in *O'Hara v. Mobile & O. R. Co.* 22 C. C. A. 514, 40 U. S. App. 471, 76 Fed. 720, holding general finding on trial by court without jury precludes consideration on appeal of errors other than in admission of evidence.

34 L. R. A. 747, *RUSSELL v. PACIFIC R. CO.* 113 Cal. 258, 45 Pac. 323.

Enforcement of stockholder's personal liability.

Cited in *Stoddard v. Lum*, 32 App. Div. 569, 53 N. Y. Supp. 607, holding method prescribed for enforcement of stockholder's liability at domicile of corporation precludes use of any other by creditor suing in foreign jurisdiction.

Cited in note (34 L. R. A. 743, 755) on right to enforce stockholder's liability outside state of incorporation.

34 L. R. A. 750, *TUTTLE v. NATIONAL BANK*, 161 Ill. 497, 44 N. E. 984.

Enforcement of statutory liability of stockholder outside state of incorporation.

Cited in *Mead v. Davies*, 84 Ill. App. 562, refusing to dissolve foreign corporation and enforce special remedy against stockholder available under law of its domicile, prior to dissolution proceedings there; *Warrington v. Ball*, 33 C. C. A. 610, 62 U. S. App. 413, 90 Fed. 466, holding defense of fraud in foreign judgment upon statutory liability available in action thereon in Federal court sitting in another state; *National Bank v. Zinser*, 55 Ill. App. 517, holding constitutional provision in Kansas for stockholders' liability, self-executing and enforceable in forum in action of assumpsit; *James H. Rice Co. v. Libbey*, 85 Fed. 824, holding

corporation necessary party to equitable proceeding to determine officer's statutory liability for excess of debts over capital stock.

Cited in note (34 L. R. A. 743, 755) on right to enforce stockholder's liability outside state of incorporation.

Distinguished in *Bell v. Farwell*, 176 Ill. 493, 42 L. R. A. 806, 68 Am. St. Rep. 194, 54 N. E. 346, enforcing statutory liability of stockholder under Kansas law in action of assumpsit where contractual nature admitted by demurrer; *Woodworth v. Bowles*, 61 Kan. 575, 60 Pac. 331, dismissing petition in equity by creditor in behalf of himself and other creditors, as not in conformity to individual right of each creditor to enforce stockholder's liability under Kansas law.

Disapproved in *Western Nat. Bank v. Lawrence*, 117 Mich. 674, 76 N. W. 105, holding constitutional liability of stockholder in Kansas corporation self-executing and enforceable at law in foreign state in action of assumpsit; *Whitman v. National Bank*, 28 C. C. A. 411, 51 U. S. App. 536, 83 Fed. 295, and *Hancock Nat. Bank v. Ellis*, 172 Mass. 45, 42 L. R. A. 401, 70 Am. St. Rep. 232, 51 N. E. 207, holding statutory liability of stockholder in Kansas corporation transitory and enforceable wherever service may be properly made.

34 L. R. A. 757, *MARSHALL v. SHERMAN*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419.

Motion for reargument denied, 148 N. Y. 755, 43 N. E. 988.

Enforcement of stockholder's statutory liability.

Cited in *Crippen v. Loughton*, 69 N. H. 551, 46 L. R. A. 473, 76 Am. St. Rep. 192, 44 Atl. 538; *Hancock Nat. Bank v. Farnum*, 20 R. I. 469, 40 Atl. 341; *Brookman v. Merchants' Sav. Bank*, 31 Misc. 193, 65 N. Y. Supp. 54; *Tuttle v. National Bank*, 161 Ill. 503, 34 L. R. A. 753, 44 N. E. 984,—holding that individual creditor cannot maintain action to enforce statutory liability of local stockholder in Kansas corporation; *Bank of China v. Morse*, 168 N. Y. 482, 56 L. R. A. 148, 35 Am. St. Rep. 676, 61 N. E. 774, refusing to enforce against domestic stockholder, assessment under foreign statute in dissolution proceeding of which no notice given and to which stockholder not party; *Finney v. Guy*, 106 Wis. 267, 49 L. R. A. 491, 82 N. W. 595, holding liability not enforceable in forum, where laws of Minnesota where corporation domiciled provide for single action against all stockholders and corporation in favor of all creditors; *Warrington v. Ball*, 33 C. C. A. 610, 62 U. S. App. 413, 90 Fed. 466, holding defense of fraud in foreign judgment upon statutory liability available in action thereon in Federal court sitting in another state; *Woodworth v. Bowles*, 61 Kan. 575, 60 Pac. 331, holding individual creditor's right to maintain action against individual stockholder not affected by subsequent statute taking away such right; *Lang v. Lutz*, 83 App. Div. 537, 82 N. Y. Supp. 319, denying right of creditor to enforce for his benefit alone, liability of stockholder for amount unpaid on stock; *Hutchinson v. Stadler*, 85 App. Div. 430, 83 N. Y. Supp. 509, enforcing liability, under statute, against director of foreign corporation paying dividends out of capital of corporation in violation of statute.

Cited in note (34 L. R. A. 741) on right to enforce stockholder's liability outside state of incorporation.

Distinguished in *Stoddard v. Lum*, 159 N. Y. 273, 45 L. R. A. 554, 70 Am. St. Rep. 541, 53 N. E. 1108, Reversing 32 App. Div. 569, 53 N. Y. Supp. 607, sustaining equitable action by foreign assignee for creditors of foreign corporation to collect unpaid subscriptions to stock from all local stockholders thereon; *Howarth*

v. Lombard, 175 Mass. 580, 49 L. R. A. 308, 56 N. E. 888, and Howarth v. Angle, 162 N. Y. 189, 47 L. R. A. 730, 56 N. E. 489, Affirming 39 App. Div. 161, 57 N. Y. Supp. 187, Which Affirms 25 Misc. 554, 55 N. Y. Supp. 1108, sustaining action by foreign receiver to collect assessment imposed by court at domicil of foreign corporation upon stockholders thereof; Thompson v. Nicolai, 21 Misc. 709, 49 N. Y. Supp. 422, sustaining action by assignee of creditor of insolvent business corporation to recover debt from individual stockholder of unpaid stock, where debt does not exceed par value of stock, without joining other parties; Persons v. Gardner, 42 App. Div. 500, 59 N. Y. Supp. 463, holding that receiver of bank may enforce liability of stockholders imposed by statute enacted subsequent to insolvency; Hale v. Hardon, 37 C. C. A. 245, 95 Fed. 751, upholding appointment of receiver in another jurisdiction to enforce at law, equitable contribution of local stockholders in insolvent Minnesota corporation; Bell v. Farwell, 176 Ill. 493, 42 L. R. A. 806, 68 Am. St. Rep. 194, 54 N. E. 346, enforcing contractual liability of local stockholders in Kansas corporation in action at law by single creditor, where admitted by demurrer; Latimer v. Citizens State Bank, 102 Iowa, 165, 71 N. W. 225, enforcing liability of local stockholder in South Dakota corporation at suit of individual creditor; Stieffel v. Tolhurst, 67 App. Div. 526, 73 N. Y. Supp. 1034, holding directors liable for statutory penalty for failure to file annual report, irrespective of insolvency of corporation; Worthington v. Griesser, 77 App. Div. 208, 79 N. Y. Supp. 52, holding obligation created by contract enforceable against directors of pretended foreign corporation.

Disapproved in Whitman v. National Bank, 28 C. C. A. 411, 51 U. S. App. 536, 83 Fed. 295, Affirming 76 Fed. 698; Hancock Nat. Bank v. Ellis, 172 Mass. 45, 42 L. R. A. 401, 70 Am. St. Rep. 232, 51 N. E. 207; Kulp v. Fleming, 65 Ohio, 340, 87 Am. St. Rep. 611, 62 N. E. 334; Western Nat. Bank v. Lawrence, 117 Mich. 674, 76 N. W. 105,—holding liability enforceable by individual creditor against individual resident stockholder in insolvent Kansas corporation; Pfaff v. Gruen, 92 Mo. App. 572, upholding action by creditor in behalf of all against all resident stockholders in Ohio corporation to collect assessment imposed by Ohio court; Love v. Pusey & J. Co. 3 Penn. (Del.) 578, 52 Atl. 542, holding action maintainable in Delaware to enforce, under Kansas statute, individual liability of Delaware stockholder of Kansas corporation.

— **Equitable nature of proceeding.**

Cited in Hirshfeld v. Fitzgerald, 157 N. Y. 179, 46 L. R. A. 846, 51 N. E. 997, holding creditor bringing action on behalf of himself and other creditors, entitled to settle and discontinue same at any time prior to joinder therein of other creditors; Marsh v. Kaye, 44 App. Div. 79, 60 N. Y. Supp. 439 (dissenting opinion), majority denying right of creditor proceeding in equity in behalf of all, to enjoin actions by other creditors at law to enforce statutory liability of directors of charitable corporation; Hallett v. Metropolitan Messenger Co. 69 App. Div. 263, 74 N. Y. Supp. 639, holding creditor not entitled to personal judgment against all stockholders in equitable proceeding in behalf of all creditors, where it appears that there are other creditors in same position.

— **Necessary parties.**

Cited in Milson Rendering & Fertilizer Co. v. Baker, 16 App. Div. 586, 44 N. Y. Supp. 999, holding corporation and all its directors necessary parties to action to enforce statutory liability for creation of debt in excess of paid-up capital stock; Hirshfeld v. Bopp, 39 App. Div. 616, 57 N. Y. Supp. 699, refusing to permit action

by creditors against portion only of stockholders of insolvent corporation in forum; *James H. Rice Co. v. Libbey*, 85 Fed. 824, holding corporation necessary party to equitable proceeding to determine officer's statutory liability for excess of debts over capital stock.

Extraterritorial force of state statutes and decisions.

Cited in *People v. Martin*, 38 Misc. 70, 76 N. Y. Supp. 953, refusing to convict notary public of perjury for false oath, where oath not required by domestic laws, though authorized by law of foreign jurisdiction in a proceeding under which it was taken; *Bath Gaslight Co. v. Rowland*, 84 App. Div. 568, 82 N. Y. Supp. 841, refusing to hold surety liable on lease declared to be *ultra vires* in state where made; *Hilliker v. Hale*, 54 C. C. A. 257, 117 Fed. 225, holding action not maintainable in foreign jurisdiction by a receiver who is a mere agent of court in winding up corporation.

34 L. R. A. 767, *PITTSBURGH, C. C. & ST. L. R. CO. v. REDDING*, 140 Ind. 101, 39 N. E. 921.

Liability for injuries to trespassers.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 594, 40 N. E. 822, holding railway company liable only for wilful injury of boy walking on tracks at place where no regular crossing, though commonly used as footpath.

Right to eject passengers.

Cited in footnote to *Randall v. Chicago & G. T. R. Co.* 38 L. R. A. 666, which denies implied authority of brakeman to eject passenger from freight train.

34 L. R. A. 769, *DANTZER v. INDIANAPOLIS UNION R. CO.* 141 Ind. 604, 50 Am. St. Rep. 343, 39 N. E. 223.

Obstruction of access to property.

Cited in *Newton v. New York, N. H. & H. R. Co.* 72 Conn. 428, 44 Atl. 813, holding railway company not liable for depreciation in value through circuitry of access, caused by removal of grade crossing; *Cram v. Laconia*, 71 N. H. 47, 57 L. R. A. 285, 51 Atl. 635, holding discontinuance of portion of street, resulting in diversion of trade, not ground of action where access exists by longer route; *O'Brien v. Central Iron & Steel Co.* 158 Ind. 221, 57 L. R. A. 509, 92 Am. St. Rep. 305, 63 N. E. 302, holding construction of building wholly obstructing street entitles property owner, whose access to business portion of city thereby cut off, to maintain action for special damages; *Strunk v. Pritchett*, 27 Ind. App. 586, 61 N. E. 973, holding obstruction of alley special injury where only mode of access to rear of lot; *Pittsburgh, C. C. & St. L. R. Co. v. Noftsgar*, 148 Ind. 109, 47 N. E. 332, holding abutting owner entitled to recover for obstruction of access by switch, materially interrupting same; *Long v. Wilson*, 119 Iowa, 273, 60 L. R. A. 722, footnote p. 720, 97 Am. St. Rep. 315, 93 N. W. 282, holding judgment establishing boundary of highway in suit against owner on one side not conclusive on opposite owner whose access to property interfered with by boundary established; *Hall v. Lebanon*, 31 Ind. App. 269, 67 N. C. 703, holding owner of property not abutting on portion of street sought to be vacated not entitled to injunctive relief, where not suffering special damages.

34 L. R. A. 773, *JACKSON v. JACKSON*, 82 Md. 17, 33 Atl. 317.

Record of error on appeal.

Cited in *Lewis v. Tapman*, 90 Md. 303, 47 L. R. A. 388, 45 Atl. 459, holding erroneous admission of question on examination of witness not ground for reversal where record does not disclose that answer given.

Validity of marriage.

Cited in note (57 L. R. A. 156, 159, 161, 169) on conflict of laws as to validity of marriage.

Evidence of character.

Cited in footnote to *Daniels v. State*, 54 L. R. A. 286, which requires evidence of good character to be weighed by jury according to weight of testimony by which supported.

34 L. R. A. 777, *STATE ex rel. CHILDS v. COPELAND*, 66 Minn. 315, 61 Am. St. Rep. 410, 69 N. W. 27.

Uniformity of operation of statutes.

Cited in *Robert J. Boyd Paving & Contracting Co. v. Ward*, 28 C. C. A. 676, 55 U. S. App. 730, 85 Fed. 36, and *Owen v. Baer*, 154 Mo. 443, 55 S. W. 644, holding statute giving municipalities of fourth class power to tax for sewers, on adoption of provision by two-thirds vote, unconstitutional as special in operation.

Distinguished in *State ex rel. Anderson v. Sullivan*, 72 Minn. 133, 75 N. W. 8, upholding statute making identical provisions for operation in counties of same class, though, by reason of discretion exercisable thereunder by county commissioners, salaries may differ for same office in different counties.

Disapproved in *Adams v. Beloit*, 105 Wis. 374, 47 L. R. A. 446, footnote p. 441, 81 N. W. 869, upholding statute general in terms, though operating to affect but single municipality.

Office of commissioner of public works.

Cited in *State ex rel. St. Paul v. District Court*, 72 Minn. 227, 71 Am. St. Rep. 480, 75 N. W. 224, holding assessment levied for improvements ordered by one holding office of commissioner of public works under unconstitutional statute, void.

34 L. R. A. 781, *MITCHELL v. ROCHESTER R. CO.* 151 N. Y. 107, 56 Am. St. Rep. 604, 45 N. E. 354.

Liability for injuries caused by fright.

Cited in *Cleveland, C. C. St. L. R. Co. v. Stewart*, 24 Ind. App. 381, 56 N. E. 917, denying damage for nervous shock due to fright at peril of daughter, caused by negligence of railway company; *Spade v. Lynn & B. R. Co.* 168 Mass. 290, 38 L. R. A. 514, 60 Am. St. Rep. 393, 47 N. E. 88, holding nervous shock due to fright at scuffle in removal of disorderly passenger by conductor not ground of recovery; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 212, 63 Am. St. Rep. 343, 47 N. E. 694, holding fright at danger in which person is placed by runaway caused by negligent dropping of gate on horse and buggy not ground for recovery; *Ward v. West Jersey & S. R. Co.* 65 N. J. L. 384, 47 Atl. 561, holding that paralysis from fear at danger in which one is placed by negligent gateman will not support action; *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 405, 86 Am. St. Rep. 206, 64 S. W. 226, refusing recovery for nervous prostration caused by fright at having to cross cattle-guard with children at night, through failure to stop train at sta-

by creditors against portion of
forum; James H. Rice Co. v.
party to equitable proceedings
of debts over capital stock.

Extraterritorial force

Cited in *People v. Ma*
notary public of perjurer
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refusing to hold s
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Liability

Cited App. 52, holding nervous shock due to violent, angry speech
intiff, while prostrated from child-birth, not ground of recovery;
822, 122 Mich. 467, 80 Am. St. Rep. 577, 81 N. W. 335, denying
trae' miscarriage caused by fright at man dressed in woman clothes; *Prince*
32 Misc. 667, 66 N. Y. Supp. 454, refusing damage for shame and suffer-
R' used by mere solicitation to illicit intercourse; *Lee v. Burlington*, 113 Iowa,
86 Am. St. Rep. 379, 85 N. W. 618, refusing recovery of value of horse whose
death was caused by rupture of blood vessel of heart through fright at negligently
operated street roller; *Nason v. West*, 31 Misc. 585, 65 N. Y. Supp. 651, holding
allowance of damage for propensity of horse to subsequent fright erroneous in
action for damages to animal by automobile; *Western U. Teleg. Co. v. Sklar*, 61
C. C. A. 287, 126 Fed. 301, holding damages for mental suffering due to delay in
delivery of telegram not recoverable; *Wood v. New York C. & H. R. R. Co.* 83 App.
Div. 607, 82 N. Y. Supp. 160, holding carrier liable for negligence causing injury,
due to shock and muscular strain not produced by fright.

Cited in footnotes to *Spade v. Lynn & B. R. Co.* 38 L. R. A. 512, which denies
right to recover for fright, etc., unaccompanied by physical injuries; *Sanderson v.*
Northern P. R. Co. 60 L. R. A. 403, which denies right to recover for fright re-
sulting in physical injury, but without contemporaneous injury, unless fright
proximate result of legal wrong; *Smith v. Postal Teleg. Cable Co.* 47 L. R. A. 323,
which denies recovery for sickness due to fright caused by grossly negligent act of
one knowing such result would follow; *Kline v. Kline*, 58 L. R. A. 397, which sus-
tains right to damages for mental suffering for assault by pointing gun with
threat to shoot unless house abandoned; *Watson v. Dilts*, 57 L. R. A. 559, which
holds one liable for frightening woman, causing nervous prostration, by stealthily
entering her home in nighttime; *Homans v. Boston Elev. R. Co.* 57 L. R. A. 291,
which holds carrier liable for nervous shock to passenger from jar to nervous
system accompanying blow; *Reed v. Maley*, 62 L. R. A. 900, which holds that
merely soliciting woman to sexual intercourse gives her no right of action by
reason of mental distress suffered thereby.

Distinguished in *Jones v. Brooklyn Heights R. Co.* 23 App. Div. 143, 48 N. Y.
Supp. 914, allowing damages for fright accompanying injury by fall of light from

C. A. 546, 55 U. S. App. 427.

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v. Ferguson, 157 Ind. 77, 54 L. A.

U. Teleg. Co. 13 App. Div. 254, 42

ery for mental suffering caused by delay

death of relative. *Mahoney v. Dankwart*, 106

recovery for permanent nervous disorder caused

on adjoining lot; *Braun v. Craven*, 175 Ill. 413, 42

adding fright and shock caused by negligent and violent

collection of rent insufficient to support action for damages;

App. 52, holding nervous shock due to violent, angry speech

intiff, while prostrated from child-birth, not ground of recovery;

ford, 122 Mich. 467, 80 Am. St. Rep. 577, 81 N. W. 335, denying

miscarriage caused by fright at man dressed in woman clothes; *Prince*

32 Misc. 667, 66 N. Y. Supp. 454, refusing damage for shame and suffer-

used by mere solicitation to illicit intercourse; *Lee v. Burlington*, 113 Iowa,

86 Am. St. Rep. 379, 85 N. W. 618, refusing recovery of value of horse whose

death was caused by rupture of blood vessel of heart through fright at negligently

operated street roller; *Nason v. West*, 31 Misc. 585, 65 N. Y. Supp. 651, holding

allowance of damage for propensity of horse to subsequent fright erroneous in

action for damages to animal by automobile; *Western U. Teleg. Co. v. Sklar*, 61

C. C. A. 287, 126 Fed. 301, holding damages for mental suffering due to delay in

delivery of telegram not recoverable; *Wood v. New York C. & H. R. R. Co.* 83 App.

Div. 607, 82 N. Y. Supp. 160, holding carrier liable for negligence causing injury,

due to shock and muscular strain not produced by fright.

roof of car; *Mack v. South Bound R. Co.* 52 S. C. 332, 40 L. R. A. 683, footnote p. 679, 68 Am. St. Rep. 913, 29 S. E. 905, permitting recovery for injury to youth whose mind unbalanced by fright at proximity to train killing mule which he was leading; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 242, 47 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 944, holding railway company liable for nervous shock proximately caused by fright at collision; *Buckbee v. Third Avenue R. Co.* 64 App. Div. 364, 72 N. Y. Supp. 217, holding plaintiff entitled to damages for injury due to electric shock while leaving car in terror at flames from controller box; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 543, 60 L. R. A. 620, footnote p. 617, 42 S. E. 983, permitting recovery for nervous disorders of woman caused by fright at negligent blasting upon adjoining land; *Preiser v. Wielandt*, 48 App. Div. 572, 62 N. Y. Supp. 890, holding landlord liable for death of tenant's wife where he wilfully tears down house immediately on expiration of lease, though notified of her pregnancy and heart disease; *Hickey v. Welch*, 91 Mo. App. 11, holding landlord liable for nervous prostration caused by fright at his abuse and threatening attitude with gun; *Ford v. Schliessman*, 107 Wis. 483, 83 N. W. 761, holding woman entitled to damage for fright caused by actions of trespasser on premises, though no assault actually made; *Williams v. Underhill*, 63 App. Div. 226, 71 N. Y. Supp. 291, allowing damages for mental derangement following actual assault; *Koch v. Fox*, 71 App. Div. 298, 75 N. Y. Supp. 913, holding party responsible for negligent injury causing insanity liable for death proximately resulting therefrom; *Powell v. Hudson Valley R. Co.* 88 App. Div. 137, 84 N. Y. Supp. 337, holding carrier liable for consequences of physical injury to passenger, due to its negligence, although condition partly produced by shock and fright.

Disapproved in *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 64 L. R. A. 549, 101 Am. St. Rep. 268, 98 N. W. 281, holding damages recoverable for mental pain and suffering due to negligence in transmission of telegram.

34 L. R. A. 784, *STATE v. ZICHFELD*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802.

Validity of common-law marriage.

Cited in *University of Michigan v. McGuckin*, 62 Neb. 493, 57 L. R. A. 919, footnote p. 917, 87 N. W. 180, holding lawful marriage shown between persons whose cohabitation originally meretricious, by continued cohabitation after disability removed, and birth of children baptized as legitimate.

Cited in footnote to *Hilton v. Roylance*, 58 L. R. A. 723, which sustains sealing for time and eternity under Mormon marriage ceremony.

34 L. R. A. 788, *LOUISVILLE & N. R. CO. v. McELWAIN*, 98 Ky. 700, 56 Am. St. Rep. 385, 34 S. W. 236.

Right of actions for injuries resulting in death.

Cited in *Owensboro & N. R. Co. v. Barclay*, 102 Ky. 28, 43 S. W. 177, holding husband required to elect between statutory action for physical and mental suffering of deceased wife and common-law action for negligent killing; *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 338, 43 L. R. A. 571, footnote p. 568, 75 N. W. 1066, holding but single action survives under statute providing for action by administrator for pain and suffering of deceased and for action for pecuniary loss to heirs by reason of death; *United States Electric Lighting Co. v. Sullivan*, 22 App.

D. C. 130, holding that father has no cause of action, independent of statute, for negligent killing of minor son.

Cited in footnotes to *Brown v. Chicago & N. W. R. Co.* 44 L. R. A. 579, which holds cause of action for personal injuries which survives death, distinct from right of action for death; *Broughel v. Southern New England Teleph. Co.* 49 L. R. A. 404, which holds substantial damages recoverable for instantaneous death by wrongful act; *Re Meekin*, 51 L. R. A. 235, which holds action for death by administrator, who is also father and sole beneficiary of deceased, survives father's death; *Worcester & S. Street R. Co. v. Travelers' Ins. Co.* 57 L. R. A. 629, which holds cases of instantaneous death not covered by policy insuring railroad company against loss from liability to persons sustaining "personal injuries."

Distinguished in *Foreman v. Taylor Coal Co.* 112 Ky. 851, 57 L. R. A. 450, 66 S. W. 1044, holding that cause of action against employer for failure to protect nonunion laborer against violence of strikers does not survive.

— **Effect of release.**

Cited in *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 580, 50 L. R. A. 697, footnote p. 694, 36 S. E. 881, holding voluntary settlement by deceased with tortfeasor for injury precludes statutory action in favor of survivors.

Cited in footnote to *Hill v. Pennsylvania R. Co.* 35 L. R. A. 196, which holds right of action for subsequent death precluded by release of damages for personal injuries.

— **Measure of damages.**

Distinguished in *Lines v. Chesapeake & O. R. Co.* 91 Fed. 968, holding earning power of deceased is measure of damages in statutory action by personal representative.

34 L. R. A. 797, *LUBRANO v. ATLANTIC MILLS*, 19 R. I. 129, 32 Atl. 205.

Right of actions for negligent injury causing death.

Cited in *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 339, 43 L. R. A. 572, 75 N. W. 1066, holding but single action survives under statutes providing for action by administrator for pain and suffering of deceased, and for action for pecuniary loss to heirs by reason of death; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 579, 50 L. R. A. 696, 36 S. E. 881, holding settlement by deceased with tortfeasor bars statutory action in favor of heirs.

Cited in footnote to *Broughel v. Southern New England Teleph. Co.* 49 L. R. A. 404, which holds substantial damages recoverable for instantaneous death by wrongful act.

Cited in note (34 L. R. A. 788) on how many distinct causes of action arise from injuries resulting in death.

Distinguished in *Letson v. Brown*, 11 Colo. App. 19, 52 Pac. 287, holding action for negligent injury does not survive against estate of wrongdoer.

Disapproved in *Brown v. Chicago & N. W. R. Co.* 102 Wis. 147, 44 L. R. A. 584, 77 N. W. 748, holding action by administrator for suffering of deceased distinct from that by heirs for pecuniary loss.

34 L. R. A. 803, *HOLLEMAN v. HARWARD*, 119 N. C. 150, 56 Am. St. Rep. 672, 25 S. E. 972.

Deprivation of services.

Cited in *Whitaker v. Hamilton*, 126 N. C. 464, 35 S. E. 815, holding loss of

daughter's services during infancy, through lawful marriage, *damnum absque injuria*.

Husband's right of action for injuries.

Cited in footnote to *Kelley v. New York, N. H. & H. R. Co.* 38 L. R. A. 631, which sustains husband's common-law right of action for loss of consortium through injury to wife.

Liability for death from effect of liquor sold husband.

Cited in footnote to *Riden v. Grimm Bros.* 35 L. R. A. 587, which sustains wife's right of action for husband's death from effects of liquor furnished in violation of statute.

34 L. R. A. 806, *FARMERS' MUT. INS. ASSO. v. BURCH*, 47 S. C. 453, 58 Am. St. Rep. 899, 25 S. E. 211.

Nature of proceeding to recover assessments.

Cited in *Farmers' Mut. Ins. Asso. v. Berry*, 53 S. C. 130, 31 S. E. 53, holding jury trial not demandable as matter of right in action equitable in nature.

34 L. R. A. 810, *KINGMAN COUNTY v. LEONARD*, 57 Kan. 531, 57 Am. St. Rep. 347, 46 Pac. 960.

Situs of personality for taxation.

Cited in *Buck v. Miller*, 147 Ind. 595, 37 L. R. A. 388, 62 Am. St. Rep. 436, 47 N. E. 8, holding notes and mortgages owned by nonresident, but kept in forum by resident agent managing local loan business, subject to taxation; *Mecartney v. Caskey*, 66 Kan. 414, 71 Pac. 832, holding tax sale certificates held by nonresidents not subject to taxation.

Cited in footnote to *Allen v. National State Bank*, 52 L. R. A. 760, which sustains right of state to tax nonresident mortgagee's interest in land within state.

34 L. R. A. 812, *McLAUGHLIN v. LOUISVILLE ELECTRIC-LIGHT CO.* 100 Ky. 173, 37 S. W. 851.

Negligence as to electric wires.

Cited in *Thomas v. Maysville Gas Co.* 108 Ky. 229, 53 L. R. A. 149, 56 S. W. 153, holding company supplying electricity to railway liable jointly with latter, for injury due to negligent failure properly to insulate wires; *Macon v. Paducah Street R. Co.* 110 Ky. 689, 62 S. W. 496, holding that railway company must exercise highest degree of care in use of electricity, for protection of all persons in all places where such persons have right to be; *Geismann v. Missouri-Edison Electric Co.* 173 Mo. 674, 73 S. W. 654, holding lighting company liable for death of sign hanger receiving shock due to contact of wire he was holding with uninsulated wire maintained by company; *Will v. Edison Electric Light Co.* 19 Lanc. L. Rev. 338, holding electric lighting company liable for death of painter, caused by his coming in contact with uninsulated live wire while painting building; *Rucker v. Sherman Oil & Cotton Co.* 29 Tex. Civ. App. 419, 68 S. W. 818, holding evidence of customary use of awning admissible in action for death of lineman killed by coming in contact with uninsulated wire while at work on such awning; *Cole v. Parker*, 27 Tex. Civ. App. 566, 66 S. W. 135, holding owners of electric lighting plant liable for failure to exercise due care in discovery of defect in construction of plant, by reason of which boy is killed; *Perham v. Portland Electric Co.* 33 Or.

475, 40 L. R. A. 809, footnote p. 799, 72 Am. St. Rep. 730, 53 Pac. 14, which holds it negligent to string over bridge dangerous electric wires with which employee must come in contact when making repairs.

Cited in footnotes to *Moran v. Corliss Steam-Engine Co.* 45 L. R. A. 267, which holds employer using defectively insulated wire with slight current liable for injury to employee due to outside contact with dangerous current; *Griffith v. New England Teleph. & Teleg. Co.* 52 L. R. A. 919, which requires telephone company to exercise care to prevent accident by conducting lightning into house over wires; *Brown v. Edison Electric Illuminating Co.* 46 L. R. A. 745, which holds prima facie presumption of negligence arises from injury to boy by contact with exposed point of charged wire within few inches of small roof just below second-story window; *Boyd v. Portland General Electric Co.* 52 L. R. A. 509, which holds want of sufficient assistance to promptly replace wires broken by severe storm not excuse, as matter of law, for delay; *Anderson v. Inland Teleph. & Teleg. Co.* 41 L. R. A. 410, which holds telephone lineman negligent in touching span wire in contact with trolley wire, insulation of which broken; *Brush Electric Light & Power Co. v. Lefevre*, 49 L. R. A. 771, which denies liability for death by uninsulated electric light wire running above awning 16 feet above street; *Cumberland Teleg. & Teleph. Co. v. Martin*, 63 L. R. A. 469, which denies liability of telephone company, negligently stretching inadequately insulated wire over roof of store porch, to passerby, while taking refuge under roof from storm, killed by lightning escaping from wire.

Disqualification of jurors.

Cited in footnote to *Reed v. Peacock*, 49 L. R. A. 423, which holds Odd Fellow not disqualified as juror in action by Odd Fellow of other lodge.

34 L. R. A. 817, *LANCEY v. KING COUNTY*, 15 Wash. 9, 45 Pac. 645.

Singleness of subject in statute.

Cited in *Merritt v. Corey*, 22 Wash. 448, 61 Pac. 171, upholding act "concerning actions to enjoin collection of taxes, and actions to recover property sold for taxes."

Sufficiency of title to act.

Cited in *Seattle v. Barto*, 31 Wash. 146, 71 Pac. 735, holding title of ordinance "to regulate certain trades and occupations" broad enough to authorize provision for licensing pawnbrokers; *State v. Sharpless*, 31 Wash. 194, 96 Am. St. Rep. 893, 71 Pac. 737, holding title to act "to regulate the practice of barbering" etc. broad enough to authorize provision for board of examiners, and their duties and compensation.

Taxation for "public purpose."

Cited in footnotes to *Pritchard v. Magoun*, 46 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes, toll bridge owned by private corporation; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation.

Cited in note (61 L. R. A. 833) on construction and operation of canals.

34 L. R. A. 821, *KEYSTONE LUMBER CO. v. KOLMAN*, 94 Wis. 465, 59 Am. St. Rep. 904, 69 N. W. 165.

Reaffirmed on second appeal in 103 Wis. 302, 79 N. W. 224.

Who may maintain replevin.

Cited in footnote to *Mitchell v. Georgia & A. R. Co.* 51 L. R. A. 622, which holds possession of property as agent does not authorize action for its conversion.

Timber as realty.

Cited in *Fluharty v. Mills*, 49 W. Va. 451, 38 S. E. 521, holding oral sale of standing timber merely license to enter for purpose of cutting.

34 L. R. A. 824, *HINES v. WILLCOX*, 96 Tenn. 148, 328, 54 Am. St. Rep. 823, 33 S. W. 914, 34 S. W. 420.

Liability of landlord for injuries due to defects in premises.

Reaffirmed on second appeal in 100 Tenn. 540, 41 L. R. A. 278, 66 Am. St. Rep. 770, 46 S. W. 297, holding landlord liable for injury to tenant from fall of porch, known by him to have drawn away from house, and which he negligently left unsafe after repairing, and referring particularly to annotation in 34 L. R. A. 824.

Cited in *Stenberg v. Willcox*, 96 Tenn. 164, 34 L. R. A. 617, 33 S. W. 917, holding guest of lessee entitled to recover for injuries due to defective balcony, condition of which at time of lease could have been known by landlord by use of reasonable diligence.

Cited in footnotes to *Moore v. Parker*, 53 L. R. A. 778, which holds landlord liable for failure to inform tenant of known defect or dangerous condition; *Railton v. Taylor*, 39 L. R. A. 246, which holds landlord not exempt by lease from liability for damage resulting from negligence in use of heating apparatus remaining under his own control; *Smith v. State*, 51 L. R. A. 772, which denies landlord's liability for injury to subtenant's child from defective balustrade on porch; *Stillwell v. South Louisville Land Co.* 52 L. R. A. 325, which holds contributory negligence not shown by tenant entering premises on landlord's agreement to at once repair unprotected cistern.

Cited in notes (34 L. R. A. 612) on landlord's liability for injuries to tenant's guests and servants from defects in premises; (33 L. R. A. 455) on implied covenant in lease as to fitness of property for purpose intended.

Distinguished in *Schmalzried v. White*, 97 Tenn. 41, 32 L. R. A. 783, 36 S. W. 393, holding landlord not liable for injuries due to hidden defects in leased premises of which he could not have been aware by use of reasonable diligence.

Disapproved in *O'Malley v. Twenty-five Associates*, 178 Mass. 559, 60 N. E. 387, holding landlord not liable to tenant for injury due to breaking of crane hook, defect in which not known; *Whitmore v. Orono Pulp & Paper Co.* 91 Me. 308, 40 L. R. A. 380, 64 Am. St. Rep. 229, 39 Atl. 1032, holding landlord not liable for injury due to defective pulp digester in leased mill, where not dangerous unless used, and referring with approval to annotation in 34 L. R. A. 824; *Shinkle, W. & K. Co. v. Birney*, 68 Ohio St. 335, 67 N. E. 715, holding lessor, in absence of warranty or deceit, not liable to lessee for injury due to defective condition of warehouse; *Franklin v. Tracey* (Ky.) 63 L. R. A. 652, footnote p. 649, 77 S. W. 1113, holding owner not required to exercise care to discover latent defects for benefit of intending lessees, and referring with approval to annotation in 34 L. R. A. 824.

Annotation in 34 L. R. A. 824, referred to particularly in *Hanson v. Cruse*, 155 Ind. 178, 57 N. E. 904, holding landlord not liable for injuries to health, due to obvious defects in house known to tenant, though former promising to repair same; *Thompson v. Clemens*, 96 Md. 207, 60 L. R. A. 583, footnote p. 581, 53 Atl.

919, denying landlord's liability for injury to member of tenant's family from failure to keep agreement to make repairs.

Parol evidence of contract.

Cited in *Lewis v. Turnley*, 97 Tenn. 202, 36 S. W. 872, upholding admission of parol evidence to prove independent collateral agreement for transfer to vendee of insurance on premises by vendor in action on purchase money note; *Quigley v. Shedd*, 104 Tenn. 565, 58 S. W. 266, holding parol evidence competent to prove agreement that contemporary payment not to be credited on written obligation then executed; *Lyons v. Stills*, 97 Tenn. 517, 37 S. W. 280, admitting evidence of agreement to take pony for period of probation, in action on absolute purchase note given at time.

34 L. R. A. 835, *GRAND ISLAND & N. W. R. CO. v. BAKER*, 6 Wyo. 369, 71 Am. St. Rep. 926, 45 Pac. 494.

Consideration of reserved questions by supreme court.

Cited in *Foot v. Smith*, 8 Wyo. 511, 58 Pac. 898, refusing to consider reserved questions where action properly dismissed by plaintiff in district court; *State ex rel. Perkins v. Sheridan County*, 7 Wyo. 164, 51 Pac. 204, refusing to consider merits of case on appeal from ruling on motion for judgment on pleadings, where answer denies material allegations of complaint.

Collateral attack upon judgment.

Cited in *Re Fremont & B. H. Counties*, 8 Wyo. 38, 54 Pac. 1073, holding judgment against original county conclusive against new county embracing same territory in subsequent resubdivision of state, in proceeding to apportion indebtedness between new counties; *Lake County v. Platt*, 25 C. C. A. 92, 49 U. S. App. 216, 79 Fed. 573, holding county estopped to assert excess of debt limit by debt forming basis of default judgment in payment of which, bonds sued upon were issued; *Holt County v. National L. Ins. Co.* 25 C. C. A. 473, 49 U. S. App. 376, 80 Fed. 690, enforcing judgment in mandamus to levy tax to meet judgment against school district, although levy urged to be in excess of constitutional powers of county officers; *McEntire v. Williamson*, 63 Kan. 283, 65 Pac. 244, holding taxpayer concluded by judgment against city on all questions that might have been litigated in action, until judgment impeached for fraud or collusion.

County tax limit.

Cited in *Dawson County v. Clark*, 58 Neb. 766, 79 N. W. 822, holding tax levied by school district to meet judgment, void where constitutional maximum previously levied; *Eaton v. Mimunaugh*, 43 Or. 471, 73 Pac. 754, holding statute directing county to incur indebtedness beyond constitutional limit, void.

Distinguished in *State v. Laramie County*, 8 Wyo. 121, 55 Pac. 451, holding liability of county for deficiency due upon state levy not chargeable against proceeds of tax for county revenue.

Power to confess judgment.

Cited in *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 726, 84 N. W. 97, holding waiver of issuance and service of summons against village, by chairman of board of trustees, void; *Custer County v. Chicago, B. & Q. R. Co.* 62 Neb. 661, 87 N. W. 341, holding confession of judgment against county by county attorney acting under resolution of county board, void.

34 L. R. A. 845, *STATE ex rel. BLYDENBURGH v. BURDICK*, 6 Wyo. 448, 46 Pac. 854.

34 L. R. A. 851, *DEBNEY v. STATE*, 45 Neb. 856, 64 N. W. 446.

Prejudice by conduct of trial.

Cited in *McMahon v. State*, 46 Neb. 167, 64 N. W. 694, sustaining refusal of new trial on ground of prejudicial statements by prosecuting attorney, where not harmful when taken with evidence; *Lindsay v. State*, 46 Neb. 182, 64 N. W. 716, upholding refusal of new trial for prejudice by unexpected accusation of defendant in courtroom by mother of deceased, where removed immediately by court at request of both prosecution and defense.

Error in instructions.

Cited in *Whitney v. State*, 53 Neb. 299, 73 N. W. 696, refusing to reverse conviction for embezzlement on ground of prejudicial instruction, where not harmful when taken with balance of charge; *Ferguson v. State*, 52 Neb. 434, 66 Am. St. Rep. 512, 72 N. W. 590, refusing to reverse conviction for erroneous inclusion in charge, of matter not in evidence, where rights of prisoner not prejudiced thereby; *Welsh v. State*, 60 Neb. 115, 82 N. W. 368, upholding instruction embodying collateral matter, evidence of which not contradicted; *Henry v. State*, 51 Neb. 155, 66 Am. St. Rep. 450, 70 N. W. 924, holding it reversible error to discredit defense of alibi in charge, as easily fabricated.

Defense of intoxication.

Cited in *Latimer v. State*, 55 Neb. 617, 70 Am. St. Rep. 403, 76 N. W. 207, holding defense of intoxication competent on trial for robbery, though insanity or loss of reason not produced thereby.

34 L. R. A. 857, *YOCH v. HOME MUT. INS. CO.* 111 Cal. 503, 44 Pac. 189.

Avoidance of policy by breach of condition.

Cited in *Schroeder v. Imperial Ins. Co.* 132 Cal. 19, 84 Am. St. Rep. 17, 63 Pac. 1074, holding policy avoided by failure to give insurer notice of foreclosure proceedings within reasonable time after knowledge thereof obtained by insured.

— Keeping of benzine, etc.

Cited in *Ackley v. Phenix Ins. Co.* 25 Mont. 279, 64 Pac. 665, holding description of goods as "usually kept in retail drug store" sufficient to prevent forfeiture under prohibition against keeping of benzine, etc.

Cited in footnote to *Springfield F. & M. Ins. Co. v. Wade*, 58 L. R. A. 714, which holds policy not avoided by bringing gallon of gasoline on premises for temporary use, though causing their destruction.

Distinguished in *Mitchell v. Potomac Ins. Co.* 16 App. D. C. 263, refusing recovery on fire policy excepting liability for damage by gasoline explosion, where evidence proves loss thereby, rather than by fire; *Vandervolgen v. Manchester Fire Assur. Co.* 123 Mich. 294, 82 N. W. 46, holding policy avoided by violation of condition on which sales of kerosene at night permitted.

— Effect of agent's knowledge.

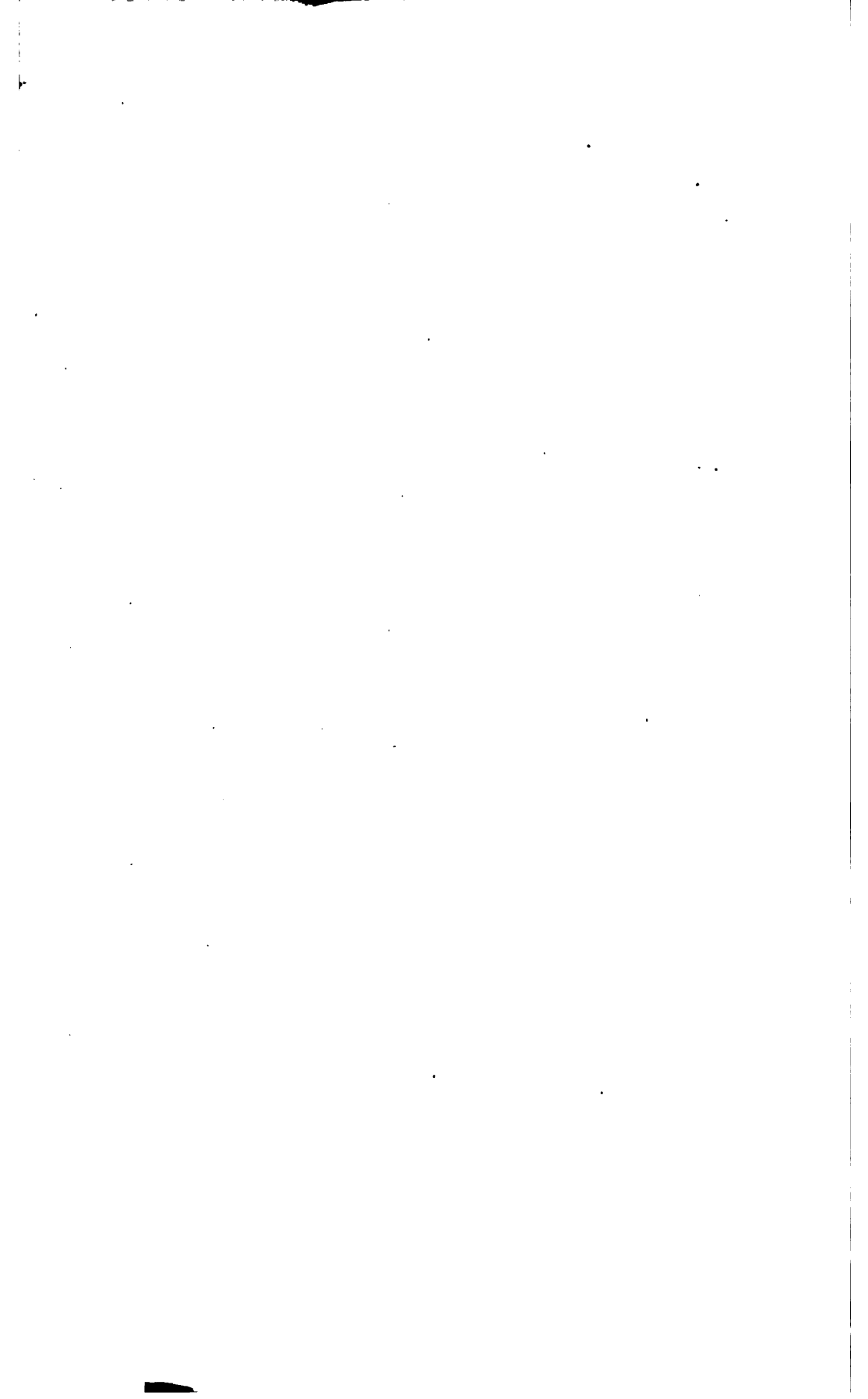
Cited in footnotes to *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds statement that life tenant has fee-simple title to insured property does not avoid policy where agent knew facts; *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A.

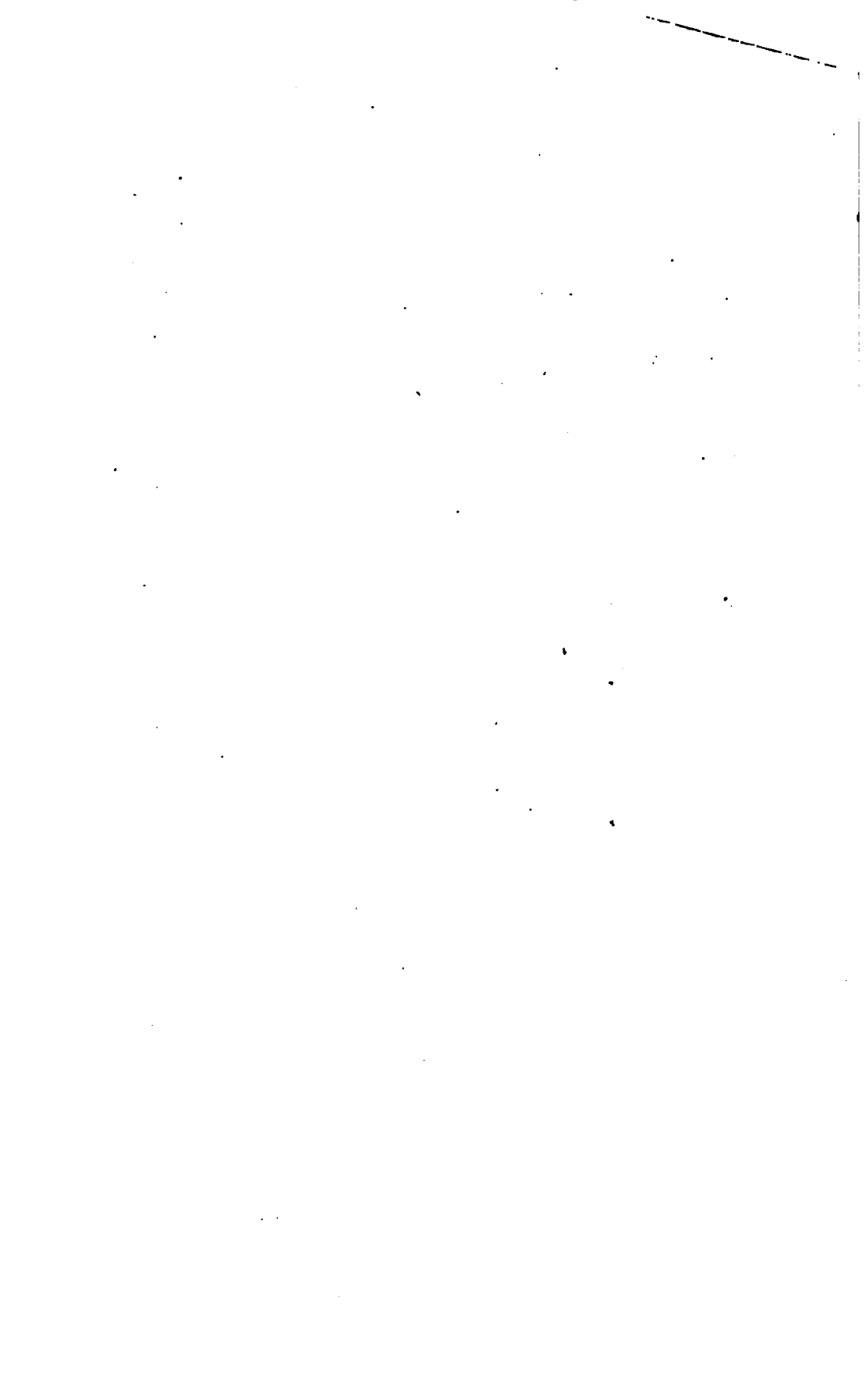
319, which denies insurer's right to rely on warranty by applicant that answers properly recorded, where medical examiner knew otherwise.

34 L. R. A. 861, STANDARD OIL CO. v. ARNESTAD, 6 N. D. 255, 66 Am. St. Rep. 604, 69 N. W. 197.

Liability of sureties for partnership.

Cited in London & L. Ins. Co. v. Holt, 10 S. D. 174, 72 N. W. 403, holding sureties for partnership acting as agents, not liable for money collected after dissolution by member of firm.







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